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CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

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JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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¹ Appointed Circuit Justice, to succeed Rufus W. Peckham, deceased.

² Died February, 1909.

³ Appointed to succeed John K. Richards, deceased.

⁴ Appointed Circuit Judge to succeed Horace H. Lurton.

⁵ Appointed January 31, 1910, to succeed Loyal E. Knappen.

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⁶ Appointed January 11, 1910, to succeed Solomon H. Bethea, deceased.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

SCOFIELD et al. v. UNITED STATES ex rel. BOND.

(Circuit Court of Appeals, Sixth Circuit. November 16, 1909.)

No. 1,927.

1. BANKRUPTCY (§ 134*)—TRUSTEE—"ABANDONMENT OF OFFICE"—APPOINTMENT OF SUCCESSOR.

Where a trustee in bankruptcy absconded after embezzling the funds of the estate, such conduct amounted to an abandonment of his office, which was thereby vacated, and a new trustee may be appointed without notice to him or a hearing for his removal.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 134.*]

2. BANKRUPTCY (§ 134*)—REMOVAL OF TRUSTEE—APPOINTMENT OF SUCCESSOR BY COURT.

Where a trustee in bankruptcy absconded, and was removed, the appointment of a new trustee by the court, without calling a meeting of the creditors for an election, was at most an irregularity, and the legality of the appointment cannot be questioned collaterally by persons who are not creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 134.*]

3. BANKRUPTCY (§ 373*)—TRUSTEE—ACTION ON BOND.

Where a trustee in bankruptcy absconded, and his whereabouts were unknown, an order directing him to account is not a necessary prerequisite to an action on his bond to recover funds of the estate embezzled by him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 373.*]

4. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—EVIDENCE.

In an action by a trustee in bankruptcy on the bond of a former trustee to recover a sum claimed to have been received by the former trustee and embezzled by him, where the sureties alone were served and defended, the calendar entries of a referee, not the record itself, showing that the trustee rendered an account, which was confirmed, was not a defense, where the record did not show, nor was it alleged, whether or not the sum in dispute was shown by the account or settled; and the admission of parol evidence to contradict such record, if error, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

In Error to the District Court of the United States for the Northern District of Ohio.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the United States, on relation of Charles W. Bond, trustee in bankruptcy, against George B. Scofield and E. B. Durfee. Judgment for plaintiff, and defendants bring error. Affirmed.

W. E. Scofield, for plaintiffs in error.

G. C. Bryce, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. The record in this case, brought here on a writ of error, is of a trial in the District Court for the Northern District of Ohio of a cause instituted in that court by a petition of the United States, upon the relation of Bond, trustee in bankruptcy of Caroubas & Goodman, to enforce a bond given by Frank J. Kelleher, a former trustee in that matter, and his sureties upon his appointment as such trustee. Service of process was made upon the sureties, but Kelleher could not be found.

The petition stated that, after Kelleher was appointed, there was turned over to him on June 30, 1900, by the clerk, on the order of the court, the sum of \$462.13, assets of the estate; that he appropriated this money to his own use and left the state, was a long time in hiding, and is now residing in Pennsylvania; that on January 8, 1903, Kelleher was removed by an order of the court on account of his mismanagement of the estate and his failure to account for the assets; that thereupon the relator, Bond, was appointed trustee to collect and distribute the estate; that he duly qualified as such trustee, and has ever since been acting as such trustee; that he has frequently demanded of Kelleher the money in his possession belonging to the estate; that Kelleher has failed to comply with such demand, and has never paid the said \$462.13, or any part of it. The sureties appeared, and filed various pleas and answers, raising issues, some of them relating to the power and jurisdiction of the court in making orders in the proceedings, and some of them relating to the insufficiency of the proceedings to establish any liability on the part of the sureties. But no objection was taken to the competency of the District Court to try the case. The questions thus raised will be presently stated. After the pleadings had been settled, the cause came on for a trial of the merits before a jury. The result was a verdict for the plaintiff for the \$462.13, with interest from the date of Kelleher's reception of the money. The proof in the case was in accord with the allegations of the petition. It was shown that the trustee had demanded the money taken by Kelleher, and for which this suit was brought, by letter addressed to him in Pennsylvania, which was acknowledged, but the money was not forthcoming. Certain incidental facts appeared which form the basis of some of the defendants' assignment of errors.

1. No notice was given to Kelleher of the proceedings taken for his removal as trustee. It is therefore urged that the order of removal was unlawful and void. But he had absconded, a long time had elapsed, and he could not be found. It was his duty, and he had given his bond, to "in all respects faithfully perform all of his official duties" as said trustee, one of which was to remain under the view and juris-

diction of the court, whose officer he was, and subject to its summons and orders. He fled, and hid, as the jury might well believe, for the very purpose of avoiding the service of the process of the court, and, if so, he should be deemed to have waived such service. It amounted to a consent that the necessary proceedings might go on in his absence. He left the court in such a position that it must dispense with giving notice, or the bankruptcy proceedings must prove abortive, and he himself escape with the fruits of his embezzlement. His consent, however, was not necessary. His conduct amounted to an abandonment of his office; and in such a case there is no requirement that a hearing be had or notice given. The abandonment ipso facto vacates the office, and a new trustee may be appointed. *Hedley v. Board*, 4 Blackf. (Ind.) 116; *Osborne v. State*, 128 Ind. 129, 27 N. E. 345; *State v. Moores*, 52 Neb. 634, 72 N. W. 1056; *Attorney General v. Maybury*, 141 Mich. 31, 104 N. W. 324, 113 Am. St. Rep. 512; *People v. Common Council*, 77 N. Y. 503, 33 Am. Rep. 659; 29 Cyc. 1404. In these circumstances we think the order of removal was not void—at least, not in a collateral proceeding.

2. It appears that the creditors were not summoned to elect a new trustee, and it is urged that the court could only appoint the trustee in case the creditors failed to elect one. But the appointment of a trustee is finally subject to the approval of the court, and in some conditions the court might itself make the appointment. The whole matter of appointing trustees is subject to the power and superintendence of the court. If the court ought to have summoned the creditors to elect a trustee, its failure to do so was a mere irregularity, and cannot be taken advantage of collaterally, certainly not by those who are not creditors or otherwise interested in the appointment.

3. The court did not make an order directing Kelleher to account as trustee, and this is said to be an indispensable prerequisite. That might, and probably would, be proper in conditions where such a proceeding is practicable. But an order upon a person who was lurking in an unknown place, and purposely keeping out of the reach of any legal notice of an order, if one should be made; would be of no avail.

4. One other question, which we think should be noticed is this: The defendants introduced certain entries in a record kept by the referee, the object of which was to show that Kelleher had filed his account as trustee, and it had been confirmed; their deduction being that this would absolve the sureties from all further liability. This record, as it is called, consisted, not of the proceedings themselves, but of calendar entries showing the dates when certain named papers were filed or certain things done. The following is the part of it on which the defendants relied:

"1900. April 9th. Bond of trustee filed, with E. Durfee and George B. Scofield as sureties, which bond was approved by referee.

Final account of trustee filed. Account confirmed by referee. Notice of hearing on final account of trustee mailed to each creditor listed in the schedule."

The referee was called, and testified, over an objection by the defendants that the record could not be contradicted by oral testimony, that these particular entries were not his own, and were not authorized

by him; that he had never seen them, or had any knowledge of them, until this trial; that he believed they were made by his stenographer; that no such account was ever filed or confirmed; that he received from Kelleher what purported to be a trustee's account; that it was a defective account, and not verified; that he sent it back to Kelleher for correction and verification, but that it was never returned to him. There was no proof as to what the contents of the account were. If it were permissible to make any inference, it would be that the item of \$462.13 was not charged to the trustee in it; for there was no pretense that he ever paid over the money or expended it for the estate. But the ruling of the court on admitting the testimony of the referee was excepted to by the defendants, and is assigned as error.

We do not find it necessary to determine to what extent and in what circumstances such entries as these partake so much of the character of records that they may not be disputed, or it may be shown in a collateral proceeding that they were made without the authority of the court. There was no statement of claim or offer of proof as to what Kelleher's account contained. If it did not contain an acknowledgment of the \$462.13 received by him, even the confirmation of the account would not preclude the recovery of it, if in fact he had received it, and still had it, and it was not known to the referee. That would be a fraudulent suppression which would justify a revision of the settlement, and the establishment of his liability for the suppressed item, as was effected by the present proceeding. If it did contain that item, it should have been declared, and the presumption, in the absence of the account or proof of its contents, would be that it was declared, as a balance against him. In short, it nowhere appears what the settlement, if there was one, included, or how the balance stood.

Moreover, this was a plenary action against the former trustee and his sureties. The former could not be found; but the action as against the sureties did not thereby abate. Doubtless they could make any defense, not personal to himself, which their principal might; but they could not, upon the facts of this case, make any other. And no preliminary action by the court was necessary. If the former trustee had received the assets, and had embezzled and never accounted for them, he was simply a defaulter to the estate to the extent of his defalcation; and the trustee, by virtue of his title, could bring suit for the recovery of the fund without any express order of the court. In these circumstances the error, if there was error, in the reception of the evidence of the referee, was harmless, and does not constitute ground for reversal.

Other questions of minor and not of controlling importance were discussed in the briefs of counsel, which we do not think it necessary to discuss. We are of opinion that the judgment is, upon the merits, right, and that no sufficient ground is shown for reversing it.

It is accordingly affirmed.

THE WILLIS A. HOLDEN.

(Circuit Court of Appeals, Ninth Circuit. November 9, 1909.)

No. 1,720.

SALVAGE (§§ 13, 34*)—NATURE OF SERVICE—AMOUNT OF COMPENSATION—"SALVAGE SERVICE."

The schooner *Holden*, laden with lumber, left Willapa Harbor, Wash., for China, but when 150 miles out lost her rudder and rudder post in a storm. She jettisoned a part of her deck load and rigged a jury rudder, with which she worked her way back to the strait of Juan de Fuca, which she reached in the night after 13 days. In the morning she hoisted distress signals. During the day she sailed across the strait, but came back to the same place on the Washington side with her jury rudder wrecked and with a list of some 9 degrees by shifting of cargo. Toward night the steam schooner *Nelson* came to her assistance and agreed to tow her to Port Townsend. After considerable difficulty and danger a line was passed aboard and a start made; but during the night, which was very rough, the hawser parted three times, and it was with difficulty that the *Holden* was again picked up. At noon the next day she was left safely anchored in Port Angeles. *Held*, that the service was clearly a salvage service, and entitled to be compensated as such, and that an award to the *Nelson* and her officers and crew of \$4,800 was justified; the *Holden* and her cargo being worth about \$43,000.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. §§ 23-25, 80-83; Dec. Dig. §§ 13, 34.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6316, 6317.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

Libel in rem for salvage against the four-masted schooner *Willis A. Holden*, by the *Charles Nelson Company*, a corporation, owner of the steam schooner *Charles Nelson*, and her master and crew. Decree below for the libelants in the sum of \$4,800. Claimant appeals. Affirmed.

H. R. Clise and Geo. H. King, for appellant.

Kerr & McCord, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge. The four-masted schooner *Willis A. Holden*, owned by the *Globe Navigation Company, Limited*, sailed from Willapa Harbor, in the state of Washington, on November 27, 1907, bound on a voyage for Shanghai, China, with a cargo of 1,294,000 feet of lumber, valued on the manifest at \$15,950. On the second day out, and at a distance of about 150 miles west of the Washington coast, the schooner encountered rough weather and became disabled by the loss of her rudder and rudder post, whereupon, to save the schooner and her cargo, the master and crew jettisoned about 25,000 feet of the deck load of lumber. They thereupon rigged a jury rudder and navigated the vessel into the strait of Juan de Fuca, the entrance to which is about 140 miles north of the harbor from which the schooner sailed. The schooner reached the strait on the early morning of December 12th, 15 days after sailing from Willapa

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Harbor, and 13 days after having lost her rudder and jettisoned a part of her cargo. What the schooner was doing during this time does not appear from the evidence. The strait of Juan de Fuca, from the entrance eastward for a distance of 50 miles, has an average width of 11 miles. The island of Vancouver, British Columbia, is on the north, and the state of Washington on the south, side of the strait. Cape Flattery, on the south side of the entrance to the strait, is the northwestern extremity of the state of Washington. The lighthouse for this point is on Tatoosh Island, about three-eighths of a mile north-westward from the cape.

The master in his testimony states that on December 12th the schooner had no rudder and the deck load had partly shifted; that she had a list to port of about 9 degrees; that at daylight on December 12th, somewhere off Waaddah Island, he hoisted signals of distress fore and aft. The signal at the fore was a square flag with a round ball below. The meaning of this signal was, "I want immediate assistance." The signal aft was a flag with the letters "C.N." (N.C.), the meaning of which was, "Can you give me assistance in the way of?" The distress signals are those provided in article 31 of international rules of May 28, 1894 (28 Stat. 83, c. 83 [U. S. Comp. St. 1901, p. 2871]). The distance from Tatoosh Light to Waaddah Island, near the Washington shore, is about $5\frac{1}{2}$ miles. The wind on the morning of December 12th at Tatoosh Island, as reported by the Weather Bureau, was from the southwest from midnight to 4 a. m., and from the south from 4 a. m. until 8 a. m. The average hourly velocity of the wind was 29 miles. High water on that morning at Neah Bay, just west of Waaddah Island, was at 6:57. Tide Tables for the Pacific Coast by the Coast and Geodetic Survey, 1907. The disabled schooner must, therefore, have come into the strait with the aid of a favorable wind and on a flood tide. From the position off Waaddah Island, where the signals of distress were set on the Holden, the master testified that he sailed the schooner until he came to a position off Sombrio Point on the Vancouver shore; the schooner heading towards the shore. From Waaddah Island to Sombrio Point is $13\frac{3}{4}$ miles. The master then tried to get the schooner around, so as to head for the American shore; but, failing in this, he set his sails so that he was able to gather sternway, and in this way he sailed stern foremost across the strait in the direction of southwest by south, and at about 4 o'clock in the afternoon he was again off Waaddah Island, where he was in the early morning. The wind at that time was from the northeast and the tide running flood. The sea was rough. The jury rudder had drifted apart and was a wreck, laying alongside the schooner. It was useless for steering purposes. The schooner was crossways to the wind and was drifting across and towards the entrance to the strait.

At about 4 o'clock the steam schooner Charles Nelson, bound on a voyage from San Francisco to Seattle, came around Cape Flattery and entered the strait, and soon after discovered the Holden heading across the strait flying signals. The master of the Nelson consulted his book of signals, and found that the Holden's signals meant, "In distress; want immediate assistance." The Nelson proceeded to the relief of

the schooner, and, steaming up close to the Holden, asked the master what he wanted, or if he wanted assistance. The master of the Holden replied that he did; that he wanted to be towed to Port Townsend. The master of the Nelson replied that he would tow him. The Nelson then passed alongside of the Holden, and, turning around abaft, came up on the starboard side. The testimony is conflicting as to what passed between the masters of the two vessels at this time. The master of the Nelson testified:

"He asked me how much I wanted for it. I told him I could make no bargain; I could not state now; if he wanted any assistance I would do so, and if he did not want it to say so, and I would go on my way. He told me then he had better take assistance, and for me to tow him. I told him: 'All right.' I steered a little further off, and I told the mate to get all hands on deck, and we took our 10-inch line on deck, and made one end fast to our towing bitt, and got another 3-inch line ready to bend onto it, and then we steered towards the Holden, went on the weather side of him. Before that I see that there was some wreckage afloat alongside of her. Before that, as I came alongside, the captain told me: 'There is nothing the matter with me.' I told him: 'I don't care what is the matter; if you want any assistance I will give you assistance.' I could see he was in distress. He had signals of distress up. I had no time to have an argument with him, because it was getting dark. After we got alongside of him— We made two or three attempts to get alongside of him. He had some wreckage floating on the weather side. There was a spar or planks, and wire attached to it. So I did not know how far that was drifting towards the weather side, so I steered as close as I could towards him. Then I rounded her up and backed down towards her; but the wind threw the bow back again, and I think it was two or three times that we attempted to get a heaving line on board of him, and we got a line on board, a heaving line, and bent that onto the 3-inch line, and the 3-inch line was bent onto the 10-inch hawser, and we also bent a big shackle onto the big hawser. Then I told the captain to shackle that hawser with the big shackle onto his anchor chain, so that I could tow on that. Then he told me that it would take him a couple of hours to get his anchor chain ready; the best he could do would be to make a line fast to that bitt. I told him: 'All right'—to make it fast to his bitt, and let me know as soon as he had it fast. After he had it fast, that must have been about pretty nearly close onto 5 o'clock."

Hansen, the first mate of the Nelson, who heard the conversation between the two captains, testified:

"The captain of the Nelson asked the captain of the Holden if he wanted assistance, if he wanted to be towed, and the captain of the Holden said that he wanted to be towed to Port Townsend; but there was no price to my knowledge, or in my hearing, agreed on. The captain of the Nelson said he would tow him to Port Townsend, but he would make no bargain. He would leave it to be set later on. He (the captain of the Holden) said: 'All right.' And he got the hawser. I did not hear him say anything about salvage. Some time after getting the hawser, he said something to the effect that it would be a tow. Our captain said: 'All right; I will tow you.' That is, while we were in the act of getting the hawser onto the Holden."

MacRae, the second mate of the Nelson, who also heard the conversation between the captains, testified:

"We came up alongside, and our captain spoke to him, and he wanted to know if he wanted any assistance. He said: 'Yes; will you tow me to Port Townsend?' Our captain said he would; he would tow him to Port Townsend. Then he asked him how much he wanted to tow him to Port Townsend. He said: 'I will make no agreement with you. I cannot make no agreement.' Afterwards he says: 'I want you to understand that it won't be a salvage job.' Our captain says: 'I cannot make any agreement with you at all as to

that. If you want me to help you I will; if not, say so, and I will proceed. If you want to take my line, all right. Do you want to take my line?' our captains says. He says: 'Yes; I will take your line.'"

The master of the Holden testified: That the captain of the Nelson asked him, "What do you want?" And he asked the captain of the Nelson, "Can you tow me to Port Townsend?" The captain of the Nelson replied, "Yes; I will tow you." The captain of the Holden then asked, "How much do you want to tow me to Port Townsend?" The captain of the Nelson replied, "I don't want to make any agreement." He said, "You lost your rudder?" And the captain of the Holden said, "Yes." The Nelson then passed, and turned around abaft, and came alongside again, when the captain of the Holden said to the master of the Nelson, "Captain, I understand this to be a towage job, and not a salvage job." That the master of the Nelson did not reply at first, when the master of the Holden said: "I don't want to take your line, except you consider this a towage job and not a salvage job." To which the master of the Nelson replied: "All right; I will tow you."

Carlson, mate of the Holden, testified that the captain of the Nelson hailed the captain of the Holden, and he said, "What do you want, Captain?" The captain of the Holden asked if he would tow him to Port Townsend. The captain of the Nelson said, "All right; I can do that." The captain asked him what he would charge to tow him to Port Townsend. He said he would not make any agreement for towing. The captain of the Holden said he would not take his line, except he would consider it towage, and not salvage. The captain of the Nelson said, "All right; I will tow you."

The carpenter of the Holden testified:

"The captain of the Nelson came up on one side of us, and he sang out to the captain of the Holden, and he says, 'What do you want?' and he says, 'I want a tow,' and the Chas. Nelson came right around on the side, on the star-board bow, and the captain of the Holden sung out again, 'Captain,' he says, 'this is only a tow; if you want salvage out of it, I won't take your line,' and the captain of the Chas. Nelson, he said, 'All right,' and he took the line."

The hawser passed to the Holden by the Nelson was a new, 10-inch Manila hawser. At the time the hawser was being passed the wind was high and a heavy swell running. In this state of the weather there was great danger to both vessels in the Nelson going alongside of the Holden in its unmanageable condition. The situation required great care, and in exercising this care it took the Nelson an hour or more to get the Holden in tow. After this was accomplished, the Nelson proceeded with her tow in the direction of Port Townsend, a distance of about 80 miles. About midnight the wind changed to the southwest, and the Holden sheered from side to side, steering badly. About half-past 12, and after the tow had been taken about 35 miles, the hawser parted at the Nelson's rail, and the Nelson's mate called all hands on deck to again take the Holden in tow. The Nelson then passed a 6-inch hawser to the Holden to hold her and prevent her from drifting over onto the Vancouver shore. About 3 o'clock the 6-inch hawser parted. By this time the Holden had taken in the 10-inch hawser, and this was passed on board the Nelson and made fast. The

Nelson again proceeded with her tow, and at about half-past 5 or 6 o'clock in the morning the 10-inch hawser parted the second time, this time near the Holden. The two vessels were then near Race Rock, on the Vancouver shore, and in a dangerous position. The Nelson hove in her hawser by steam. It took an hour and a half to pick up the Holden. After the hawser had been made fast on her, the Nelson steamed across the strait in the direction of Port Angeles on the American side, a distance of about 11 miles. In rounding Ediz Hook to get into Port Angeles, the Holden took a sheer, and the 10-inch hawser parted the third time. The Nelson again went alongside the Holden to pass the hawser, when the captain of the Holden said he was in smooth water and in no danger. The captain of the Nelson said, "It was quite a rough night." The captain of the Holden replied that "It was a dirty night, and you did well." The Nelson then took the Holden in tow, and at about noon on December 13th anchored her safely in Port Angeles. The evidence is that the night was very stormy and dark, and the sea rough. The captain of the Nelson testified that it was one of the worst nights he ever experienced. MacRae, the second mate, testified in his experience up and down the Juan de Fuca Strait he never had worse weather than they had that night since he had been running up there. At times the wind was blowing a gale, with rain, hail, and snow. The Weather Bureau at Tatoosh reported that the wind was from the west from midnight to morning, and the average hourly velocity was 25.5 miles; that at 4:15 a. m. the maximum velocity of the wind was 52 miles per hour from the west for 5 minutes.

The Charles Nelson is a steam schooner of 890 horse power. Her gross tonnage is 629 tons. Her net tonnage is 397 tons. She is 196 feet in length, and 37.8 feet in width. She had on board on December 12th 12 or 15 passengers and 300,000 feet of lumber. The schooner was of the value of \$75,000. The Willis A. Holden is a four-masted schooner. Her gross tonnage is 1,188 tons. Her net tonnage is 1,040 tons. She is 210 feet in length, and 42 feet in width. She had on board on December 12th a cargo of lumber valued at \$15,500. The schooner itself was of the value of \$27,500.

The court below held that the services rendered the Holden by the Nelson and her officers and crew was a salvage service, and awarded the Nelson \$3,500, her master \$300, her first mate \$100, her second mate \$50, and each of the 20 members of the crew appearing as interveners \$40, making a total of \$4,850. It is contended by the appellant that the compensation for the services rendered to the Holden was to be based upon a towage service, and not a salvage charge.

In the case of *The Reward*, 1 W. Rob. 177, Dr. Lushington said:

"I apprehend that mere towage service is confined to vessels that have received no injury or damage, and that mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident."

In the case of *The Charlotte*, 3 W. Rob. 68, 71, Dr. Lushington said:

"All services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be

sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered."

In the case of *The Phantom*, L. R. 1 A. & E. 58, 60, the same great admiralty judge said:

"I am of opinion that it is not necessary there should be absolute danger in order to constitute a salvage service. It is sufficient if there is a state of difficulty, and reasonable apprehension."

In *McConnochie v. Kerr* (D. C.) 9 Fed. 50, 53, Judge Brown, of New York, one of America's great admiralty judges, said:

"A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger."

In support of this rule Judge Brown refers to the cases which have just been cited from Dr. Lushington.

In the case of *The Flottbek*, 118 Fed. 954, 55 C. C. A. 448, this court, referring to the towage of a disabled vessel in the locality where the services now under consideration were performed, said:

"There is a marked and clear distinction between a towage and a salvage service. When a tug is called or taken by a sound vessel as a mere means of saving time, or from considerations of convenience, the service is classed as towage; but if the vessel is disabled, and in need of assistance, it is a salvage service. In cases of simple towage, only a reasonable compensation is allowed, as upon a quantum meruit. In case of salvage, the award is upon a broader and more liberal scale, as we have before stated."

The court had previously defined a salvage service in the following language:

"Salvage is decreed by courts of admiralty as a reward for services successfully rendered in saving property from maritime damage, not on the principle of a quantum meruit, or as compensatory remuneration, but as a reward for perilous services, and as an inducement to seamen and others to readily engage in such undertakings and assist in saving life and property. Danger, peril, and a successful deliverance therefrom, either by voluntary effort, special request of, or by contract with the owner, constitutes a case of salvage, whether rendered by one or more salvors. Each salvor that renders a meritorious service, directly aiding in the rescue and saving of the property, is entitled to a salvage award."

It is contended by the appellant that the *Holden* was not in distress at the time she was taken in tow by the *Nelson*; that her signals of distress, flying at the time she was hailed by the *Nelson*, had been hoisted in the early morning. The master of the *Holden* did testify that he hoisted these signals at daylight in the morning for the purpose of attracting the attention of the lighthouse people on the American side, so that he would be reported; that there was a telegraph station from there; and that he could get into communication with either the towboat people or the Globe Navigation Company, the owner of the vessel. He further testified that the signals "were forgotten to be taken down." But the master appears to have overlooked the fact that the International Code of Signals provides for precisely such communications as he says he desired to make with his hoisted signals.

There is a signal calling for a tug, and there is a signal requesting to be reported by telegraph to the owner. He did not hoist either of these signals, but hoisted a signal forward, "I want immediate assistance," and another signal aft, "Can you give me assistance in the way of?" When asked upon cross-examination why he had the signal flying calling for immediate assistance, if he did not want immediate assistance, his reply was that he hoisted that signal when he was on the Vancouver shore. He says:

"I was heading right for the beach at that time. The vessel was going right into the Vancouver shore, and I could not get the vessel around at that time, and I would have taken anything because I was in danger then."

But the schooner was in the same dangerous situation on the American shore, and, later, even worse, than on the Vancouver shore. She was without a rudder, and had a list of 9 degrees to port. She was unmanageable as against wind and current. She was nearing a rocky shore. Waaddah Island was a mile directly to the west. The Weather Bureau at Tatoosh Island reports that the wind from 4 p. m. to 11 p. m. was from the northeast. High water on that evening at Neah Bay, immediately to the west of Waaddah Island, was at 6:58. Tide Tables of the Pacific Coast by the Coast and Geodetic Survey, 1907. After 7 o'clock the tide would ebb towards the entrance of the strait, and with the added force of the wind there would have been imminent danger that the schooner would have been carried either immediately ashore, or upon Waaddah Island, or upon the rocks at the entrance of the strait. "The ebb current is felt most along the southern shore of the strait." United States Coast Pilot, Pacific Coast (2d Ed.) Juan de Fuca Strait, p. 135. It is idle to say that in this situation the schooner was not in distress, and that she was not in danger. She was in great danger, and very properly had signals of distress flying all that day, and at the time she was rescued. But the master testified that he could have anchored where he was. The weight of evidence is that the ground at this point is rocky, and anchorage insecure, and particularly so with what is called "patent anchors," with which the schooner was equipped. We do not think that, in the state of the weather and tide, the schooner had any security in her anchors at the place she was when she was taken in tow by the Nelson.

The conflicting testimony relating to the conversation between the two captains when the towage service began, as to whether the service to be rendered was to be a towage or a salvage service, is immaterial. The master admitted that the Nelson came to the Holden in response to the signals calling for immediate assistance, and that the captain of the Nelson asked, "What do you want?" The subsequent conversation between the two captains about towage establishes at least one fact beyond question—the commendable purpose of the master of the Nelson to do his duty in a dangerous situation to a disabled vessel. But the claim that the service was to be a towage service is contradicted by the conduct of the master of the Holden. He said he asked the master of the Nelson, "Can you tow me to Port Townsend?" He afterwards asked, "How much do you want to tow me to Port Townsend?" When, on the morning of December 13th, the two vessels were rounding Ediz

Hook at the entrance to the harbor at Port Angeles, and the 10-inch hawser had parted for the third time, the captain of the Holden was disinclined to take the Nelson's hawser again, and said to the captain of the Nelson that he was in smooth water and in no danger, intimating that the services of the Nelson were no longer required. He, however, took the hawser, and was towed into Port Angeles, where he anchored. When asked by the captain of the Nelson if he was safe, he said he was, and that he had ordered two boats to take him to Port Townsend. This port was 30 miles to the east of Port Angeles. If the master of the Holden had entered into an agreement with the master of the Nelson to be towed to Port Townsend, why did he not insist upon the fulfillment of the agreement, and why did he order two boats to take him on to Port Townsend? It is apparent from the evidence that there was no such agreement with the captain of the Nelson. It was a service voluntarily rendered to a vessel needing assistance, and was designed to relieve her from distress, caused by her disabled condition and the state of the weather and tide. She was in the presence of danger, and further danger was reasonably to be apprehended.

The Nelson was not engaged in the towing business, and the service she rendered was not for the mere purpose of expediting the Holden on her voyage. She was not on her voyage. She was seeking a place of safety. The service rendered was prompt, efficient, and successful, causing delay, inconvenience, and danger to the Nelson. The difficulties and dangers encountered during the night in towing the schooner to a place of safety are sufficient to show the value of the service rendered, and justified the court in its award. Under the circumstances, the decree made by the District Court in favor of the Nelson, her officers, and crew appears to be reasonable and just.

The decree of the District Court is therefore affirmed.

UNITED STATES v. ABEEL et al. †

(Circuit Court of Appeals, Fifth Circuit. October 4, 1909.)

No. 1,823.

1. CLERKS OF COURTS (§ 74*)—CLERKS OF UNITED STATES COURTS—LIABILITY ON OFFICIAL BONDS—CONVERSION OF MONEY DEPOSITED TO PAY COSTS.

A clerk of a Circuit Court who has given bond as required by Rev. St. § 795, or under the provisions of Act Feb. 22, 1875, c. 95, § 3, 18 Stat. 333 (U. S. Comp. St. 1901, p. 619), conditioned that he shall "faithfully discharge the duties of his office * * * and properly account for all moneys coming into his hands as required by law," and who fails to pay out to the persons entitled thereto money deposited with him by litigants to secure costs under an order or rule of the court, or to account for and pay over the same to his successor in office, commits a breach of such bond.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 132; Dec. Dig. § 74.*]

2. CLERKS OF COURTS (§ 75*)—CLERKS OF UNITED STATES COURTS—ACTION ON OFFICIAL BOND.

Where a clerk of a Circuit Court in the course of a number of years received a large number of deposits of money made by litigants to secure

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied November 2, 1909.

costs, as required by a rule of court, and failed to pay the same out to the persons who became entitled to the same as fees or to turn the fund over to his successor in office, but converted it to his own use, the United States, as payee, may maintain an action on his official bond to recover the amount, and is not required in its pleading to name all or any of the persons entitled to share in the fund as use plaintiffs, since the sums so deposited can in no event become the property of the clerk beyond the amount he is entitled to retain for his own fees, but must legally remain subject to the orders of the court, which has power on the recovery of the fund to see that it is properly disbursed.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 138; Dec. Dig. § 75.*]

In Error to the Circuit Court of the United States for the Northern District of Texas.

Action by the United States against Alfred Abeel, Fannie Finks, as executrix of the will of John H. Finks, deceased, and the Fidelity & Deposit Company of Maryland. Judgment for defendants on exceptions to first amended original petition of plaintiff, and plaintiff brings error. Reversed.

The following is the petition of the plaintiff, filed in the Circuit Court:

"To the Honorable Judges of Said Court:

"Your petitioners, the United States of America, hereinafter called plaintiffs, by their district attorney for the Northern District of Texas, William H. Atwell, after having obtained leave of the court, file this, their first amended original petition, in lieu of their original petition filed herein on the sixteenth day of October, 1907, and for such amendment complain of Alfred Abeel, Mrs. Fannie Finks, a feme sole, and the Fidelity & Deposit Company of Maryland, all of whom are hereinafter styled defendants, and represent:

"(1) That Alfred Abeel is an inhabitant, resident and citizen of the county of McLennan, state of Texas. That Mrs. Fannie Finks is the widow of John H. Finks, deceased, and is the executrix of the said John H. Finks' estate, and resides in and is a citizen and inhabitant of the county of Dallas, state of Texas; that the Fidelity & Deposit Company of Maryland is and was at the time of the happening of the matters hereinafter detailed, a corporation organized and existing under and by virtue of the laws of the state of Maryland, for the purpose, among other things, of guaranteeing the fidelity of persons holding positions of public and private trust, and to execute bonds and undertakings for such persons, and at the time of the execution and delivery of the hereinafter mentioned bond and writing obligatory, had complied with the provisions of the laws of the state of Texas authorizing it to do business in said state of Texas, and had complied with the provisions of an act of Congress, approved August 13, 1894, and had been duly granted by the Attorney General of the United States authority as under the laws provided to do business under such act in the state of Texas and in the Northern District thereof, and the said company has and had a local director and agent in the city of Dallas on the dates aforesaid, to wit, Lee E. Burgess.

"(2) That the said Mrs. Fannie Finks was, by the duly probated will of the said John H. Finks, deceased, appointed executrix of the said John H. Finks' estate, and became under the terms of said will, and is now, the owner and holder of all the said property of the said John H. Finks, both real and personal, and that vested in him at the time of his demise.

"(3) That on the thirteenth day of May, 1903, John H. Finks was the duly appointed and acting clerk of the Circuit Court of the United States within and for the Northern District of Texas, and on or about that date was notified and required by the Attorney General of the United States to execute with sufficient sureties, and cause to be delivered to these plaintiffs, a bond to these plaintiffs in the penal sum of fifteen thousand dollars, conditioned among

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

other things that he, the said John H. Finks, should faithfully discharge the duties of his office, and properly account for all moneys coming into his hands, as required by law; and thereupon, to wit, on the thirteenth day of May, 1903, the said John H. Finks, as principal, and the said Alfred Abeel and the said Fidelity & Deposit Company of Maryland, as sureties, did make, execute and deliver to these plaintiffs, pursuant to the laws in such case made and provided, their certain bond and writing obligatory, in words and figures herein, following, to wit:

"Know all men by these presents: That we, John Hollingsworth Finks, of Dallas, Dallas county, Texas, and Alfred Abeel of Waco, in the county of McLennan, are held and firmly bound unto the United States of America, in the sum of fifteen thousand dollars, lawful money of the said United States to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this 13th day of May 1903.

"The condition of the above obligation is such,

"Whereas, pursuant to law, John Hollingsworth Finks has been appointed clerk of the Circuit Court of the United States for the Northern District of Texas, to have and to hold the same, with all the rights, privileges and emoluments thereunto lawfully appertaining, as by an appointment to him bearing date the 24th day of April 1889, more fully appears, a certified copy of which is hereunto annexed.

"Now, if the said John Hollingsworth Finks, by himself and by his deputies, shall faithfully discharge the duties of his office and seasonably record the decrees, judgments and determinations of the said court, and properly account for all moneys coming into his hands, as required by law, then this obligation to be void, otherwise, to remain in full force and virtue.

"(T. S.) John Hollingsworth Finks.

"(T. S.) Alfred Abeel.

"(T. S.) Fidelity & Deposit Company of Maryland.

"(L. S.) By Lee E. Burgess, Local Director."

* * * * *

"Which said bond was duly, to wit, on the first day of June, 1903, approved.

"(4) That the said bond and writing obligatory was executed and delivered as aforesaid for and in consideration of the fact that the said John H. Finks had not, within four years next preceding the said thirteenth day of May, 1903, given any bond to secure the faithful discharge by him of his duties as such clerk aforesaid, and was also executed and delivered to enable the said John H. Finks to comply with the requirement made and notified to the said John H. Finks by the Attorney General of the United States, to wit, that the said John H. Finks give a bond to the plaintiffs conditioned as aforesaid in the penal sum aforesaid, for the purpose of strengthening the security therefore given by him, the said John H. Finks, for the faithful discharge of his duties as such clerk, and was further executed and delivered for the purpose and in consideration of enabling the said John H. Finks to retain his office and position as such aforesaid clerk.

"(5) That thereafter, on the first day of June, 1903, the said bond and writing obligatory, so executed and delivered to the plaintiffs, was duly presented to and approved, as aforesaid, by the United States Circuit Court for the Northern District of Texas, and recorded at large upon the records thereof.

"(6) That thereafter the said John H. Finks, pursuant to said appointment and under and pursuant to and because of the security afforded by the said bond, and the approval thereof, continued to occupy and fill his said office and position as clerk aforesaid, and receive the emoluments thereof under the law until the fourteenth day of May, 1906, at which time his term was ended.

"(7) That the said John H. Finks was appointed clerk of the Circuit Court of the United States for the Northern District of Texas on the twenty-fourth day of April, 1889, in all things due and regular, and continued to serve under the law as such clerk from the date of said appointment until the fourteenth day of May, 1906.

"(8) The plaintiffs allege that the said John H. Finks did not faithfully discharge all the duties of his said office of clerk of the Circuit Court of the

United States in and for the Northern District of Texas, and for assigning a breach thereof, and of the condition of the said bond and writing obligatory, the plaintiffs allege that after his appointment as clerk of said Circuit Court, and at divers times between the said twenty-fourth day of April, 1889, and the said fourteenth day of May, 1906, and between the thirteenth day of May, 1903, and the said fourteenth day of May, 1906, upon and during all of which dates the said John H. Finks was in office, as aforesaid, filling and occupying the position of clerk of the United States Circuit Court, as aforesaid, a large amount of money, to wit, \$26,675.04, came into the hands of the said John H. Finks in his official capacity as such clerk, and not otherwise, that is to say, by virtue and under the authority of the rules and regulations of the Circuit Court of the United States for the said District, which said rules and regulations were made by the presiding judge and judges of the said Circuit Court under and by virtue of the power and authority in them vested as such courts and judges through and by the statutes and acts of Congress of the United States, which said rules are hereto annexed and made a part of this petition, rule 8 thereof being specially pleaded, which was in the following words, to wit:

"The clerk and marshal shall keep in their respective offices the statutes of the United States. All moneys collected for costs shall be collected upon a taxation showing the items taxed. Neither the clerk nor marshal shall be required to perform any service for the parties to any cause until satisfactory security to the clerk and marshal respectively shall be given in such sums as will cover the costs in the case, or an amount sufficient to cover the expense of the required service shall have been deposited; provided, if at any time any service shall be required of the marshal which shall require the expenditure of moneys by him to properly perform it, then the marshal may require a deposit of such sum as will be sufficient to meet the required outlay. Nothing in this rule is to be taken as depriving any party of any rights he may have under the existing practice to protect himself against his adversary in the matter of costs, and the aforesaid sum of money was collected by him as such clerk and placed in his official possession and custody to be by him as such clerk safely kept under the rules as aforesaid until the same was earned, disbursed or otherwise accounted for by him, according to the rules and regulations aforesaid, and to the statutes of the United States relating to the payment of costs in suits at law and in equity in the United States courts, and according to the statutes and judgments carrying such cost to the respective parties in such litigation.

"That the said moneys, amounting in the aggregate to \$26,675.04, were derived from numerous payments and deposits made by parties litigant in cases brought or pending in said court, which said payments and deposits were required by the clerk under the authority of the law and rules heretofore mentioned, and under and by virtue of the laws of the United States and the rules and judgments of the said Circuit Court, and the said sum of money was the aggregate of said payments and deposits, and the said aggregate was a part of the moneys and deposits that the said Finks had exacted and collected under the authority of the rules and judgments aforesaid from parties litigant in the said court over which he was said clerk, and which was paid to him by reason of said rules and law and judgment and exaction and because he was such clerk, and the same is no part of any sum or sums earned by him, the said Finks, as such clerk, but was in fact the sum that he had collected as such clerk under the authority aforesaid, for the payment in such litigation of witness fees, marshal's fees, stenographer's fees, deposition fees, attorneys' docket fees, notaries' fees, and in general court costs, exclusive of those due to him as such clerk, or any of his deputies, but were paid into his hands for disbursement to the said parties because he, the said Finks, demanded the same under the said authority and as such clerk aforesaid.

"That the said money so paid to him and collected by the said Finks, as clerk, were to be and should have been by him, the said clerk, paid to the witnesses who earned their fees, to the notaries who earned their fees, to the marshals who earned their fees, to the stenographers who earned their fees, to the attorneys who earned their fees, and to such other officers or witnesses or individuals as might, by the judgments of said court, to be entitled to pay

out of the said moneys so deposited with the said Finks under the said rules, law, and judgments. But that the said moneys were by him at and before the time of his retirement from office, and at and after the making of the bond herein sued on, misappropriated and converted to his own use, in violation of his duty as clerk of said court, which duty required him to account for said money and any and all parts thereof, and to pay over the same and any and all parts thereof to the aforesaid parties to whom they were due, or to his successor in office, or to the plaintiffs, and the said John H. Finks, at the time of his retirement from office, and at all other times before, and his executrix, the said Mrs. Fannie Finks, have entirely failed and refused so to do, and the said Mrs. Fannie Finks, executrix as aforesaid, Alfred Abeel, surety as aforesaid, and the Fidelity & Deposit Company of Maryland, surety as aforesaid, each of them have failed and refused and neglected to pay over to the successor of the said Finks in office, or account for, the said sum of money, to wit, \$26,675.04, or any part thereof.

"(9) Plaintiffs show that the condition of the said bond has been breached, as hereinbefore shown, to wit, by the failure and refusal of the said Finks, as shown in paragraph 8, to properly account for all moneys coming into his hands, as required by law, to wit, the moneys and funds hereinbefore mentioned.

"(10) Plaintiffs show that filed herewith and annexed hereto as a part hereof is a book labeled upon the outside thereof, 'Trial Balance,' which contains on the first forty-two pages thereof an itemized statement of the moneys and funds mentioned in paragraph 8 of this complaint, which the said John H. Finks, clerk as aforesaid, failed and refused to account for, as required by law, which came into his hands as such clerk as aforesaid, and the plaintiffs show that it is inexpedient and impracticable to set out in this petition, otherwise than shown by said exhibit, the precise amount in each case which goes to make up the aggregate amount herein sued for, to wit, the said \$26,675.04, because to effect a more detailed statement herein would render this pleading voluminous and serve no good purpose, the plaintiffs showing that the aforesaid aggregate comprises amounts the kinds of which are detailed in paragraph eight of this petition, growing out of hundreds of cases, but the dates and numbers of the causes, and whether law or equity, and the amount of deposits, are set out in said 'Trial Balance.'

"(11) Plaintiffs show that by reason of the execution and delivery of the said bond and writing obligatory, the defendants and each of them became liable jointly and severally to pay to these plaintiffs the amount of money in damages heretofore set forth, to wit, the sum of \$26,675.04.

"(12) Wherefore, plaintiffs pray that citation having issued in terms of law against each of the defendants herein, they have upon final hearing hereof, judgment against said Mrs. Fannie Finks, executrix and legatee, for such amount as under the laws of the state of Texas relating to descent and distribution of estates they may be entitled to, and that they have judgment for the full amount of said bond, to wit, fifteen thousand dollars, against said Alfred Abeel, surety as aforesaid, and against said Fidelity & Deposit Company of Maryland, surety as aforesaid, together with the interest thereon from October 16, 1907, at the rate prescribed by law, and all costs of suit.

"William H. Atwell,

"United States District Attorney for the Northern District of Texas, for Plaintiffs."

The defendants excepted to the petition as follows:

"Said defendants specially except to plaintiff's said first amended original petition, in that same wholly fails to show that the plaintiff is in any wise interested in the alleged subject-matter of this suit, nor does it appear from said petition that this suit is instituted by the plaintiff herein upon the relation of any person whomsoever shown in any wise to be aggrieved by any of the acts attempted to be complained of by the plaintiff herein, nor are any such acts, facts or circumstances as entitle the plaintiff to maintain this suit in any wise averred in the said petition herein; and of this the said defendants pray judgment, and, as, etc."

The Circuit Court sustained the exceptions, and entered judgment against the plaintiff. The plaintiff sued out the writ of error, and assigns that the Circuit Court erred in sustaining the exceptions to the petition.

Wm. H. Atwell, U. S. Atty.

Etheridge & McCormick, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). This case was decided against the plaintiff on a general exception to the petition. The court below, therefore, held that, admitting all the averments of the petition to be true, it showed no right of action in the plaintiff. The action is by the payee, the United States of America, against the makers of the bond sued on. To show fully the case presented by the petition, we have set it out in full in the statement of the case, omitting only the exhibits, which may be understood from the averments of the petition.

When Finks was appointed clerk of the Circuit Court of the United States for the Northern District of Texas, he was required to give bond in a sum to be fixed, and with sureties to be approved, by the court which appointed him, "faithfully to discharge the duties of his office." Rev. St. U. S. § 795 (U. S. Comp. St. 1901, p. 619). The bond conforms to the statute, and contains the condition that he, "by himself and by his deputies, shall faithfully discharge the duties of his office * * * and properly account for all moneys coming into his hands, as required by law." The petition shows very clearly and elaborately that he failed to comply with the condition of his bond. He received, under rules of the court of which he was clerk, \$26,675.04, and has not properly disbursed or accounted for the same, but, on the contrary, has misappropriated and converted the money to his own use. The money having been received by Finks as clerk under rules of the court, it is clearly money held by him officially, and it is a breach of his bond to convert it to his own use. *Smith v. United States*, 170 U. S. 372, 379, 18 Sup. Ct. 626, 42 L. Ed. 1074; *Howard v. United States*, 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754. It does not seem to be denied that the conversion of the money was a plain violation of duty and a breach of the condition of the bond for which the makers are liable in a proper action. The defense, as we understand it, is that the suit cannot be maintained by the United States, the payee named in the bond. The money, it appears, was received by the clerk as deposits to secure costs. The several sums making the aggregate, after deducting his own costs, should have been paid by the clerk to witnesses, attorneys, notaries, marshals, and others who earned and were entitled to fees out of the funds so deposited. He failed and neglected to pay out the fund as he should have done, but converted it to his own use, and failed to turn it over to his successor in office or to otherwise account for it. It is not denied that if the fund so received had been the property of the United States, due to the government primarily and not to others, this action could be maintained; nor is it denied that any one of the officers or witnesses who earned and to whom was

due a part of such sum could maintain an action on the bond in the name of the United States for his use for the sum so due him. The action here is not by the United States as nominal plaintiff for the use of some named witness or officer, but it is a suit seeking to recover the entire amount converted by the clerk, stating the facts and showing that the sums making up the aggregate sued for were really earned by and are due to the officers and witnesses to secure whom the deposits were made. The defense sustained by the court below is based on the proposition that the United States has no such interest in the fund as will sustain the suit.

These sums were paid to Finks, not as an individual, but as clerk of the court. The parties who made the deposits were required to do so by rules of the court. Except as to the part of the sums necessary to pay his own costs, the clerk held the money officially, to be paid out to those entitled to it. His possession of it never gave him any personal right to it, and he violated his official duty when he converted it to his own use. Holding the money as clerk, he held it subject to the orders of the court, and any witness or officer entitled to part of it, on motion and on proving the facts, could have obtained an order on the clerk to pay him the amount due him. If, when he ceased to be clerk, the deposits were in his custody, he had no right to longer hold them. If he could not immediately disburse the money to those entitled to it, he should have left it on deposit, subject to the order of the court, or turned it over to his successor in office. If it had been shown to the court that a retiring clerk had funds in his hands held by him officially, an order would have been made, if necessary, directing the fund to be turned over to his successor, or otherwise placed under the control of the court.

The clerk necessarily receives under the rules of court a great many small sums as security and indemnity for costs. These sums in the aggregate in a few years may amount to many thousand dollars. It would be unfortunate if there was no other way to make him account for the fund except by suit in the name of the United States by each witness or officer to whom a few dollars were due.

It is not denied, as we have said, that this suit could be maintained by one of the witnesses or officers who sued in the name of the United States for the small part of the sum involved that had been earned by him. This petition alleges the failure of the clerk to pay over the moneys sued for to those who earned it or to his successor. If necessary to place it on that ground, why could not this suit be maintained as one for the use of those entitled to the fund, or for the use of the succeeding clerk? Clearly, if the money sued for is collected, the court could direct its disbursement by the clerk to any witness or officer who showed that he was entitled to fees out of it.

The bond sued on is payable to the United States. The legal title, therefore, to whatever sum is due for a breach of the bond, is in the government. Under the ancient common law, no action whatever could be maintained on the bond at law except by the payee named in the bond. As modified by statutes and decisions in most jurisdictions, others having equitable interests are permitted to assert them at law, but they are usually required to do so in the name of the payee. This

is true even where the payee is entirely without pecuniary interest, and is the mere holder of the legal title. Therefore, in the absence of a statute changing the rule, this action could only be brought in the name of the government, the payee in the bond, and the only question in this aspect of the case is whether or not it is a fatal defect to fail to name the person or persons entitled to the fund, and to aver that the suit is for his or their use. When we consider that the petition fully states the facts, and shows that it would be impracticable to name all who may be entitled to some small portion of the fund, this objection seems technical and wanting in merit and substance. The main reasons for naming the usee is that he may be in court to receive what may be due him, or to have his rights protected, and that he may be bound by the result. If recovery is had in this action, the amount collected would be brought into court by the suit, and would be subject to the orders of the court. Nor would there be any danger that the defendants would be subject to a second suit by the usees for the same or a part of the same demand. The clerk or his representative or the sureties on his bond, under an order of the court, could at any time deposit the fund with the present clerk of the court, and be relieved of all further liability on account of such fund. If paid pursuant to a judgment of the court for breach of the bond, the effect would be the same. Proof of the fact of payment would bar any other action for the money.

Unquestionably one entitled to a part of the fund in the hands of the clerk could sustain a suit on the clerk's bond in the name of the United States. *Howard v. United States*, supra. But it by no means follows that on the facts stated in the petition a suit for the breach cannot be maintained by the United States without a statement that the suit is for the use of some one named in the petition. In *Boston & El. Ry. Co. v. Grace & Hyde Co. et al.*, 112 Fed. 279, 284, 50 C. C. A. 239, 244, the court, referring to the phrase in a declaration, "for the use and benefit" of another, said:

"According to respectable authority, the expression of a use may be disregarded as surplusage. Its purpose is to guard the interest of the usee against the adverse action of a nominal plaintiff. It is held that such a phrase has no force to make an issue different from what it would have been if the phrase had been left out. It is held, also, that the declaration of use is no part of the pleading. *Bentley v. Insurance Co.*, 40 W. Va. 729, 739, 23 S. E. 584; *Belton v. Gibbin*, 12 N. J. Law, 77; *State v. Johnson*, 52 Ind. 197; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346, 355; *Northrop v. McGee*, 20 Ill. App. 108; *Tedrick v. Wells*, 152 Ill. 214, 217, 38 N. E. 625; *Hobson v. McCambridge*, 130 Ill. 367, 375, 22 N. E. 823; 15 Enc. Pl. & Prac. 484, 498."

See, also, 31 Cyc. 100, and cases there cited, and *United States v. Griswold*, 8 Ariz. 453, 76 Pac. 596; *Id.*, 9 Ariz. 304, 80 Pac. 317.

We are of opinion that the facts stated in the petition show a cause of action in the plaintiff. The conclusion, we think, is sustained by the principles of pleading at common law. "So far as plaintiffs are concerned, the rules of common law are modified very little, if at all, in the Texas practice." *Townes on Texas Pleading*, 199. It may not be amiss to note the fact that, if this were a suit on a Texas official bond, "made payable to the state of Texas, or any officer thereof," a

suit could be maintained on it in the name of the state alone when the recovery would inure to parties other than the state; such suit being brought "for the benefit of all parties entitled to recover thereon." Id. 202; Rev. St. Tex. 1895, art. 1207. This action is, in effect, for the benefit of all parties entitled to the fund sued for; for, if it is recovered, it will be brought into court to be disposed of according to law. It is true that no effort is made to name the many persons who may be entitled to parts of the fund. It appears to be impracticable to do so. To hold that the suit cannot proceed without naming them would be equivalent to saying that the clerk could appropriate the fund and hold it because of the fact that it is not possible, under the circumstances, to name them all. We would not willingly reach a conclusion leading to results so injurious to the public interests.

But if, as between the clerk who has wrongfully converted the fund and the United States, the latter has the better right, it is probably not necessary to consider the question as to whether this action can be construed to be and sustained as one for the use of the clerk's successor, or the witnesses and officers who earned the fees.

Except as to fees and commissions plainly allowed by law, it is not intended that the clerk should become the owner of any money received by him officially. No matter how long it may remain in his hands, no matter how negligent of asserting claim to it the true owner may be, it is not to become the property of the clerk, and he has no right to use it as his own. It would be against public policy, and likely to lead to scandalous results, if sums which litigants are required to deposit with the clerk to secure costs or otherwise could be considered a personal gain or perquisite of the clerk if not claimed by those entitled to it. Such a doctrine would make it to the pecuniary interest of the clerk to suppress the facts relating to the deposit of money and the disposition of cases which called for its distribution. If there were no statutes on the subject, it would still be within the power of the court, its attention being called to the matter, to prevent such a course of conduct on the part of the clerk. If a sum received by the clerk to be distributed as costs and fees could not be paid out by order or direction of the court or pursuant to the usual practice, the clerk should make a deposit of it as required by statute:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court: Provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court." Rev. St. U. S. § 995; Act March 24, 1871, c. 2, § 1, 17 Stat. 1 (U. S. Comp. St. 1901, p. 711).

When the money was so deposited, there would be a public record of the fact tending to protect parties in interest, and the accumulation of these sums in the hands of the clerk would no longer lead him into temptation. These sums, we repeat, could never become the property of the clerk, but they may, if unclaimed, and if it become impossible to pay them to those entitled to them, become the property of the United States, "if they have remained in the custody of the

court unclaimed for ten years or longer." Rev. St. U. S. § 996, as amended by Act Feb. 19, 1897, c. 265, § 3, 29 Stat. 578 (U. S. Comp. St. 1901, p. 711).

If it be true, as alleged, that the clerk converted funds held by him officially to his own use, this was a breach of the bond he gave to the United States, and it was the duty of the United States Attorney to bring a suit on the bond. Judge Boyd, speaking for the Circuit Court of Appeals for the Fourth Circuit, suggested as the proper practice:

"When such state of facts was shown to exist, we think the law clearly contemplates that a breach shall be declared which would entitle the United States to recover the amount of the bond, to be discharged, however, upon the payment of such special damages as may have been proved to exist." *United States v. American Surety Company*, 163 Fed. 228, 89 C. C. A. 658.

Upon proof of a breach of the bond, in the aspect of the case most unfavorable to the plaintiff, a recovery of nominal damages would follow. If, however, the evidence is such as to show the amount of damages arising from the breach of the bond, instead of entering judgment for the entire penalty, to be subsequently satisfied, as suggested in the case last cited—there being no proof of special damage in that case—the judgment should be entered for the amount shown to be due "according to equity." The following is the statute which controls the procedure in such cases:

"In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury." Rev. St. U. S. § 961; Act Sept. 24, 1789, c. 20, § 26, 1 Stat. 87 (U. S. Comp. St. 1901, p. 699).

In *S. Oteri*, 67 Fed. 149, 151, 14 C. C. A. 344, 346, Judge Pardee said that "the rule declared by this statute is to be generally applied in proper cases in courts of the United States." See, also, *Gurney v. Hoge*, 6 Blatchf. 499, Fed. Cas. No. 5,875; *United States v. White*, 4 Wash. C. C. 414, Fed. Cas. No. 16,686.

This case has been brought to this court to review a judgment rendered sustaining an exception to the petition. For purposes of our decision, therefore, we are required to assume the allegations of the petition to be true. Nothing said here, however, should reflect on the character of the deceased clerk, whose representatives will have the right on the next trial to require proof of, and to disprove, the charges made in the petition.

The judgment is reversed, and the cause remanded, with instructions to overrule the exception to the petition, and thereafter proceed according to law and the views herein expressed.

**NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO., et al. v.
ROCKEFELLER.**

(Circuit Court of Appeals, Eighth Circuit. October 15, 1909.)

No. 2,861.

1. GUARANTY (§ 37*)—CONSTRUCTION OF CONTRACT—COMMENCEMENT.

It is a rule of very general application that all guaranties are prospective and not retrospective in operation, unless the contrary appears by express words or by necessary implication; and a written guaranty given to a bank of all debts which a corporation "may from time to time contract or become liable for to said bank, however said debts may be contracted or evidenced," cannot be construed to cover a note previously given by the corporation to the bank, nor renewal notes, given after the guaranty was executed, for the sole purpose of extending the time of payment of the same indebtedness.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 46; Dec. Dig. § 37.*]

2. GUARANTY (§§ 3, 27*)—REQUISITES—PAROL GUARANTY.

A parol statement, made by a prospective stockholder of a corporation to the president of a bank, that he would like to have the corporation do business with the bank, and that he "was going to give a guaranty to protect" the bank, did not constitute a guaranty, nor a present binding promise to give one, but was only an expression of a general purpose to do something, which would not bind him until done; nor can it affect the construction of a subsequently given written guaranty, clear and definite in its terms, which must be conclusively presumed to express the final agreement of the parties and to measure their rights and obligations.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. §§ 3, 27.*]

3. BILLS AND NOTES (§ 103*)—CONSIDERATION—MISREPRESENTATIONS.

Where a guarantor of an indebtedness from a corporation to a bank, in settling his liability to the bank after the corporation became insolvent, accepted the representations of the bank, implied, if not expressed, that a note of the corporation then held by the bank represented an indebtedness which was all within the guaranty, and paid the full amount due thereon in cash and by giving his own note, but it afterward appeared that the note so taken up was in large part in renewal of an indebtedness antedating the guaranty and not covered thereby, his own note to that extent was without consideration, and on payment of the remainder he was entitled in equity to its cancellation.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 103.*]

4. SUBROGATION (§ 7*)—GUARANTOR.

A corporation executed to a bank its note, which recited that "to secure the payment of this note, and of any and all other indebtedness which we now owe to said bank, or may owe it any time before the payment of this note, we have hereto attached as collateral security the following notes, * * * and hereby authorize [the cashier], * * * on default in the payment of this note, * * * to sell said collateral." *Held*, that such collateral was pledged primarily to secure payment of the note to which it was attached, and secondarily, but no less effectually, to secure the payment of any other indebtedness owing by the corporation to the bank when such note matured, and that a guarantor who paid the note was not entitled by subrogation to the collateral, where a prior indebtedness of the corporation to the bank remained unpaid.

[Ed. Note.—For other cases, see Subrogation, Dec. Dig. § 7.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. APPEAL AND ERROR (§ 169*)—GROUNDS OF REVIEW—NECESSITY OF PRESENTATION IN LOWER COURT—EQUITY CAUSES.

In an equity case, which is tried on appeal *de novo*, it is not necessary that every reason for or against a decretal order should be presented to the trial court; but if the pleadings warrant the contention, and there be an assignment of error warranting its consideration, it is the duty of the appellate court to decide it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 169.*]

6. GUARANTY (§ 36*)—CONSTRUCTION OF CONTRACT—GUARANTY OF "DEBTS."

A contract of guaranty is to be strictly construed, and a guaranty executed to a bank of the payment of any "debt" which a corporation may "contract or become liable for to said bank" cannot be enlarged to render the guarantor liable on guaranties by the corporation of collateral notes pledged by it to the bank, which guaranties did not constitute debts of the corporation, but were merely executory contracts, on which its liability was contingent.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 38; Dec. Dig. § 36.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Suit in equity by Frank Rockefeller against the National Bank of Commerce of Kansas City, Mo., and others. Decree for complainant, and defendant bank appeals. Modified and affirmed.

This was a suit in equity, brought by Frank Rockefeller against the National Bank of Commerce of Kansas City, to secure the cancellation and surrender of a certain promissory note, dated August 16, 1901, for \$36,229.05 (hereafter referred to as the \$36,000 note), executed and delivered by him to the bank, and to secure the delivery to him of certain notes secured by chattel mortgages which the bank had taken from the Siegel-Sanders Live Stock Commission Company, a corporation, as collateral security for the payment of debts due it from that company, and which Rockefeller claimed to have paid, and therefore to be entitled to be subrogated to the rights of the bank with respect to them. The Circuit Court entered a decree in favor of complainant, both for the cancellation of the note, and subrogating him to the rights of the bank to the collateral notes and mortgages as claimed. The bank appeals.

Rockefeller was a stockholder and director in the commission company, whose business consisted of buying and selling live stock on commission at Kansas City, Mo., and loaning money on cattle, taking notes secured by chattel mortgages to evidence the loans. He lived in Cleveland, Ohio, and had not, prior to the transactions involved in this suit, taken any active part in the conduct of the business of the commission company. That was left to Frank Siegel, the president, and R. D. Swain, the secretary and treasurer. The company, not having sufficient capital to carry on business of the magnitude desired by its officers, attempted to borrow money from banking institutions for that purpose; but the banks exacted as a condition to such accommodations the personal guaranty of the officers of the company and of Rockefeller that its debts should be paid. One of these banks was the defendant the National Bank of Commerce, and the guaranty exacted by it and executed by Rockefeller and others was in the following words:

"For a valuable consideration to us in hand paid by National Bank of Commerce of Kansas City, Missouri, we, the undersigned, do hereby agree to make and guarantee to the National Bank of Commerce of Kansas City, Missouri, any and all debts which the Siegel-Sanders Live Stock Commission Company, a corporation doing business in Kansas City, Missouri, may from time to time contract or become liable for to said bank, however said debts may be contracted or evidenced. This guaranty shall be an open one and cover debts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

aggregating two hundred thousand (\$200,000) dollars at any one time, and shall continue at all times unconditional until revoked by us; and for the consideration aforesaid we hereby waive all notice to us or either of us of the beginning or ending of credit which said bank may give to said company under this guaranty, or of the state of its indebtedness at any or all times. Witness our hands this 21st day of January, 1901.

"[Signed] Frank Siegel.

"R. D. Swain.

"Frank Rockefeller."

On January 9, 1901, prior to the giving of the guaranty, the commission company had borrowed \$45,000 from the bank and executed its promissory note therefor, pledging as collateral security for its payment various notes secured by chattel mortgages. The bank claims this indebtedness was covered by the terms of the guaranty when properly interpreted, and also that it was contracted on the strength of an oral agreement made by Rockefeller to guarantee its payment or to execute a written guaranty to that end. This note matured after the giving of the guaranty, and, \$1,000 only being paid thereon, was twice renewed for the balance of \$44,000; the last renewal falling due April 16, 1901. On January 29, 1901, after the execution of the guaranty, the commission company borrowed \$30,000 more from the bank, and executed its note therefor, maturing in 30 days, and pledged certain collateral for its payment. At the maturity of this note it was not paid, but renewed for another term of 30 days. On March 11, 1901, the commission company borrowed \$30,000 more from the bank, and gave its note therefor, maturing about April 11, 1901, and also pledged certain collateral for its payment. Some time in April, 1901, the commission company failed, and on April 22d of that year, after crediting the company with the amounts collected on collateral pledged for the payment of the three notes, it was found that it owed the bank the aggregate sum of \$59,204.19 and for this sum Swain, as treasurer of the company, executed its note (hereafter referred to as the note for \$59,000) to the bank, payable in 30 days. Siegel had disappeared, and Rockefeller, at the instance of Swain, went to Kansas City, saw Dr. Woods, the president of the bank, and told him he intended to remain until the affairs could be straightened out, and assured him that his guaranty was good for any legal liability against him. Dr. Woods answered that the company owed the bank \$59,204.19, represented by the consolidated note just mentioned, and that he felt safe because he had Rockefeller's guaranty back of it. Under the impression that all of the indebtedness of the company to the bank had been incurred since the execution of the written guaranty, and also that the bank held collateral security enough belonging to the company to fully pay the indebtedness, Rockefeller returned to Cleveland, and later was advised by the bank that it desired settlement of his obligation, and that unless settlement was speedily made it would be obliged to sell the collateral held by it. On August 10th Rockefeller returned to Kansas City, and, after settling other accounts not necessary now to be considered, took up the settlement of the \$59,000 note, and found that it was entitled to credits arising from collections of collateral by the bank which reduced the amount due to \$45,852.60. This was settled by Rockefeller paying \$10,000 in cash and giving the \$36,000 note in controversy for the balance. All the collateral which the commission company had pledged to secure the payment of its note for \$59,000, which had not already been paid and credited upon the company's obligation to the bank, was allowed to stand as collateral security for the payment of Rockefeller's new note for \$36,000, and was listed on the back of that note.

Rockefeller had never given personal attention to the details of the business of the commission company and knew little of its financial transactions. He intrusted such matters to his friend, Swain; but as trouble came his first impulse was to learn the amount of his obligation and have it settled as soon as possible. He seems to have taken the implications, if not the statements and representations, of the officers of the bank, to the effect that the entire amount of the \$59,000 note fell under his guaranty, as true, and to have relied upon them without making any special examination of the books of the commission company or of the bank to inform himself independently concerning the matter. Some time after he had given the \$36,000 note, and prior to its ma-

turity, his suspicions became aroused, and he ascertained as a result of considerable investigation that \$44,000 of the first loan for \$45,000 made by the bank to the commission company, less such collections of collateral pledged for its payment as had been made by the bank, had been embraced in the amount claimed to be guaranteed by him. He also learned that, after crediting the two notes of \$30,000 given by the commission company to the bank with the net proceeds of collections of collateral properly pertaining to them, the total amount due on them on October 28, 1901, was only \$10,811.09. This appears to have been stipulated as a fact in the progress of the trial below. Rockefeller then paid this sum to the bank and demanded the surrender of his \$36,000 note of date August 16th, and this demand was refused by the bank. It results that, unless Rockefeller in some manner became liable for what remained unpaid on the first loan of \$45,000 made before the written guaranty was executed, he had paid all he owed the bank by reason of his guaranty, and his note should be canceled.

O. H. Dean (Robinson, Carkener & Robinson, on the brief), for appellant.

Sanford B. Ladd (John C. Gage and Charles E. Small, on the brief), for appellee.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). We think Rockefeller did not become liable for the \$45,000 loan of January 9, 1901, by the terms of the guaranty afterwards signed by him. It is a rule of very general application that all guaranties are prospective and not retrospective in operation, unless the contrary appears by express words or by necessary implication. *Brandt on Suretyship and Guaranty* (3d Ed.) § 108; *People v. Lee*, 104 N. Y. 441, 449, 10 N. E. 884; *Pritchett, Baugh & Co. v. Wilson*, 39 Pa. 421. A most critical reading of the guaranty in question discloses no purpose, either express or implied, to give it any retrospective operation. It is couched in plain and simple language, and is an agreement on the part of the signers to guarantee all debts which the commission company may from time to time contract or may become liable for to the bank. These words, in our opinion, clearly look to the future and not to the past. Did either one or both of the renewal notes given for \$44,000 of the original \$45,000 loan, after the execution of the guaranty, amount to the contracting or becoming liable for a debt within the meaning of the written guaranty? We think not. There is nothing in this record showing that the renewal notes were intended to be given or received in actual payment of the original debt. They were clearly intended, not as payment or discharge of that debt, but as extensions of time for or postponement of its payment. The debt had already been contracted. The evidence of it only was changed. 2 *Daniel on Neg. Inst.* 1260; *McLaughlin v. Bank of Potomac*, 7 How. 220, 228, 12 L. Ed. 675; *Jones v. Guarantee & Indemnity Co.*, 101 U. S. 622, 630, 25 L. Ed. 1030; *Lee v. Hollister* (D. C.) 5 Fed. 752, 757; *Case v. Fant*, 3 C. C. A. 418, 53 Fed. 41; *Patterson v. Wade*, 53 C. C. A. 1, 115 Fed. 770; *Deseret National Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215; *National Bank v. Cramer*, 78 Mo. App. 476, 484.

Was the original loan of \$45,000 made pursuant to an oral agreement by Rockefeller to guarantee its payment or to execute a general

guaranty like that subsequently executed on January 21st? We think not. There is no claim that anything was said by Rockefeller to the officers of the bank at the time the loan was made, or that Rockefeller then had any knowledge of the transaction. Dr. Woods, the president, with the doubtful corroboration of one other witness, testified that some time in December, 1900, before the loan of \$45,000 was made, and before the guaranty was executed, he had a conversation with Rockefeller, and that the latter said to him that "he had arranged to become connected with the Siegel-Sanders Live Stock Commission Company and made some inquiries about the business, also about Siegel. I told him that I thought Mr. Siegel was bright enough and smart enough, but that he was young and impulsive, and that our business relations with him had not been satisfactory. Mr. Rockefeller expressed a desire that the company should do business with us, giving us reasons for it, and said to me that he was going to give a guaranty to protect us," and Dr. Woods testified that he would not have loaned the company any money, but for that promise. This conversation is explicitly denied by Rockefeller; but, assuming it to be true as stated by Dr. Woods, it is manifestly an expression of an intention on Rockefeller's part to do something in the future. It does not purport to be a present promise, but only an expression of a revocable general purpose. The putting of his intention into effect seems also to have been conditioned upon his becoming at some time in the future connected with the company, and then, if at all, he was, according to the testimony, "going to give a guaranty." These words clearly imply no present accomplished act, but a future purpose to do something, which should not bind him till done.

This language is too vague and indefinite to constitute a present engagement of the importance now claimed for it. Moreover, the actual execution of the guaranty in writing soon thereafter elucidates the meaning of the alleged conversation. The giving of it was an act quite in harmony with Rockefeller's general purpose, foreshadowed only in the prior tentative conversation, and not at all in harmony with the present contention that he had already legally bound himself. This writing must be taken as the last and only expression of the intention of the parties, and in the absence of fraud, accident, or mistake must be conclusively presumed to express their whole engagement. It merged all former conversations and negotiations on the subject, and conclusively settled the rights of the parties to it. *Bast v. Bank*, 101 U. S. 93, 96, 25 L. Ed. 794; *Union Selling Co. v. Jones*, 63 C. C. A. 224, 128 Fed. 672; *Connecticut Fire Ins. Co. v. Buchanan*, 73 C. C. A. 111, 141 Fed. 877, 4 L. R. A. (N. S.) 758; *Omaha Cooperage Co. v. Armour & Co.* (C. C. A.) 170 Fed. 292. Assuming, then, that a parol promise to give a written guaranty would have rendered Rockefeller liable for a debt contracted thereafter, we conclude that such a promise is not established by the proof in this case.

It is further contended by the bank that the \$36,000 note was given in settlement and adjustment of differences between the bank and Rockefeller, and that a consideration is thereby afforded for the whole

note; but we are unable to take this view of the matter. The note was given to evidence what was understood and believed at that time by Rockefeller to be a just liability against him on his guaranty. There was no dispute or difference concerning that liability, and no concession was asked for or made on account of any differences between the parties. The bank represented that the amount of the note embraced only the unpaid parts of loans made to the commission company covered by Rockefeller's guaranty, and Rockefeller, assuming that to be true, executed his note therefor, and that was all there was of the transaction. The giving of the note, in the most charitable aspect that can be taken of the facts, was the result of mutual mistake of the parties. A compromise of disputed claims is desirable, and in itself affords ample consideration for a promise to pay the amount agreed on. But obviously there must be disputed claims, and a conscious compromise of them, as the genesis of such a consideration. 1 Wharton on Law of Contracts, § 533; Northern Liberty Market Co. v. Kelly, 113 U. S. 199, 5 Sup. Ct. 422, 28 L. Ed. 948.

The bill predicates complainant's equitable right to the cancellation of the \$36,000 note upon three grounds: (1) That the bank secured the execution of it by falsely representing to Rockefeller that the \$59,000 note executed by the commission company to the bank, in settlement of which the note in question was given by Rockefeller, represented and embraced only loans which had been made to the commission company by the bank after the execution of the guaranty; (2) that the bank secured its execution by concealing the fact that the note for \$59,000 actually embraced a part of the original \$45,000 loan; and (3) that the note was without consideration, except as to the sum of about \$10,000, which was paid by Rockefeller just before this suit was brought.

We cannot say, after a careful consideration of the proof, that there was any direct and intentional false representation or concealment by the bank, such as was charged in the bill; but, when it is considered that the bank had actual knowledge of the constituent loans that went to make up the \$59,000 note, and necessarily knew that the unpaid portion of the original loan of \$45,000 was included in it, and, with that knowledge, took the face of the \$59,000 note, less what had been collected on the pledged collateral, as the measure of Rockefeller's liability on his guaranty, and presented to him, on the occasion of his going to Kansas City to settle that liability, a claim for the difference, amounting to \$45,852.60, as the amount due from him on the guaranty, it, in effect, assured Rockefeller that the claim as presented was for money advanced on the strength of his guaranty. All parties agreed that Rockefeller's sole purpose in the interviews with the bank officials on this subject was to settle that liability. This misrepresentation may have been made under the mistaken belief that the guaranty in law covered the original loan of \$45,000, as is now ably contended; but, however inspired, it constituted a substantial misrepresentation and concealment of facts which were within the knowledge of the bank, and not shown to have been within the knowledge of Rockefeller.

The third ground for equitable relief however is clear. It results,

from what we have said, that the \$36,000 note now sought to be canceled, in so far as it embraced any part of the original \$45,000 loan, was without consideration, and as between the parties to it its payment ought not to be enforced. We have already seen by the stipulation of the parties that it did embrace \$25,417.96 of that loan. The payment, therefore, by Rockefeller to the bank of \$10,811.09 immediately before the institution of this suit left nothing legally due on the \$36,000 note; and the decree for its cancellation and surrender was right.

We now pass to a consideration of the errors assigned to that part of the decree directing the bank to assign and deliver to Rockefeller 10 certain promissory notes which had been pledged by the commission company, payee therein, as security for the payment of the two \$30,000 notes, and subsequently carried forward in the pledge to secure the payment of the consolidated note of \$59,000. These notes constituted all the collateral security which had been pledged for the payment of those two notes which remained uncollected at the time the decree was entered in this case. If these notes had been pledged as collateral security for the payment of those two notes only, the right of Rockefeller, upon paying them, to be subrogated to the rights of the pledgee, would seem to be unquestionable. But such is not the fact. The two notes each read as follows:

"Thirty days after date, for value received, we promise to pay to the order of the National Bank of Commerce of Kansas City, Mo., thirty thousand dollars, at the National Bank of Commerce, Kansas City, Mo., with interest from maturity until paid at the rate of eight per cent. per annum. To secure the payment of this note and of any and all other indebtedness which we now owe to said bank or may owe it any time before the payment of this note, we have hereto attached, as collateral security, the following notes: [describing them], all secured by chattel mortgages, and hereby authorize W. A. Rule [who was the cashier of the bank], or in case of his death, absence, or refusal to act, the then acting cashier of the said bank, on default in payment of this note, or any interest thereon, to sell said collateral or any part thereof, with or without notice, at public or private sale.

"[Signed] Siegel-Sanders Live S. Com. Co.,
"R. D. Swain, Treas."

We think the fair meaning of this pledge, giving force and effect to all its terms and provisions, is that the notes were pledged by the commission company primarily to secure the payment of the two \$30,000 notes, and secondarily, but no less effectually, to secure the payment of any other indebtedness which the commission company might owe the bank at the maturity of those notes. This, we understand, is the way the parties in interest treated the pledges, and we also understand that financial institutions generally employ substantially the same language in their collateral notes, and apply the proceeds of the sale of the collateral first in satisfaction of the debt primarily secured, and the surplus, if any, in satisfaction of any other indebtedness then due. Inasmuch as it appears that there is other unpaid indebtedness of the commission company to the bank, we are of opinion that the learned trial court erred in holding that Rockefeller was subrogated to the rights of the bank with respect to the ten notes in question. We do not find anything in the stipulation of the parties, called to our attention by complainant's counsel, or elsewhere, which stands in the way of our recognition of the bank's right to these notes.

There is one other contention of defendant's learned counsel, which was not presented to the trial court, and which first made its appearance in a supplemental brief filed in this court on the day of the argument, and which for these reasons, counsel for complainant contend, cannot be considered here. This being an equity case, which is tried on appeal *de novo*, it is not necessary that every reason for or against a decretal order should have been presented to the trial court. If the pleadings warrant the contention, and if there be an assignment of error permitting consideration of it, it is our duty to take it up and decide it. The contention is that as the renewal notes for \$44,000 of the original loan of \$45,000 were executed after Rockefeller's guaranty was made, and as those renewal notes pledged notes of other persons as collateral security for their payment, and as the commission company by a writing signed by it on the back of those notes guaranteed their payment, this last-mentioned guaranty was in itself a debt which the commission company contracted or became liable for to the bank after the guaranty of January 21st was executed, and that Rockefeller was by the terms of his guaranty obligated for it.

There are several valid reasons why this contention cannot be sustained. In the first place, it is foreign to the pleadings in the case. Defendant in its answer justified its retention of the \$36,000 note because the original \$45,000 note or its renewal, a part of which was embraced in the \$36,000 note, was a debt of the commission company which was guaranteed by Rockefeller. The battle below was waged exclusively on this issue and on the grounds which have already been considered. Neither the pleadings nor the assignments of error remotely suggest that any part or portion of the consideration of the \$36,000 note rested in the guaranty of Rockefeller of the guaranty made by the commission company of the payment of the collateral pledged to secure the payment of the \$45,000 note. Moreover, the only proof found in the record justifying the contention were two unauthenticated exhibits, purporting to be copies of notes which are found, by tracing them back, to have been pledged for the payment of one of the \$30,000 notes executed after the date of Rockefeller's guaranty, and not to have been pledged for the payment of the original \$45,000 debt, or any part of it, and what purports to be a guaranty of their payment by the commission company indorsed upon them. Whether these two notes ever became an enforceable obligation or a debt of the commission company does not appear. From the proof it would be impossible to find facts requisite to support the defendant's present contention.

Moreover, the contention that Rockefeller's contract of guaranty is elastic, and comprehensive enough to cover the commission company's guaranty of the payment of notes which it pledged as collateral for the payment of a debt which was not covered by his guaranty is too subtle to be sound. The parties to this plain and simple contract never could have reasonably contemplated any liability brought about by this circuitous process. Rockefeller's guaranty was for the payment of debts which the commission company might contract or become liable for. The commission company's guaranty of the col-

lateral did not constitute a debt. It was an executory contract only. It might or might not ripen into a debt. Unlike a surety, which becomes at once liable unconditionally as an original promisor with his principal for a debt, a guarantor becomes liable only in the event of default by the principal, and his liability does not generally attach unless the creditor gives him reasonable notice of the default of the principal, or unless due diligence is exercised to collect from the principal. 1 Brandt on Suretyship and Guaranty, § 2, and cases cited. In other words, the contracting of a debt is a single act, resulting in an immediate and unconditional obligation, while the contract of guaranty is complicated, and subject to many conditions which may defeat its enforcement. Obviously a guaranty of a debt is one thing, and the guaranty of a guaranty is another thing. A contract of the former kind only cannot be so construed as to cover the obligation which would be undertaken by a contract of the latter kind. The contracts of a guarantor are strictissimi juris, and unless a given transaction is brought clearly within the obligation of the guarantor no liability is incurred.

It results that the decree of the Circuit Court requiring the bank to surrender and deliver to Rockefeller the 10 notes described therein, with the chattel mortgages securing their payment, was erroneous, that the decree should be modified by eliminating that requirement, and that in all other respects it should be affirmed. The cause is therefore remanded to the Circuit Court, with directions to make the required modification, and, as so modified, the judgment will stand affirmed. The costs of this appeal should be equally divided between the parties.

CONVERSE v. GARDNER GOVERNOR CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,545.

1. CORPORATIONS (§ 77*)—SUBSCRIPTION TO STOCK—IMPLIED CONDITIONS.

In general, it is an implied condition of a subscription to the stock of a corporation that it shall not become binding and enforceable until the full amount of the capital stock of the corporation has been subscribed, although such condition may be waived, either expressly or by implication from the acts or declarations of the subscriber.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 229; Dec. Dig. § 77.*]

2. CORPORATIONS (§ 77*)—SUBSCRIPTION TO STOCK—IMPLIED CONDITION—WAIVER.

The fact that a creditor of an insolvent corporation accepted in payment of its debt preferred stock of a reorganized corporation and retained the same for a number of years, until the new corporation became insolvent, where it took no part in the organization or management of such corporation, was not a waiver of its right to deny liability for an assessment made against it as a stockholder under a double liability statute, on the ground that the capital of the corporation was never fully subscribed or paid in.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 77.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CORPORATIONS (§ 377*)—LIABILITY ON ULTRA VIRES CONTRACT—SUBSCRIPTION TO STOCK OF ANOTHER CORPORATION.

A manufacturing corporation, organized under the law of Illinois, having no power under its charter to invest in the capital stock of another corporation, cannot be held liable as a stockholder in a corporation of another state, although it acquired the stock in payment of a pre-existing debt for merchandise sold by it in the course of its regular business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1531-1534; Dec. Dig. § 377.*]

Acquisition by corporation of stock of other corporation, see note to Anglo-American Land, M. & A. Co. v. Lombard, 68 C. C. A. 120.]

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Action by Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company, against the Gardner Governor Company. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

The plaintiff in error, as receiver of the Minnesota Thresher Manufacturing Company, a Minnesota corporation (hereinafter called the Thresher Company), brought this action in the court below against the defendant in error, an Illinois corporation, to enforce an alleged stockholder's liability under the Constitution and statutes of Minnesota. The declaration is in two counts, the first upon an assessment of 36 per cent. and the second upon an assessment of 64 per cent. levied against 94 shares of the capital stock of the Thresher Company, alleged to be owned by the Gardner Governor Company. The Circuit Court sustained a demurrer to the declaration, and, the plaintiff in error declining to plead further, judgment was entered for the defendant. The errors assigned question the ruling on demurrer. The facts averred in the declaration are in substance as follows:

For some time prior to May, 1884, the Gardner Governor Company was "engaged in business in the state of Illinois as a corporation; that in the course of its regular business it extended credit for goods, wares, and merchandise manufactured and sold by it to the Northwestern Manufacturing & Car Company" (hereinafter called the Northwestern Company), a Minnesota corporation engaged in manufacturing. The Northwestern Company became insolvent, and a receiver was appointed for it by the district court of Washington county, Minn. Pursuant to notice and order of that court the Gardner Governor Company proved its claim to the amount of \$4,706.39, which was duly allowed. While the property of the Northwestern Company was still in the hands of said receiver, the creditors of that company, including the Gardner Governor Company, "for the sole purpose of enabling the said creditors to save the debts held by them, respectively, against said Northwestern Company, and for no other reason or purpose," prepared and agreed to a plan of reorganization of the business of the Northwestern Company, consisting of the incorporation of a new corporation, the issuance of preferred stock to the several creditors in exchange for, and to the par amount of, their respective claims, and the purchase by such new corporation of the property and assets of the Northwestern Company at judicial sale.

Pursuant to said plan of reorganization the Thresher Company was incorporated on November 26, 1884, under the laws of Minnesota; the objects for which said corporation was formed being "the purchase of the capital stock, evidences of indebtedness issued by, and the assets of the Northwestern Manufacturing & Car Company, a corporation existing under the laws of Minnesota, or any portion of said capital stock, evidences of indebtedness, or assets, and the manufacture and sale of steam engines, and all kinds of farm implements, machinery of all kinds, and the manufacture and sale of all articles, implements, and machinery of which wood and iron, or either of them, form the principal component parts, and the manufacture of materials therein

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

used." The capital stock of the Thresher Company provided by the articles of incorporation was the sum of \$7,000,000, of which \$4,000,000, or 80,000 shares of \$50 each, were preferred stock, and \$3,000,000, or 60,000 shares of \$50 each, were common stock; that there were issued and outstanding 27,967 shares of preferred stock and 42,594 shares of common stock, which issued and outstanding shares of preferred and common stock were duly subscribed and paid for in full with the understanding and agreement by and between the stockholders that said Thresher Company was to commence business as soon as it could acquire the property and plant of the Northwestern Company. It is further averred that "there never was any understanding or agreement of any sort or nature between the defendant and the other stockholders, or any of them, or between the defendant and the Thresher Company, that the commencement of business by said Thresher Company should be postponed until such time as all of the stock of said Thresher Company should be subscribed for, and there was no understanding or agreement of any kind had or entered into by and between the defendant and the other stockholders, or any of them, or between the defendant and the Thresher Company, that all of the stock of said Thresher Company should at any time be subscribed for."

The Gardner Governor Company assigned its claim, pursuant to the plan of reorganization, to the Thresher Company, and received in exchange 94 shares of the preferred stock and \$6.39 of the scrip of said Thresher Company; and every share of the preferred stock of said Thresher Company at any time outstanding was issued to such creditors of the Northwestern Company in exchange for their respective claims, and not otherwise. The Thresher Company purchased the plant and property of the Northwestern Company at judicial sale, and carried on the classes of business authorized by its articles until some time in 1901, when the plaintiff in error, Theodore B. Converse, was by decree of the district court of Washington county, Minn., upon a creditors' bill, duly appointed receiver of all the property, assets, rights, and interests of the Thresher Company, with the usual powers of such receiver, and the power to sue for, collect, recover, compromise, or settle any and all stockholders' liability that may exist under the Constitution and laws of Minnesota, or otherwise.

In the receivership of the Thresher Company claims to the amount of \$443,752.17 were allowed, and, the corporate assets being insufficient to pay the same, the Minnesota court, acting under the provisions of chapter 272, p. 315, Gen. Laws Minn. 1899, and sections 3184 and 3188, Rev. Laws Minn. 1905, ordered the assessments of 36 per cent. and 64 per cent. upon all holders and owners of the capital stock of the Thresher Company. Notice and certified copies of the orders, and demand for payment were duly made upon the defendant in error as required by the Minnesota statute, and upon failure to pay the assessments this action was commenced.

R. H. McAnulty, for plaintiff in error.

John E. Nall, for defendant in error.

Before GROSSCUP and BAKER, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge (after stating the facts as above). Two grounds are urged by defendant in error in support of the ruling below. It is insisted, first, that, the full amount of the capital stock of the Thresher Company not having been subscribed, the contract of subscription of defendant in error never became enforceable, and, for the same reason, the additional liability provided by the Minnesota Constitution did not attach; and, second, that the act of defendant in error in subscribing for and taking stock in the Thresher Company was ultra vires the defendant in error, and therefore void. We will consider these propositions in their order.

1. "It is a general rule that all subscriptions are made upon the

implied, if not express, condition that they shall become binding and enforceable only upon the entire capital stock of the corporation being subscribed for; hence, in an action against a subscriber, it is usually a complete defense that the capital stock has not been fully subscribed." 26 Am. & Eng. Ency. of Law, 934, and cases cited. In *Masonic Temple Association of Minneapolis v. Channell*, 43 Minn. 353, 45 N. W. 716, the Supreme Court of Minnesota announced the general doctrine in the following words:

"The chief matter of defense was that the whole capital stock of the plaintiff has not been subscribed. No question is made that at the common law, when the charter or articles of incorporation, or terms of subscription, make no different rule, payment of subscription to the capital stock of a corporation cannot be required until the whole amount of stock has been subscribed. * * * It is therefore implied in the contract of subscription, as a condition precedent to its being of force, that the entire amount of stock shall be subscribed for."

Plaintiff in error does not dispute the rule as above stated, but contends that the subscribers may agree among themselves to waive the rule that all the capital stock should be subscribed for, and that the subscribers to the stock of the Thresher Company, including defendant in error, did thus agree, and, further, that defendant in error by its agreement to take the stock, and by taking and holding certificates for shares of the stock for more than 20 years, is estopped from now urging this defense. It is well settled that a subscriber to stock may waive the defense that the full capital stock of the corporation has not been subscribed. This waiver may be either express or implied from the acts or declaration of the subscriber. *Cook on Corporations* (5th Ed.) § 181. The agreement relied upon by the plaintiff in error as a waiver is averred in the declaration as follows:

"That the number of shares of said stock outstanding, as herein alleged, was duly subscribed for and paid for in full, with the understanding and agreement by and between the stockholders that said Thresher Company was to commence business as soon as it could acquire the property of the Northwestern Manufacturing & Car Company, including the manufacturing plant owned by said company, and which at the date of the organization of said Thresher Company was in the hands of and being operated by the receiver of said Northwestern Manufacturing & Car Company; that there was never any understanding or agreement of any sort or nature between the defendant and the other stockholders, or any of them, or between the defendant and the Thresher Company, that the commencement of business by said Thresher Company should be postponed until such time as all of the stock of said Thresher Company should be subscribed for."

This falls far short of an averment that the defendant in error expressly agreed to waive the rule that all the capital stock should be subscribed for. Nor is there any sufficient averment of an implied waiver by defendant in error, or of an estoppel. So far as the averments of the declaration go, the defendant in error did nothing except to exchange its claim against the Northwestern Company for shares of preferred stock in the Thresher Company. There is no act averred of any participation in the management or conduct of the business of the Thresher Company, and no act or representation of defendant in error upon which any creditor of the Thresher Company acted or relied.

2. Was the act of defendant in error, in becoming a party to the

formation of the Thresher Company and assigning to it its claim against the Northwestern Company in exchange for the shares of preferred stock, ultra vires; and, if so, can the illegality of its act constitute a defense to the present action for the enforcement of the stockholders' liability created by the Minnesota Constitution?

It is conceded by plaintiff in error that the Gardner Governor Company was organized under the laws of Illinois as a manufacturing corporation, and that it had no power under its charter or the Illinois law to invest in the capital stock of another corporation; but it is insisted that under the facts pleaded in the declaration the stock was acquired and held as security for or in settlement of a pre-existing indebtedness, and therefore the power exercised in acquiring the stock was properly incidental to its power as a manufacturing corporation to transact business, enter into contracts, and become a creditor.

The case of *First National Bank v. Converse*, 200 U. S. 425, 439, 26 Sup. Ct. 306, 311, 50 L. Ed. 537, grew out of the same transactions as the case at bar. The bank was a creditor of the Northwestern Company for money loaned in the usual course of its banking business. The bank became a party to the reorganization agreement, and assigned its claim to and received in exchange therefor preferred stock of the Thresher Company in the same manner as the Gardner Governor Company did with respect to its claim for merchandise sold and delivered. The essential facts in that case are identical with the facts pleaded in the declaration here, except that a manufacturing corporation is here involved, instead of a national banking corporation. The Supreme Court of the United States held that the act of the First National Bank in acquiring the stock was ultra vires, and that there could be no recovery in a suit to enforce stockholders' liability. It is said by Mr. Justice White, who delivered the opinion of the court in that case:

"As no authority, express or implied, has ever been conferred by the statutes of the United States upon a national bank to engage in or promote a purely speculative business or adventure, accepting the view of the articles of association by which the bank was denied the benefit of the exemption accorded by the Constitution of Minnesota, it follows that the bank had no power to engage in such business by taking stock or otherwise. The power of a national bank to engage in the character of business which the articles of association of the Thresher Company manifested, as defined by the Supreme Court of Minnesota, cannot be inferred to have been possessed by the bank as an incident of securing a present loan of money or as a means of protecting itself from loss upon a pre-existing indebtedness. To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a pre-existing debt, does not imply that because a bank has lent money to a corporation it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court held cannot be done. The speculative venture, therefore, which the bank undertook, as held by the Minnesota court, when it engaged in taking the stock in the Thresher Company, being ultra vires, it follows, under the settled rules hitherto applied by this court, that the bank, despite the subscription, was entitled to plead its want of authority as a defense to the claim of the receiver."

It was held by the court below that the decision in *First National Bank v. Converse*, supra, is decisive of the question raised here by demurrer. Plaintiff in error argues that the rule there applied to a

national bank is not applicable to a manufacturing corporation organized under a state statute. It is also contended that a national bank is a public, and the defendant in error a private, corporation. These contentions are without merit. The Supreme Court applied the rule to a manufacturing corporation organized under the law of New York in the case of *De La Vergne Co. v. German Savings Inst.*, 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65, cited in *First National Bank v. Converse*, supra. It follows that the subscription of defendant in error was ultra vires, and unenforceable.

The decree of the Circuit Court is affirmed.

MILLER v. UNITED STATES.

MUNROE v. SAME.

(Circuit Court of Appeals, Seventh Circuit. June 23, 1909. Petition for Rehearing Overruled October 13, 1909.)

Nos. 1,542, 1,543.

1. POST OFFICE (§ 35*)—OFFENSES AGAINST POSTAL LAWS—USE OF MAILS TO DEFRAUD.

To constitute the offense of using the mails to defraud, under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), there must have been an intention to injure the person addressed or sought to be reached by defrauding him of something which he already had; and the making of false representations, for the purpose of deceiving the persons addressed by raising expectations of gain or advantage which it was not the intention to fulfill, is insufficient.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

2. POST OFFICE (§ 35*)—OFFENSES AGAINST POSTAL LAWS—USE OF MAILS TO DEFRAUD.

Defendants were officers of a manufacturing corporation, owning a plant and actually engaged in manufacturing and selling the product. In order to sell an increased issue of stock, defendants sent through the mails letters to certain persons, representing that the company desired to establish branch selling houses and to employ managers therefor at a stated salary. The letters also contained false representations as to the profits and dividends of the company, and by their means certain of the persons addressed were induced to purchase stock of the company at par in the belief that they would be appointed branch managers. *Held*, that an indictment charging such facts, and that the representations made were knowingly false, did not charge the offense of using the mails to defraud, within the meaning of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696); it not being charged that the stock was not worth the price paid for it.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

In Error to the District Court of the United States for Eastern Division of the Northern District of Illinois.

The facts are stated in the opinion.

Thomas C. Miller and Frank L. Munroe were each convicted of a criminal offense, and each bring error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William S. Forrest, for plaintiff in error Miller.

Henry Russell Platt, for plaintiff in error Munroe.

Edwin W. Sims and Francis G. Hanchett, for the United States.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion.

The writ of error is to a judgment of the Court below sentencing the plaintiff in error Miller to imprisonment in the house of correction of the City of Chicago for the period of three years, and to pay the costs of suit; and the plaintiff in error Munroe to imprisonment in the United States penitentiary at Fort Leavenworth for the period of three years, and to pay the costs of suit—the judgment in each case being upon a verdict of guilty upon three counts of an indictment under section 5480 of the Revised Statutes (U. S. Comp. St. 1901, p. 3696). Each count of the indictment sets forth substantially the same scheme to defraud. Each is, however, for a separate offense; the first based upon a letter placed in the postoffice at Chicago, and addressed to one Mattson, at Philadelphia; the second upon a letter placed in the postoffice at Chicago and addressed to one Foster, at Mason, Michigan; and the third upon a letter placed in the postoffice at Chicago, addressed to one Thompson, at Lake City, Florida. The verdict was a general verdict of guilty upon the three counts and, therefore, for the three offenses; and the judgment and sentence was judgment and sentence upon such general verdict.

The assignments of error cover 147 closely printed pages of the record. They challenge the sufficiency of the indictment; the correctness of the ruling of the Court in refusing, at the close of all the evidence, to direct the jury to find plaintiffs in error not guilty; the inclusion of evidence offered by the Government over the objection of plaintiffs in error; the exclusion of evidence offered by plaintiffs in error upon the objection of the Government; the charge to the jury; and the refusal of the Court to submit certain instructions asked for by plaintiffs in error—the details of which are set forth in ninety-one different assignments. There is no occasion, however, as will be seen when the reading of this opinion is completed, to deal with these assignments in detail.

The controlling principle that seems to have governed the prosecution of the case in the Court below, and the rulings of that Court in overruling the demurrer to the indictment, and that runs through the whole trial, especially in the charge to the jury, was this: That apart from any intention upon the part of plaintiffs in error actually to deprive the persons named of the money, or other thing of value that such persons might be induced to give up, there would be an offense under section 5480, provided there were put forth, as a part of the alleged scheme, false and fraudulent pretenses, known at the time to be false and fraudulent, which were intended to deceive the persons to whom they were made, even though such pretenses would result in depriving such persons of nothing that they contributed, apart from the mere expectations excited. In other words, it is contended by the Government, and the contention is supported throughout in the rulings

at the trial, that although the scheme alleged in the first two counts was not one through which any one would suffer any actual money loss or injury—be any the worse off, except in the matter of disappointed expectations, after than before—an offense under the Section is nevertheless committed, provided the pretenses embodied in the scheme, and the expectations excited thereby, were in fact false pretenses and a false expectation, known by the party making them to be false at the time made. And because of the application of this view of the Section of the statute in question, there runs throughout the whole record errors that make the trial, in all its branches, erroneous.

The alleged scheme grew out of the following transactions: In January, 1905, the Marinette Gas Engine Company, whose plant and business office were at Chicago Heights, Illinois, and whose president was plaintiff in error Miller, increased its capital stock from \$250,000 to \$400,000, divided into four thousand shares of the par value of \$100 each. The Marinette Gas Engine Company was an actual manufacturer of gas engines, employing from 100 to 150 men, and having a pay roll of about \$7,000 per month, engaged in the actual selling of such engines to the public, many of which are in use in the United States, Japan, Portugal and Mexico, and had a plant and good will variously estimated at being worth from \$65,000 upwards to the full par value of the Company's capitalization. The facts clearly disclose that the Company, at the time of the initiation of the alleged scheme, was not a fictitious company, but a real manufacturing company, in need, however, of additional capital.

The alleged scheme set forth in the indictment grows out of the method used to obtain this additional capital. In each of the counts, the scheme as set forth is substantially the same. In each, the particulars are the alleged false representations that the Company was desirous of opening and establishing, in good faith, in different parts of the United States, branch houses for the sale of the goods of their manufacture, and were desirous of obtaining in good faith the services of competent, trustworthy and responsible men to manage such branch houses; that the corporation would pay such managers fixed salaries of \$250 per month, besides profits extra; that the Company was earning a profit of twenty per cent. and upwards on its business, and paying dividends of six per cent. to holders of its stock out of its net earnings; that the purpose of such alleged false representations was to sell and dispose at par of fifty shares of the increased capital stock to each of the persons addressed; that the plaintiffs in error were not desirous of obtaining in good faith the services of the persons responding and were not expecting in good faith to pay \$250 per month, besides profits extra; that the Company was not earning a profit of twenty per cent. or any other profit, or paying a dividend of six per cent. or any other dividend; indeed, that all these pretenses were falsely put forth simply to induce the persons responding to purchase each, fifty shares of stock at par; that such persons were induced to come from their respective homes to Chicago, to talk over the arrangements with a view to entering into a contract, and were induced, finally, to enter into a contract, whereby, in exchange for fifty shares of stock, each paid par value, Five Thousand Dollars, for the same—the

plaintiffs in error never intending that there should be any relationship between them and the persons responding other than that created by the sale and purchase of the stock. There is, however, in the first two counts, no averment whatever respecting the value of such stock so exchanged for the Five Thousand Dollars—the third count alone averring “that said fifty shares of the capital stock of said corporation was not at the time of the devising of said scheme and artifice, and would not be at the time of executing the same, worth Twenty-five Hundred Dollars,” as the plaintiffs in error well knew.

The mere intention of the plaintiffs in error not to meet the expectations of the persons responding to the letters, in the matter of their employment as branch house managers, and of their salary and profits in consequence thereof, and of the earnings of the Company and the dividends therefrom, do not, in the absence of intended loss or injury to such persons in the investment made, constitute, in our opinion, a crime under section 5480.

In support of its contention that the false expectations excited, apart from any actual loss intended, constitute a crime under this Section, the Government cites *us Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; *Brooks v. United States*, 146 Fed. 223, 76 C. C. A. 581; *Horman v. United States*, 116 Fed. 350, 53 C. C. A. 570; *Weeber v. United States* (C. C.) 62 Fed. 740; *O'Hara v. United States*, 129 Fed. 551, 64 C. C. A. 81; *Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399; and *United States v. Loring* (D. C.) 91 Fed. 881.

But none of these cases sustains the contention. The *Durland Case* was that of a fictitious bond and investment company and was based upon the averment in the indictment and the proof in the case that the persons buying such bonds, through the expectation of profits, would be actually deprived of the sum of money contributed.

The *Brooks Case* was that of a bogus broker, pretending to deal in grain, provisions and stock, with such superior knowledge concerning the business as to make loss improbable, promising large profits, and in the meantime paying interest to depositors at the rate of six per cent. per month and permitting withdrawals at the depositor's election—glowing promises held out—but the indictment averred and the proof showed that the person accused had no such knowledge and no such connection, and did not intend, for any great length of time, to pay the interest or permit withdrawals, but intended to obtain the money for the sole purpose of converting it to his own use.

The *O'Hara Case* was like the *Brooks Case*, except that the superior experience of the schemer was said to be in the racehorse line, rather than in the stock, grain and provision line—but intending to result, as in the *Brooks Case*, in the party indicted obtaining for his own use, the person's money to whom the letter was addressed.

So likewise, the *Loring Case*.

The *Horman Case* was based upon a scheme to extort money from another by threatening to publish charges against him, the intention being to thereby convert such person's money to the accused's use.

The *Miller Case* is stated by Judge Sanborn as follows:

"The indictment contains averments that the scheme of the defendant was to have Gilder secure the possession and control of the funds and business of the corporation (a so-called mutual insurance company) by means of 'a certain agreement or arrangement' between him and the Board of Directors, and that this scheme was to get from the corporation and from its members, and to secure to the defendants, large sums of money, to bankrupt the corporation, and to use the postoffice establishment of the United States as a part of this scheme to accomplish its object."

It will thus be seen that in all these cases there is present, as an essential element of the scheme, the intention to defraud the persons addressed, not out of expectations excited (the expectations were the means used only) but out of the money, or a portion thereof, contributed by them to the scheme. In none of these cases is the mere false pretense or misrepresentation, apart from an actual intended deprivation of the person addressed of the money obtained, held to be an offense under the section in question. In other words, in all these cases the gist of the offense is the actual or intended injury to the person sought to be reached—the fraudulently depriving him of something that he already has—in none of them is the deprivation of the person addressed of only that which he was led to expect, made the basis of the prosecution.

Suppose that Mattson and Foster, the persons named in the first two counts, did not get employment, would they be defrauded, provided they got their outlay back? Defrauded of what—of the expected employment? Apart from what was falsely held out to them, they had no claim on such employment. Defrauded of an investment that would pay twenty per cent.? Apart from what was falsely held out, they had no claim to such an investment. How can they be said to be deprived of anything that has no existence, except in the false promise itself; and if there was no intention to deprive, there cannot, within the meaning of this Section, be an intention to defraud; for to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit and artifice.

True, there is some testimony in the record, such as the sale of the stock of the Marinette Company to persons on the inside at forty cents, at about the time this scheme was devised, and some alleged declarations of Miller, that tend to show that one of the purposes of the scheme was to sell to the persons addressed, at par, stock in the Company that the promoters of the scheme knew to be worth much less than par—testimony that was pertinent to the third count of the indictment; but the conviction and sentence, as already stated, was a general one on all three counts, including the first and second as well as the third—counts that aver no such intended injury, or anything upon which such intended injury can be based—and the rulings were all on the theory that it was not the loss or injury in the investment, but the disappointment of expectation excited by the promises that constituted the offense; from which it follows that the judgment must be reversed.

We have gone through the assignments of error to ascertain if, on any of the specific questions raised during the course of the trial, there should, in the view of another trial, be any more specific answer

than what has already been stated; but we find nothing in the record that, once the trial of this case is set on its right course—is tried upon a correct theory—will not be fully answered by the ordinary and fundamental rules of pleading, evidence, and instructions by the Court to the jury. There seems to be no need, therefore, to repeat these rules here.

The judgment is reversed, with instructions to grant a new trial and to proceed further, in accordance with this opinion.

ROBINSON v. CHICAGO RYS. CO.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1909. Petition for Rehearing Denied November 10, 1909.)

No. 1,558.

1. EQUITY (§ 240*)—PLEADING—MOTION TO STRIKE OUT—TREATING AS DEMURRER.

The rule of chancery practice that every demurrer must be set down for argument on a day certain, when the parties may be heard thereon, cannot be summarily dispensed with; and where a court ordered a motion to strike a bill from the files to be changed to a demurrer instantan, it was error to also sustain it at once, instead of treating it with the formality of a demurrer, and setting it down for argument on a future day.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 514; Dec. Dig. § 240.*]

2. PATENTS (§ 310*)—SUITS FOR INFRINGEMENT—PLEADING—MULTIFARIOUSNESS.

A bill for the infringement of two patents is multifarious, unless it alleges that they are capable of conjoint use, and have been so used by defendant in what is practically a single device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 518; Dec. Dig. § 310.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by Elbert R. Robinson against the Chicago Railways Company. From a decree dismissing the bill, complainant appeals. Modified and affirmed.

This is an appeal from a final decree of the Circuit Court of the Northern District of Illinois, Eastern Division, dismissing a bill in equity to enjoin infringement of two certain letters patent of the United States, issued to appellant, numbered, respectively, 886,306 and 886,541. It appears that an amended bill had been held bad on demurrer, leave being granted to amend. Accordingly a second amended bill was filed, whereby, among other things, two of the original parties defendant were dropped. Thereupon the defendant moved the court to strike the second amended bill of complaint from the files, for the reason that the complainant had not, by any proper amendment, cured the defects in the former amended bill, which had been held fatal upon the demurrer, and also moved that the suit be dismissed, with costs. It appears that the complainant then gave notice of a motion to strike the motion of defendant from the files of the court on numerous technical grounds, which it is unnecessary to enumerate. While these two cross-motions were pending the court, on November 23d, entered the following order: "This cause coming on this day to be heard upon the motion of the defendant heretofore filed herein for an order striking from the files the second amendment to the bill

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of complaint, filed herein by said complainant on October 12, 1908, and the court having heard the arguments of counsel for said defendant and of the complainant in person, and being fully advised in the premises, it is ordered, adjudged, and decreed by the court that the said motion of said defendant to strike from the files stand as a demurrer to the second amendment; that said defendant be given leave to have the said motion certified and sworn to instant, in accordance with the rules of court respecting demurrers; that the said demurrer to the said second amendment be, and the same is, hereby sustained; that the said second amendment be, and the same is, hereby stricken from the files; and that said complainant have leave to amend his bill herein within five days from this date."

The complainant in his own behalf thereupon made three ineffectual motions to set aside and revoke the order of the court, whereby he disclosed his unfamiliarity with chancery proceedings, and, having failed to amend within five days, the following decree was entered on the 1st day of December: "This cause coming on this day to be heard upon the motion of the defendant to dismiss the above-entitled cause, at complainant's costs, and all parties being before the court, and it appearing to the court that by an order entered herein on the 23d day of November, 1908, the demurrer of the defendant to the second amended bill of complaint was sustained, and the complainant given leave to amend his bill of complaint within five days from November 23, 1908, and it further appearing to the court that the period allowed said complainant to amend his bill having now expired, and said complainant having failed to amend his bill herein within said period of five days, and having elected to stand by his second amended bill of complaint, it is therefore ordered, adjudged, and decreed by the court that the above-entitled cause be and the same is hereby dismissed, at complainant's costs, to be taxed. It is further ordered, adjudged, and decreed by the court that the clerk of this court issue execution for the costs of the defendant as herein adjudged." From this decree the appeal is taken.

Elbert R. Robinson and Richard T. Greener, for appellant.

George A. Chritton and Russell Wiles, for appellee.

Before BAKER, Circuit Judge, and ANDERSON and QUARLES, District Judges.

QUARLES, District Judge (after stating the facts as above). The complainant, who is the patentee, has undertaken to conduct his own case, and has been drawn into a technical contest which has resulted in disaster to him, and has produced a record so complicated that it is not easily disentangled. This record well illustrates the futility of any attempt on the part of one not learned in the law to pilot his own case through the mazes of the procedure of the English Court of Chancery, which system is still retained in the federal courts. It would be fruitless to follow the several stages of the technical combat. It is sufficient to state that a motion was made by the defendants to strike the second amended bill from the files, because the amendments had not effectually cured the defects pointed out by the demurrer and held fatal to the amended bill. For some reason the court preferred that the question should be presented in the form of a demurrer, and thereupon made the order of November 23d, providing that the pending motion should stand as a demurrer, and that the certificate and affidavit required by the rules might be attached thereto instant.

Whether it is a legitimate exercise of judicial power to transform a motion into a demurrer, we do not decide; but we are unwilling to sanction the procedure adopted by the court whereby a new-made demurrer was sustained instant, and whereby the second amended

bill was stricken from the files, all of which was accomplished without debate and in the twinkling of an eye. The familiar requirement of chancery practice that every demurrer must be set down for argument on a day certain, when the respective parties may be heard thereupon, cannot be summarily dispensed with. If the order was effectual to transform the motion into a demurrer, it should have been treated with the ceremony and respect due to a demurrer, under our familiar practice. Neither could it at the same time discharge the dual function of a motion and justify an order striking the second amended bill from the files, so that there remained nothing in the record to amend by; the earlier bills having gone out of the case by former action of the court.

Furthermore, the decree fails to disclose whether the action was dismissed for want of equity, or because of one or more of the several irregularities pointed out as the grounds of demurrer. It is probable that the decree as entered would stand as a bar to any further action or proceeding by the complainant. This seems to be a severe penalty for the complainant to pay for his lack of legal knowledge. The law allows him to appear in his own proper person, and the court is probably justified within reasonable limits in protecting a meritorious cause of action, when imperiled solely by lack of skill on the part of complainant to meet technical defenses interposed by astute counsel. It will be observed that the second amended bill is a third attempt on the part of complainant to frame a suitable bill for infringement, which among members of the profession is not esteemed a difficult task. We have been led to consider the numerous technical objections that are urged to this second amended bill, and we feel justified in admonishing the complainant that his task has not yet been successfully accomplished. He has become enmeshed in technical difficulties from which we would be glad to relieve him, so far at least as to preserve any meritorious cause of action he may have upon either of his letters patent.

During the argument the complainant made profert of his letters patent, which on their face would seem to indicate that they are not capable of conjoint use in any single device. We notice, also, that the second amended bill contains no averment that the two inventions are capable of conjoint use, nor that the defendant has employed them conjointly in any alleged infringing device. Therefore the objection of multifariousness seems to be well taken, and would seem to that extent to justify an order sustaining the demurrer. In 1 Foster's Federal Practice (3d Ed.) § 77, the law is stated as follows:

"A bill to enjoin the infringement of several distinct patents has been held multifarious; but if all the patents are infringed in the use or manufacture of a single machine, etc., and it is so alleged, the bill is good."

It has been said that complainant should aver that said inventions are capable of conjoint as well as separate use, and are so used by defendant. Perhaps the leading case upon the subject is *Hayes v. Dayton* (C. C.) 8 Fed. 702, 705, where the doctrine as stated by Foster is held to be the law. See, also, *Gamewell v. City of Chillicothe* (C. C.) 7 Fed. 353; *Barney v. Peck* (C. C.) 16 Fed. 413; *Lilliendahl v.*

Detwiller (C. C.) 18 Fed. 176; Louden v. Montgomery Ward (C. C.) 96 Fed. 232; Union Switch Co. v. Philadelphia R. R. Co. (C. C.) 68 Fed. 914; Union Switch Co. v. Philadelphia R. R. Co. (C. C.) 69 Fed. 833; Kaiser v. Bortel (C. C.) 162 Fed. 902, 907. It has also been held that the objection of multifariousness is not obviated by the fact that two or more patents are employed in the same system of railway, unless they act together, and practically constitute a single device. Consolidated Electric Light Company v. Brush-Swan Electric Light Company (C. C.) 20 Fed. 502.

Considering all the circumstances, we feel inclined to afford the complainant further opportunity to have framed a suitable bill based upon either of his letters patent, and thus obviate numerous technical objections which now confront him. We have therefore concluded to direct an amendment of the decree by the insertion of a clause therein to the effect that the cause is dismissed on the ground that the bill of complaint is multifarious, and also by a clause to be inserted therein that the decree of dismissal is without prejudice to the right of complainant to institute such suit or suits, either at law or in equity, based upon either or both of his letters patent, as he may be advised. And after such amendments the decree of the Circuit Court will be affirmed.

And it is so ordered.

TYSSOWSKI v. THAYER et al.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,528.

PATENTS (§ 328*)—INVENTION—PYROGRAPHIC TOOL.

The Tyssowski patent, No. 727,034, for a pyrographic tool "comprising a combined pyrographic point and a scorcher," is void for lack of invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Suit in equity by Joseph G. Tyssowski against Henry J. Thayer and Charles H. Chandler. Decree for defendants and complainant appeals. Affirmed.

For opinion below, see 159 Fed. 165.

Joseph G. Tyssowski, in pro per.

Charles A. Brown, for appellees.

Before GROSSCUP and BAKER, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge. This is an appeal from a decree of the Circuit Court dismissing the bill for want of equity in a suit on United States letters patent No. 727,034 granted May 5, 1903, to Zell Niver Tyssowski for an alleged improvement in tools for pyrographic work. The pyrographic tool is an old and well-known device, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

alleged improvement set forth in the patent relates simply to the small nozzle which is put upon the tool for use in scorching. The patentee in the specifications of the patent recites:

"My invention relates to improvements in tools for pyrographic work in which a hollow platinum point is maintained at a continuous red heat by the combustion of a current of 'carbureted' air, by which I mean air carrying hydrogen or any hydrocarbon, which is made to pass through the instrument."

And again:

"I am aware that scorching devices and burning tools are separately old, and I do not claim the mere combination of these two; but what I do claim, broadly, is a device for the utilization of the heated gases from the one for the operation of the other, all combined in a single tool."

The only claim alleged to be infringed is claim 3, which is as follows:

"3. A tool for pyrographic work, comprising a combined pyrographic point and a scorcher, said pyrographic point consisting of a hollow pointed instrument adapted to be brought into direct contact with the material operated on, and having an interior combustion-chamber by which it may be heated to incandescence, and said scorcher consisting of a nozzle having a passageway through it of such limited cross-section as to maintain the pressure and temperature of the escaping gases, whereby a hot fine jet of escaping gases, at charring temperature, from the combustion-chamber may be projected with precision, substantially as described."

The patent is for "a tool for pyrographic work comprising a combined pyrographic point and a scorcher." The prior art shows each of these things, the "point" and the "scorcher." The point consisted of a stylus-shaped point which was heated to incandescence by maintaining within it a steady combustion of carbureted air. This point was used for etching, and was brought directly into contact with the surface of the wood. The scorcher also consisted of a stylus-shaped point, with an aperture in the apex through which the heated gases were forced and used for scorching. Each of these was used as a separate tool. The combustion of carbureted air within the point required the continuous forcing of the air into the instrument, and in order to permit of a continuous supply of air a hole was placed upon the side of the chamber of the point to allow the escape of the heated gases. Prior to the application for the patent the heated gases flowing from the little furnace within the point through the hole above mentioned were used for scorching. The patentee placed a nozzle at the hole, which was already there, and thus controlled and directed the escaping gases. In the specifications the patentee says:

"In place of the usual hole for the exit of hot gases I provide a tube or nozzle * * * with a suitable delivery orifice, * * * which projects the hot gases in a straight fine stream in such a way that they can be used for producing useful effects."

There is nothing novel in the construction of the nozzle. In the claim, No. 3, it is described as "having a passageway through it of such limited cross-section as to maintain the pressure and temperature of the escaping gases, whereby a hot fine jet * * * may be projected with precision." This is nothing more than saying that he has attached a nozzle of proper size to confine and direct the escaping gases. It is well known that, when gas escapes from the chamber in

the point through the hole into the air, it has a tendency to spread and scatter. This is not desirable in a scorcher. In the old scorching tool it was controlled by the size of the aperture in the apex of the stylus, just as the patentee controls it by a nozzle of "limited cross-section."

It was also well known that, to control and direct the escaping gases from the side of the chamber in the stylus, it was only necessary to employ a simple and well-known device—a nozzle. This the patentee did; but such a performance does not rise to the dignity of invention. The specifications of the patent acknowledge "that scorching devices and burning-tools are separately old." If the patent consists in simply bringing together into one tool these two things, it is not invention. It is mere aggregation.

But it was not new to put a nozzle upon the hole where the gases escape. Beach, whose patent, No. 615,784, was granted December 13, 1898, more than four years before the patent in suit was issued, did this same thing. He placed a nozzle upon the hole where the gases escaped from a pyrographic point, and he placed it there to control and direct the escaping gases, so as to drive away the fumes arising from the charring of the substance operated upon. His nozzle does not have the "fine issuing channel at its delivery end," nor "the issuing orifice of limited cross-section," nor is it "a nozzle having a passage-way through it of such limited cross-section as to maintain the pressure and temperature of the escaping gases"—at least it is not so described. Beach provided a nozzle to carry away, control, and direct the escaping gases. The only thing left for the patentee here was to vary the form and dimensions of the nozzle, so as to get the desired result. It does not involve invention to devise a nozzle with a channel of such shape and size as to cause the heated gases to issue in a fine jet.

The decree of the Circuit Court is affirmed.

CURTAIN SUPPLY CO. v. NATIONAL LOCK WASHER CO.

(Circuit Court, N. D. Illinois, E. D. April 5, 1909.)

No. 27,782.

1. PATENTS (§ 83*)—PRIORITY AS BETWEEN INVENTORS—LACHES IN APPLYING FOR PATENT.

An inventor, who, after perfecting his invention and reducing it to practice, without adequate excuse delays applying for a patent for five or six years, and until another has invented and patented the same device, and then applies for and obtains a patent, is estopped by his laches from asserting such patent as against the second inventor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 108, 109; Dec. Dig. § 83.*

Laches as defense in suit for infringement, see notes to *Taylor v. Sawyer Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.]

2. PATENTS (§ 328*)—PRIORITY AS BETWEEN INVENTORS—WINDOW SHADE HOLDER.

The Paterson patent, No. 754,404, for a window shade holder, claimed to have been invented by the patentee 5 years and 8 months before he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

filed his application, is invalid as against the Hoyt patent, covering substantially the same device, which was invented and patented in the meantime.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

3. PATENTS (§ 311*)—SUIT FOR INFRINGEMENT—DEFENSES—PLEADING.

In a suit for infringement of a patent, where defendant manufactures under a patent of prior date, but complainant undertakes to carry the date of his invention back to a still earlier date, although no such issue is tendered by his pleading, defendant may meet such proof by the defense of laches or abandonment, without pleading the same, since, if pleaded, it would not be responsive to anything in the bill.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 311.*]

In Equity. Suit by the Curtain Supply Company against the National Lock Washer Company. Decree for defendant.

Offield, Towle & Linthicum (Charles C. Linthicum, of counsel), for complainant.

Gifford & Bull (J. Edgar Bull, of counsel), for defendant.

KOHLSAAT, Circuit Judge. Complainant files its bill to restrain infringement of patent No. 754,404, granted to J. W. Paterson March 8, 1904, on application filed August 1, 1901, for improvements in curtain fixtures. The cause is now before the court on final hearing.

Matters very similar to those here involved were before the Circuit Court for the District of New Jersey in 1902, in the cause brought by complainant herein against North Jersey St. Ry. Co. (138 Fed. 734), upon patent to Forsyth, No. 559,446, and patent No. 659,315, granted to J. W. Paterson. The street railway company was a customer of defendant herein, by whom the defense was assumed. The court (Judge Gray) held that infringement was not shown. This was affirmed on appeal. 142 Fed. 750, 74 C. C. A. 12. This suit was begun June 15, 1905.

Claims 1 and 2, which are the only claims relied on, read as follows, viz.:

"1. In a window-shade holder, the combination, with a casing and a spring-actuated shade, of a bar carried by the shade, a pivoted locking-cam at the end of the bar adapted to engage the casing above its pivoted point, a rod carried by the bar and pivotally connected to the cam, a spring for normally forcing the rod outward to set the cam into holding engagement with the casing, and means for retracting the rod.

"2. In a window-shade holder, the combination, with a casing and a spring-actuated shade, of a bar carried by the shade having ends extended to serve as guides, pivoted locking-cams at the end of the bar, spring-actuated rods within the bar pivotally connected to the cams, and means for retracting the rods to release the cams from holding engagement with the casing."

It appears from the record that the patentee, Paterson, was the purchasing agent in 1895 for the Adams & Westlake Company of Chicago; that he was not a mechanic, though he was running a small car-curtain factory. He was interested in making a car-curtain fixture which would lock against the upward movement of spring rollers, and yet would pull down easily. Some time in November, 1895, he claims to have invented, among other devices, the curtain fixture shown as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Exhibit Paterson Original Fixture." He says he caused it to be made and mounted in a curtain and set up in a window frame. It was thus reduced to practice within the decisions. Shortly thereafter he took the frame, curtain, and device to pieces, and placed the locking fixture in his home, giving it no further attention. Several years later he mutilated the device for some unexplained reason, so that it was mere junk. While the fixture was in this condition, and on June 18, 1901, the patent under which defendant operates was granted to D. Hoyt upon application filed December 8, 1900. In the spring of 1901 Paterson sold out his business, including all inventions, to complainant, and agreed to remain out of the curtain fixture business for 15 years. He mentioned to the president of complainant that some 6 years before he had devised several curtain fixtures. He was requested to look them up, and thereupon produced the rod, "Complainant's Exhibit, Paterson Original Fixture," being the mutilated fixture. The other attempts at curtain fixtures were not to be found. This rod was thereupon made the subject of Patent Office drawings. The Hoyt patent was not yet issued. In June, 1901, the Hoyt fixture was exhibited at the Saratoga convention of the Master Car Builders' Association, where complainant's president saw and inspected it. Thereupon it was determined to use the mutilated bar in securing a patent anticipating that of Hoyt. Therefore this suit.

From the foregoing it is seen that Paterson allowed 5 years and 8 months to elapse, after he had reduced his invention to practice, without doing anything to place it where the public might eventually get the benefit of it, and then became active only at the solicitation of his assignee. There is no claim in the record that Hoyt, or any one else other than Paterson, had ever heard of this device. It is insisted for defendant that, as against the Hoyt fixture, Paterson is estopped from asserting his invention at this time.

It has been held in many cases that long delay in applying for a patent, unexplained, will amount to such laches as will avoid the patent, when other and intervening rights have arisen. Some authorities hold that abandonment of the invention will be presumed in such case. It should be stated that defendant has made large expenditures in placing its device on the market, while complainant has done little or nothing to that end.

It is the settled doctrine of the Court of Appeals for the District of Columbia that when an inventor perfects and reduces to practice an invention, and fails for an unreasonable period to take steps to give it to the public, and until some one else has independently invented and patented it, the earlier inventor forfeits his rights to a patent as against the later inventor. See *Mower v. Crisp*, 83 O. G. 155; *Mason v. Hepburn*, 84 O. G. 147; *Davis v. Forsyth & Forsyth*, 87 O. G. 516; *Mower v. Duell*, Commissioner, 88 O. G. 191; *Thomson v. Weston*, 94 O. G. 985; *Wright v. Lorenz*, 101 O. G. 664; *Macdonald v. Edison*, 105 O. G. 973. The same rule has often been laid down by the other courts. See *Robinson on Patents*, § 389. See, also, *Berg v. Thistle*, Fed. Cas. No. 1,337. "An inventor," says the court in *Eck v. Kutz* (C. C.) 132 Fed. 758, "if he keeps his ideas to himself, can take his own time to develop and perfect them, subject only to the risk that others mean-

while may become independently possessed of the same"—citing *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68, where it is said: "Inventors may, if they can, keep their invention secret; and if they do for any length of time, they do not forfeit their right to apply for a patent, unless another in the meantime has made the invention, and secured by patent the exclusive right to make, use, and vend the patented improvement. Within that rule and subject to that condition, inventors may delay to apply for a patent * * *"—and *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 92, 24 L. Ed. 68.

It is held in *Universal Adding Machine Company v. Comptograph Company*, 146 Fed. 981, 77 C. C. A. 227, that an invention would be abandoned or lost through eight years in inaction. In *Ajax Forge Company v. Morden Frog & Crossing Works (C. C.)* 156 Fed. 591, it was held that delay in applying amounted to abandonment. This was affirmed. 156 Fed. 594. The same is held in *Kellogg Switchboard & Supply Company v. International Telephone Company et al. (C. C.)* 158 Fed. 104, wherein it was sought to have the invention declared to have been abandoned, even though an application had been filed, through the failure of the patentee to press the same for two years. In denying the motion, the court says the delay shows no intention to abandon the invention, "because so long as it was not in public use, and no one else had made and procured a patent for the same discovery, his right to apply for a patent was subject to no restriction."

In *Christie v. Seybold*, 55 Fed. 69, 5 C. C. A. 33, cited by complainant, the court is dealing with diligence in reducing to practice. Here the alleged negligence consists in failing to apply for a patent until the lapse of almost six years after reduction to practice, whereby intervening rights have arisen. *Walker on Patents*, § 91, says:

"But a delay of years, between reduction to practice and filing an application for a patent, which is taken for the purpose of profiting, first from secrecy, and finally from a patented monopoly, is a delay which constitutes actual abandonment, even if the inventor intended to apply for a patent when he could maintain secrecy no longer."

In *Boyd v. Cherry (C. C.)* 4 McCrary, 70, 50 Fed. 279, it is said that, if the invention is "kept secret by the first inventor until the second has discovered it and given it to the public, the latter will be protected, for it is to him that the public is indebted." In *Kendall v. Winsor*, 21 How. 322, 16 L. Ed. 165, it is stated that the monopoly of a patent was never granted to inventors for their exclusive benefit, and that doubtless the primary object was the benefit of the public. In *Robinson on Patents*, § 390, it is said that an "inventor, who, having perfected his invention, voluntarily conceals it and unreasonably delays his application for a patent, thereby willfully misleads subsequent and innocent inventors, * * * and therefore ought to be estopped from patenting the invention and appropriating its exclusive enjoyment to himself after their honest efforts in the same direction have succeeded." A large number of cases holding in conformity with the above are cited in 30 Cyc. p. 864. See, also, 22 Am. & Eng. Ency. of Law (2d Ed.) pp. 342, 343.

It seems plain, therefore, that under the facts stated herein Pater-son's failure to apply for a patent within 5 years and 8 months after

reducing the curtain fixture to practice, unexplained, together with the fact that another had in the meantime, and in good faith, invented the same fixture and taken out a patent therefor, estops complainant from asserting its patent herein. There seems to be some disagreement of the authorities as to whether a valid patent could in such case issue to the second inventor or was abandoned to the public. The question is not here involved.

By way of excusing his laches, Paterson sets out that he was employed by Adams & Westlake Company at a salary of \$1,300 per annum; that in 1890 he commenced to make curtains and fixtures for the company; that he was still in the same employ when the above-mentioned litigation arose with Burrowes; that by a settlement had of said litigation he was not permitted to make for Adams & Westlake Company pinch handle fixtures. This was in 1893. The invention is claimed in 1895. Paterson refused to disclose his invention to Adams & Westlake Company, because he feared they would claim it, and was thus kept from disclosing it. In 1896 he sold his business to the Adams & Westlake Company for \$900 and left their employ. He claims to have found the fixture then in demand to be different from his invention. He invented and patented another patent, No. 659,315, on October 9, 1900, which he sold to complainant in 1901. He considered the device of this latter patent the easiest type to market. He claims he was hard up, having had recourse to his wife's earnings in securing the last-named patent. He never made more than \$1,850 per annum after leaving the Adams & Westlake Company. He had a family to support. On the other hand, he utterly ignored his alleged invention, forgetting where it was. He practically destroyed his bar. He was always in possession of a fair income. He had \$900 from the sale of his business to his employer. He must have received some substantial sum from the sale of his patent, though that was as late as 1901. It is plain that his failure to apply for a patent arose from want of interest in his device, and perhaps in part from the fear that it would not be in demand. He did not deem it of sufficient importance to describe it in his contract of sale to complainant company, if, indeed, he even remembered it at that time. Surely this state of facts cannot be held to excuse his delay. Inventors seldom make a better financial showing. If Paterson had so desired, he could easily have made his application. To all intents and purposes he abandoned his invention, and to permit him to urge his patent in prosecution of this suit would be a plain injustice.

Complainant insists that the defense of abandonment is not properly before the court, because abandonment is not set up in the answer. It would seem to be a hopeless task to reduce the pleadings in a patent case at this bar to the ordinary forms laid down in equity pleading. The bill herein sets up the conventional facts and allegations. The answer presents the usual denials and averments, including a list of patents in the prior art. Among these is the Hoyt patent aforesaid. There was no other course open to the defendant. To have alleged laches or abandonment of the invention would not have been responsive to the bill. The replication, of course, is general. As is usual

in such cases, the evidence is a departure from both the bill and answer. Ordinarily, the bill should have been amended to include a statement of the facts depended on to carry the invention back of defendant's Hoyt patent, together with a recital of the facts relied upon to account for and excuse the delay in making application. Defendant cannot be charged with knowledge that complainant would make this claim, so far as this record shows. Defendant could then have set up laches and abandonment. Certainly, to have set it up, even after the evidence disclosed complainant's case, would have still made the answer cover matters not set out in the bill. Here was no attempt to correct either bill or answer. The whole matter proceeds upon lines not pleaded.

True, complainant raised the point on defendant when it attempted to show laches and abandonment by the evidence; but, until the bill had been corrected, how could the answer be complained of? No abandonment of the patent is claimed, but what is tantamount to a constructive abandonment of the invention. There is some confusion in the use of the terms "abandonment," "laches," and "estoppel." Perhaps it may be more accurately said that by Paterson's laches, or that of complainant, the latter has brought about such a situation as estops it from asserting its said patent against defendant. The objection must be overruled. As above stated, it is conceded that the defendant's device is that of the Hoyt patent. It therefore follows that it is made in accordance with, and is entitled to the immunities of, that patent for the purposes of this suit.

The bill is dismissed for want of equity.

SINGLE TUBE AUTOMOBILE & BICYCLE TIRE CO. v. CONTINENTAL RUBBER WORKS.

(Circuit Court, W. D. Pennsylvania. August 7, 1909.)

PATENTS (§ 328*)—ANTICIPATION AND INFRINGEMENT—PNEUMATIC TIRES.

The Tillinghast patent, No. 497,971, for a pneumatic tire, *held* not anticipated, valid, and infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by the Single Tube Automobile & Bicycle Tire Company against the Continental Rubber Works. Decree for complainant.

Richardson, Herrick & Neave, for complainant.

J. C. & H. M. Sturgeon, for defendant.

BUFFINGTON, Circuit Judge. This bill in equity is brought against the Continental Rubber Works by the Single Tube Automobile & Bicycle Tire Company, owner of patent No. 497,971, of May 23, 1893, to Pardon W. Tillinghast. Infringement of the second claim is charged. This claim was held valid by the Circuit Court in the First Circuit (98 Fed. 624), and the decree thereof affirmed (112 Fed. 423,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

50 C. C. A. 317). The patent has also been generally respected by tube makers, and large royalties paid for licenses thereunder. Our study of the art leads us to concur in the conclusions reached by Judge Colt in the Circuit Court.

In the present case we have additional proofs bearing on the Bothroyd publication of December, 1890, and the alleged Holliday use in Chicago in the summer of that year. It is conceded by complainant's counsel that, unless the Tillinghast patent is carried back to a date prior to Bothroyd's publication, the latter would invalidate such patent. We have carefully examined all the proofs, and, without going into detail of discussion, have reached the conclusion that as early as July, 1890, Tillinghast had a clear conception of his pneumatic bicycle tube, embodying the elements of his second claim; that prior to September following he disclosed the same to the witnesses Ricketts, Renckon, and Johnson; that Ricketts, in August, under Tillinghast's directions, made a tire embodying the invention; and that from that time forward Tillinghast diligently followed up his conception and reduced the same to practice. In that connection, and as bearing on alleged anticipations in the way of gaskets and garden hose, we agree with what Judge Colt said:

"The inventive thought of Tillinghast was in the tire itself, and not in the method of uniting two annular rubber tubes and an intervening fabric, which method may previously have been adopted for various purposes. The mere fact that it was old to vulcanize together an inner rubber tube, an intervening fabric, and an outer rubber cover, in the rubber hose art and in the rubber gasket art, does not prove that there was no invention in the application of such a method of construction, with such modifications as must be made, to a pneumatic tire. Although hose pipes and gaskets had been manufactured for years prior to the Tillinghast invention, it did not occur to any skilled mechanic that their method of construction could be successfully applied to the production of a pneumatic tire."

The testimony bearing on the Holliday tire falls short of that certain and convincing character necessary to invalidate a patent. In point of time Holliday can fix none closer than that it was "some time between July and September," and he concedes "it may have been a little later [than September], but not much." No one is called to testify as to the date of the manufacture of such tires, though Holliday says he was present when they were made. He fixes his dates by no special event, and there is no corroboration by written evidence. The only supporting witness is Brady, whose testimony is not more convincing.

On the whole, we are of opinion the patent was not anticipated, and the claim in question should be decreed valid and infringed.

Let such a decree be drawn.

MOTION PICTURE PATENTS CO. v. NEW YORK MOTION PICTURE CO.

(Circuit Court, E. D. New York. November 23, 1909.)

PATENTS (§ 294*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction against infringement of a patent will not be granted, where it involves the determination by the court on affidavits of the very issue in the case; nor will it be granted in a doubtful case

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on the theory that defendant, if not an infringer, will not be injured thereby.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 473; Dec. Dig. § 294.*]

In Equity. Suit by the Motion Picture Patents Company against the New York Motion Picture Company. On motion for preliminary injunction. Motion denied.

Richard N. Dyer, for complainant.

Emerson R. Newell, for defendant.

CHATFIELD, District Judge. The complainant has brought an action upon an adjudicated patent with respect to a certain form of camera, alleging that the defendant is wrongfully using another style of camera, but with certain attachments, which the complainant shows are similar in character and use to those as to which the patent above referred to was held valid and infringed. For the purposes of this application for a preliminary injunction, the defendant has not controverted the validity of the patent, nor questioned the similarity of the particular style of camera claimed to be an infringement to the camera enjoined in the adjudicated case. It has confined its opposition to a denial of the allegations of infringing use, with any camera belonging to or used by the defendant.

A reargument was had, and further affidavits were submitted to explain certain matters connected with the trial of a shutter offered for sale at about the date in question. But the whole issue now comes down to a flat allegation on the part of the complainant, by two witnesses, to the effect that on a certain day one of the defendant's representatives was taking pictures with a camera which the affiants allege was similar in all respects to the one alleged by the complainant to be an infringement, and a statement by one of these affiants as to seeing, in a safe at the defendant's office, a camera which appeared, from external observation, to be the sort of camera the use of which is alleged by the complainant and denied by the defendant. Assuming that the complainant is charging use upon other occasions than those as to which the immaterial disputes have arisen, and assuming that the defendant has a camera, and has made use of the camera, which was thought by the persons making the affidavits to be an infringement, the question ultimately depends upon whether the defendant should be compelled to exhibit this camera, or whatever cameras it may have, and, in default of so doing, whether a temporary injunction should issue.

It is also urged by the complainant that an injunction against infringing use will not interfere with any lawful business on the part of the defendant, if it is not infringing. The defendant opposes being enjoined by protestations on general principles, and by innuendo on the ground that the complainant company is pursuing this method for the sake of harrassing the defendant and causing it expense. The defendant, while protesting against submitting its cameras for inspection, categorically denies the allegation that it has a camera

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the particular kind which is alleged by the complainant to be an infringement. This court is unwilling, upon application for a preliminary injunction, to decide, even contingently or temporarily, upon affidavits, what is substantially the issue itself of the case. It is not apparent that irreparable injury will be sustained while such a case as this is being tried, and the defendant does not seem to be of the elusive character which might require immediate action in order to prevent the risk of futility of any further determination.

This court is not of the opinion that its process, in the form of injunction, should be issued, or be held against a party, possibly innocent of wrongdoing, merely upon the theory that, if innocent, no business operations will be in terms forbidden. The possibilities from advertising such an order, and of far-reaching and unfair consequences, outweigh the benefit, unless the court is sufficiently satisfied that wrongdoing is shown, and is willing to issue an order forbidding the acts which it believes are wrong. Motion for preliminary injunction, therefore, will be denied; but, in view of the definite commercial character of the matters, this court will listen to an application for a provision in the order, if the complainant so elects, requiring the defendant to give security, not to prevent the issuance of a temporary injunction, but to cover any instances of possible irreparable injury, if a decree should be obtained at final hearing.

The amount of such bond can be determined upon the settlement of the order.

In re BLUESTONE BROS.

(District Court, N. D. West Virginia. November 20, 1909.)

BANKRUPTCY (§ 217*)—POWER OF COURT—STAY OF PROCEEDINGS IN STATE COURT.

A court of bankruptcy is without authority to enjoin a suit in a state court to recover property from one claiming to have purchased the same from a bankrupt's trustee, where such property was not claimed nor scheduled by the bankrupt, nor in fact sold by the trustee, and the bankruptcy court, therefore, never had any jurisdiction over it, or to determine its ownership.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 217.*]

In the matter of Bluestone Bros., bankrupts. On petition of William M. Ralphsnyder. Petition dismissed.

William M. Ralphsnyder has presented his bill of complaint, in the nature of a petition, in this cause, against Thornton H. Devault, setting forth the adjudication in bankruptcy of Bluestone Bros., both as partners and individuals, the reference of the cause to a referee, and the proceedings had before him whereby the property of bankrupts, consisting practically of a stock of goods, were appraised, ordered sold, and in fact sold under direction of the trustee duly selected, at which sale the plaintiff became the purchaser. It is then charged, in substance, that said stock of goods at the time of sale was in a storeroom belonging to the defendant, Devault; that such sale was made in such storeroom, and defendant, Devault, was present by his recognized agent; that all the goods, wares, and fixtures of every kind were sold in gross to plaintiff for \$650, without reservation of any kind, and without objection on the part of defendant; that defendant, Devault, was party to the bankrupt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proceeding, and as a creditor had proven his claim, and subsequently was paid the same out of the proceeds of sale; that subsequently, after plaintiff had removed the stock of goods from such storeroom and ceased to rent such room, as had been done verbally for a period of time by plaintiff, the defendant, Devault, instituted against him an action of detinue before a justice of the peace for the recovery of certain specific articles, in the nature of furniture and fixtures, which had been so sold by the trustee in bankruptcy to plaintiff, and judgment had been rendered by the justice in such action for such articles, or, in case they could not be secured, for their money value ascertained; that from this judgment an appeal was taken by plaintiff, but it was subsequently confirmed upon jury trial by the state circuit court. It is charged that these articles so recovered were the property of the bankrupts, were sold as such, that defendant was party to the bankrupt proceeding, shared in the proceeds of sale, and was guilty of contempt of the bankrupt court in thus seeking to thwart its orders and decrees. An injunction was prayed, and granted, staying the enforcement of the judgment until the matters could be inquired into. Answer has been made by defendant, the matter has been referred to a referee to take the evidence, his report is filed, and the cause has been submitted for determination.

Dent & Dent, for petitioner.

Ogden & Ogden and E. M. Showalter, for defendant.

DAYTON, District Judge (after stating the facts as above). The very interesting question of to what extent a bankrupt court has jurisdiction and power, after sale confirmed under its orders, to protect the title of property in the purchaser at such sale, was presented by this bill, and to determine this question was the purpose of granting the injunction herein. It is no longer an open question in this (Fourth) circuit that the jurisdiction of the federal courts in bankruptcy is essentially exclusive, and that a District Court, as a court of bankruptcy, has power to stay proceedings of a state court, seeking to take away from its trustee either the property itself or to impose a lien upon it. *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 91 C. C. A. 559.

But some doubt arises as to whether such jurisdiction could extend to the protection of the property after it has been sold and delivered to the purchaser. This question it becomes wholly unnecessary to decide in this case. It is only necessary to say that, in any event, the defendant, Devault, could only be stayed in his right to assert claim in a state court to the property under two conditions of things: First, in case there was conflicting claim to the property between himself and the bankrupt, which claim he had asserted in the bankruptcy court, and it had been there determined, or, being made a party to the proceeding, he had refused or failed there to assert his right, being called upon so to do; second, had by his fraudulent conduct at the time of sale, either by direct representation or by silent acquiescence, secured or allowed plaintiff to buy his goods, mingled with those of the bankrupts, as goods of the bankrupt properly to be sold.

The evidence in my judgment wholly refutes the contention that either of these contingencies arose in this case. It is substantially undisputed that the articles claimed by Devault belonged to him, and that bankrupts could and did make no claim to them whatever. The original lease filed, whereby Devault leased the storeroom to Blue-stone Bros., specified that these specific articles were leased in connec-

tion, and upon the same conditions, with the room. The trustee, therefore, had no interest in these specific articles, and the bankrupt court could take no jurisdiction over them. It was not Devault's duty to intervene and prove his right in the bankruptcy cause, for the simple reason that neither the bankrupts themselves nor the trustee made any claim to them. The schedules filed by the bankrupts show this, so far as they are concerned. Nor was there any fraudulent conduct on the part of Devault, at the time of the sale, that would estop him from disputing plaintiff's title under purchase there made. On the contrary, it is clear that his agent notified the trustee's agents, making the sale, that he claimed these items of property, and furnished or offered to furnish the list of them, and that the auctioneer, if he did not actually reserve them from sale, did announce publicly that there was doubt or dispute as to their ownership, and that he was only selling such right to and interest therein as the bankrupts had, if any. If plaintiff was not present to hear this announcement when the sale began, but subsequently came in and purchased under misapprehension that he was buying "everything in the storeroom," it was his misfortune, but not Devault's fault.

The injunction must be dissolved, and the bill dismissed.

RUMBARGER v. YOKUM et al.

(Circuit Court, N. D. West Virginia November 18, 1909.)

1. EQUITY (§ 46*)—JURISDICTION—ADEQUATE REMEDY AT LAW.

It is the rule of the federal courts that, to exclude jurisdiction in equity, a remedy at law must not only be plain and adequate, but also complete; and if it is doubtful, difficult, or not so complete as in equity, nor so efficient and practicable to the ends of justice and its prompt administration, then equity will take jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157-163; Dec. Dig. § 46.*]

2. EQUITY (§ 46*)—JURISDICTION—ADEQUATE REMEDY AT LAW.

Where a case requires the administration of a trust, the cancellation or release of liens, the removal of clouds upon title, or an accounting, and especially where fraud is charged, involving the consideration of fiduciary and trust relations, although the rendering of a pecuniary judgment may be one of the results sought, the remedy at law is neither adequate nor complete, and equity will assume jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157-163; Dec. Dig. § 46.*]

3. ACCOUNT (§ 12*)—JURISDICTION OF EQUITY—ADJUSTMENT OF LIENS.

Where a usurious contract was secured by a trust lien upon property which the creditors by contracts agreed to dispose of and from the proceeds pay off prior liens, the creditor has the right to resort to equity for a full settlement and accounting.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 12.*]

4. EQUITY (§ 150*)—PLEADING—MULTIFARIOUSNESS.

A bill against different lienholders on the same property, to ascertain and have adjusted and settled all of the liens, is not multifarious.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 150.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by Robert R. Rumbarger against Humbolt Yokum and others. On demurrer to bill. Demurrer overruled.

Rumbarger files his bill against Yokum, Strader, Greynolds, trustee, Cobb, trustee, Sincell, trustee, and Ada A. V. Halterman, in which, after charging diversity of citizenship and the amount in controversy to exceed \$2,000, he alleges that he was the owner of two tracts of land in Randolph county, W. Va., the one within the corporate limits of the city of Elkins, subdivided into 50 lots, the other a farm of about 600 acres within two miles of Elkins; that the 50 lots were worth more than \$18,000, and the farm easily \$15,000; that on January 10, 1906, he conveyed both said tracts of lots and the farm to Edward H. Sincell in trust to secure a loan of \$10,000 made to him by Mrs. Halterman; that on March 13, 1906, he again conveyed these lands to W. H. Cobb in trust to secure Humbolt Yokum and J. F. Strader three notes, for \$5,000 each; that on said last-named date, and as part of the trust deed contract inter partes, Yokum and Strader executed to him a contract setting forth that, in consideration of a loan of \$10,000 made by them to him, he had executed the three \$5,000 notes, payable in four months, to secure which he agreed to give as collateral security 150 shares, of par value of \$100 each, of the Snowbird Lumber Company, a North Carolina corporation, and to execute the deed of trust upon the lots and farms referred to, and, if the notes were not paid at maturity, he was to have the privilege to renew them for 4 additional months; that by reason of financial straits he executed the three notes for \$15,000 for a loan only of \$10,000, and agreed to pay 6 per centum interest upon the full amount of such notes; that on September 12, 1907, he and Yokum and Strader entered into another contract, set forth, whereby it was agreed that the lots in Elkins should be sold at public auction and the proceeds arising therefrom should be applied, first, to the expenses of sale, three-fourths of which was to be chargeable to Rumbarger, and the remaining fourth to Yokum and Strader; second, to the payment of said \$15,000 loan and its accumulated interest; third, any residue to be divided, three-fourths to Rumbarger and one-fourth to Yokum and Strader; and, further, it was agreed that the farm (which had been purchased August 23, 1907, by Yokum and Strader at a sale thereof made by Sincell, trustee, under the Halterman deed of trust) should be held by Yokum and Strader in their names until January 1, 1908, and meanwhile, if a sale thereof should be made either by Rumbarger or Yokum and Strader, its proceeds should be applied to the payment to Yokum and Strader of \$10,733.46 and its accrued interest, advanced by them for the purchase of the farm, and any residue to be divided three-fourths to Rumbarger and the remaining fourth to Yokum and Strader, but if no sale should be made on or before said January 1, 1908, this farm should be subject to a further agreement, its possession until then to remain with plaintiff, Rumbarger; that Sincell, trustee in the Halterman trust, had advertised all of said property, lots and farm, for sale when the \$10,000 debt of Mrs. Halterman had become due and payable in the summer of 1907, whereupon it was agreed inter partes that Yokum and Strader should buy in the properties for the amount of the Halterman debt, sell the lots at auction, which was done, and the sum of \$18,435 realized therefrom by them, the whole of which they kept, except the sum of \$973.59, which they paid to plaintiff; that before making sale of the lots the agreement of September 12, 1907, was entered into, changing the purchase by Yokum and Strader of the farm from Sincell into a trust to secure them the payment of the \$10,000 Halterman debt assumed by them; that Yokum and Strader charged the fund arising from the sale of the lots with illegal and improper costs and expenses, and with illegal interest upon the \$15,000, in fact representing a loan of but \$10,000, as shown by a statement made by them and incorporated in the bill; that, instead of allowing plaintiff to remain in possession of the farm until January 1, 1908, as provided by the contract of September 12, 1907, Yokum and Strader took possession thereof, received its rents, issues, and profits, wholly disregarding the agreement, and have sold or agreed to sell 100 acres thereof to one Mouse, who is in possession; that Yokum and Strader took possession of the proceeds of the lot sales (except the sum of \$973.59), and deducted enormous and unconscionable expense, in furtherance of a scheme to charge him with further usury by naming

it "expenses," "profits," "expenses paid by Yokum," and "expenses paid by Lew Greynolds," as set forth in their statement, and thus to cheat and defraud him entirely out of the value of his lands and property; that on November 1, 1907, plaintiff and wife, Yokum, Strader, and their wives, conveyed to Greynolds, trustee, these properties for the purpose of having him in their behalf make conveyances of the lots sold to the purchasers thereof, and for the purpose of disposing of the farm as contemplated by the agreement of September 12, 1907, but, contrary to its purpose and intention, Yokum and Strader have assumed full possession of the farm, now claim it as their own, have refused to make any settlement with plaintiff, or to enter into any further contract in relation thereto, as provided by said last-named contract; that no deed by Sincell, trustee, Cobb, trustee, or Greynolds, trustee, has been made to any one for the 600-acre farm, and Yokum and Strader have not in fact paid the full amount of the Halterman trust debt, and Sincell, trustee, or Mrs. Halterman, one or the other, holds plaintiff's \$10,000 note therefore; that the contract of March 13, 1906, is unreasonable, unconscionable, and illegal under the laws of West Virginia; that plaintiff only owed Yokum and Strader \$10,000 in fact upon the \$15,000 obligation, and if purged of its usury, and only legal and proper expenses are charged upon the sale of the lots, plaintiff would not owe to exceed \$5,000 to them, which he admits would be chargeable as a lien upon the 600-acre farm. The prayer of the bill is that the contract and deed of trust of the 13th day of March, 1906, be purged of usury; that an accounting be had between himself and Yokum and Strader; that said deeds of trust to Cobb, their trustee, and to Sincell, trustee, be released or set aside so as to give perfect title to the purchasers of the lots; that they be set aside or released as against the farm, after the court has ascertained the true amount due from plaintiff to Yokum and Strader, has charged such amount as a lien thereon, and fixed the time and terms of payment thereof; and for general relief. To this bill the defendants Yokum and Strader have entered their demurrer, alleging the bill to be multifarious, the plaintiff to have a full, complete, and adequate remedy at law, and that the allegations of the bill are not apt and sufficient to warrant a court of equity to surcharge and falsify the account rendered by such defendants to plaintiff and settled by them. This demurrer has been argued and submitted for decision.

Cunningham & Stallings, for plaintiff.

W. B. Maxwell, for defendants.

DAYTON, District Judge (after stating the facts as above). The main contention made by able counsel who has argued in behalf of this demurrer is that plaintiff has a plain, adequate, and complete remedy at law. While admitting that this bill would lie in the state courts of West Virginia, by virtue of the decisions of its courts construing the usury laws of the state (sections 3429, 3430, 3431, and 3432, Code W. Va. 1906), he insists that it cannot be maintained in a federal court, because of the express prohibition of Act Cong. Sept. 24, 1789, c. 20, 1 Stat. 82 (section 723, Rev. St.; U. S. Comp. St. 1901, p. 583), which provides:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Without attempting a discussion of the vast number of decisions construing this statute, it may be admitted at once that it is simply declaratory of the equity rule established by the High Court of Chancery of England, that the federal courts have more rigidly observed the line of demarcation between law and equity jurisdiction than have the courts of most of the states, and in a number of instances do not entertain equity jurisdiction where such state courts would. While

this is true, the federal courts have held that the remedy at law must not only be plain and adequate, but it must also be complete, and if the remedy at law is doubtful, difficult, not adequate to the object, not so complete as in equity, nor so efficient and practicable to the ends of justice and its prompt administration, then equity will take jurisdiction. *Whitehead v. Shattuck*, 138 U. S. 151, 11 Sup. Ct. 276, 34 L. Ed. 873; *Spokane Mill Co. v. Post (C. C.)* 50 Fed. 431; *Smith v. Am. Nat. Bank*, 89 Fed. 840, 32 C. C. A. 368.

While it would be next to impossible to establish a certain fixed rule to define the dividing line between the two jurisdictions, it is safe to say, in connection with this case, that in cases seeking only a pecuniary judgment for a specific amount the remedy at law is adequate and complete. It is just as safe to say that when the case requires the administration of a trust, the cancellation or release of liens, the removal of clouds upon title, an accounting—especially where fraud is charged, involving the consideration of fiduciary and trust relations—although the rendering of a pecuniary judgment may be one of the results sought, the remedy at law is neither adequate or complete, and equity will assume jurisdiction. *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183.

Under these principles, it would seem plain that if Rumbarger had simply borrowed \$10,000 from Yokum and Strader, and, as a usurious consideration for such loan, had agreed to pay and actually did pay \$15,000, with interest, then his remedy at law to recover back the \$5,000 and interest paid upon it would be plain, adequate, and complete; but when, to secure this debt, he created a trust lien upon these lots and this farm, accepted by Yokum and Strader and by contracts, established a trust with them, whereby they undertook to control the sale of the lots and farm, administer and disburse the proceeds, assume to pay off the prior trust lien due to Mrs. Halterman, his right to demand in equity a settlement on their part of these trust obligations, the ascertainment of the true state of indebtedness between them, purged of all usury and of all excessive and illegal costs and expenses of administration, the release of all such trust liens, and a reconveyance to him of the farm upon condition of his repayment to them of such true sum due from him to them, when so ascertained, is clear and indisputable.

The charge that this bill is multifarious, and therefore subject to demurrer, in my judgment, is not tenable. Mrs. Halterman's deed of trust covered both lots and farm; so did that of Yokum and Strader. The contracts set up in the bill involve these same subject-matters. The scope and purpose of the bill, from its allegations, may well be stated to be to clear off the liens now existing against the farm (sales made of the lots not being assailed) and ascertain the true amount chargeable thereon due to Yokum and Strader. The prior lien of Mrs. Halterman is not released, and she still holds Rumbarger's note for the debt secured thereby. It is charged that, while Yokum and Strader assumed to pay this debt to her, they have not in fact paid the whole of it. Under such circumstances, she and her trustee, Sincell,

are both proper and necessary parties. It is always to be remembered that the determination of whether a bill is multifarious or not is a question of sound discretion, dependent upon the facts of each case, and the very general ruling of the courts is that a bill which involves the same indivisible subject-matter is not multifarious because of separate claims thereto. *United States v. Am. Bell Tel. Co.*, 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729; *Brown v. Trust Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; *South Penn Oil Co. v. Calf Creek O. & Gas Co.* (C. C.) 140 Fed. 507; *Arnold v. Arnold*, 11 W. Va. 455; *Shafer v. O'Brien*, 31 W. Va. 601, 8 S. E. 298.

The third ground of demurrer, that the allegations of the bill are not apt and sufficient to surcharge and falsify the account rendered by Yokum and Strader, would possibly be true, if the sole purpose of the bill was to secure an accounting; but, as herein pointed out, this is not its sole purpose. It seeks to secure a settlement of trust obligations, over which equity must take jurisdiction.

The demurrer will be overruled.

ATCHISON, T. & S. F. RY. CO. v. LOVE et al. GULF, C. & S. F. RY. CO. v. SAME. MISSOURI, K. & T. RY. CO. v. SAME.

(Circuit Court, W. D. Oklahoma. November 13, 1909.)

1. COURTS (§ 508*)—JURISDICTION OF FEDERAL COURTS—SUIT TO ENJOIN ORDER OF STATE COMMISSION FIXING RAILROAD RATES.

A railroad company, which has appealed from an order of the Corporation Commission of Oklahoma fixing freight rates to the Supreme Court of the state, as permitted by the state Constitution, but was denied leave to give bond to suspend the operation of the order pending the appeal, thus leaving the order of the commission in force, may invoke the jurisdiction of a federal court to enjoin the enforcement of such order, where it is alleged that the rates fixed thereby are confiscatory and in violation of the Constitution of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1428; Dec. Dig. § 508.*]

2. COURTS (§ 508*)—JURISDICTION OF FEDERAL COURTS—REMEDY GIVEN BY STATE CONSTITUTION.

The Constitution of Oklahoma fixes the maximum passenger rates which may be charged by any railroad for transportation between points in the state at two cents per mile, but provides that the Corporation Commission shall have power to exempt any company from such rate on satisfactory proof that it is not compensatory. *Held*, that such remedy is not exclusive, and does not deprive a railroad company of the right to invoke the jurisdiction of the federal courts, where proper grounds for such jurisdiction are alleged, without first applying to the commission for relief.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1428; Dec. Dig. § 508.*]

In Equity. Suits by the Atchison, Topeka & Santa Fé Railway Company, by the Gulf, Colorado & Santa Fé Railway Company, and by the Missouri, Kansas & Texas Railway Company against J. E. Love, James J. McAlester, and A. P. Watson, members of the Corpo-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ration Commission of Oklahoma, Charles West, Attorney General of Oklahoma, and others. On pleas by defendants. Pleas overruled.

Frank Hagerman and Cottingham & Bledsoe (Gardiner Lathrop, Robert Dunlap, and T. J. Norton, of counsel), for complainants Atchison, T. & S. F. Ry. Co. and Gulf, C. & S. F. Ry. Co.

Clifford L. Jackson, C. G. Horner, and Frank Hagerman (James Hagerman and Joseph M. Bryson, of counsel), for complainant Missouri, K. & T. Ry. Co.

Charles West, Atty. Gen., and George A. Henshaw, Asst. Atty. Gen., for defendants.

HOOK, Circuit Judge. These are suits by railroad companies doing business in the state of Oklahoma to enjoin the enforcement of certain freight and passenger rates, upon the ground, among others, that after the test of experience they have proved to be so unreasonably low as to amount to a confiscation of their property, contrary to the fourteenth amendment to the Constitution of the United States. The defendants are the members of the Corporation Commission, the Attorney General of the state, and certain citizens who are alleged to be representative shippers and passengers. The freight rates in question were prescribed by orders of the commission; the passenger rate, two cents per mile, by the state Constitution. The complainants have applied for temporary injunctions. The question now before the court is presented by defendants, and it is whether this court should not suspend further proceedings in the cases, so far as the freight rates are concerned, until their validity is determined by the Supreme Court of Oklahoma, and, as regards the passenger rate, until complainants have sought relief from the commission.

The Constitution of Oklahoma confers upon the Corporation Commission the power to regulate, supervise, and control the rates and charges of transportation companies, to prescribe and enforce such rates and charges, and from time to time to alter and amend them. In such matters it is also given the power and authority of a court of record to administer oaths, require the attendance of witnesses, etc., and to compel compliance with its lawful orders by adjudging and enforcing, upon notice and opportunity to be heard, such fines or other penalties as may be prescribed or authorized by the Constitution or by law. In a proceeding to enforce a penalty for disobedience, the validity or reasonableness of the order of the commission may be drawn in question. The commission may impose a fine not exceeding \$500 for each day's default, or such sum in excess thereof as may be authorized by law; but, should the operation of the order be suspended pending an appeal therefrom, the period of suspension is not to be computed in imposing fines. The Constitution also provides for an appeal to the Supreme Court of the state from an order of the commission prescribing rates and charges, or refusing to approve a suspending bond. The appeal is a matter of right, and no other court of the state has jurisdiction to review the orders of the commission made within the scope of its authority. The appeal is heard in the Supreme Court of the state upon the record made before the com-

mission, no additional evidence being received; but the court may remand the case to the commission for further investigation pending the appeal. No reversal by the Supreme Court is valid, unless it substitutes for the order of the commission such order as in its opinion the commission should have made. The substituted order of the court has the same force and effect, and none other, as if it had been entered by the commission at the time the original order appealed from was entered.

It is apparent these provisions were substantially copied from those of the Constitution of the state of Virginia, which were considered, and their character and effect upon suits in the courts of the United States determined, in *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150. Indeed, that case is relied upon by defendants as authority for the suspension of further proceedings in the present suits. There the State Corporation Commission of Virginia, after a thorough hearing, promulgated an order fixing two cents per mile as a maximum passenger rate. The railroad companies neither obeyed the order nor appealed from it to the Supreme Court of Appeals of Virginia, as the Constitution permitted, but at once brought suits in the Circuit Court of the United States to enjoin the commission from enforcing its order. Restraining orders were granted. On appeals to the Supreme Court of the United States it was held that the proceedings for fixing rates and charges whether in the commission or in the state Court of Appeals on appeal were legislative in character, although the principal aspect of those tribunals may be judicial; and it was said in substance, but in carefully measured terms, that the legislative process fixing the rates complained of was not so complete as to give an absolute, unqualified right to resort to the courts, and that considerations of comity and equitable fitness or propriety would be best subserved by an appeal by the railroad companies from the legislative order of the commission to the state Court of Appeals. There was a question whether the time for such appeals had not expired, and regarding it the Supreme Court said:

"As our decision does not go upon a denial of power to entertain the bills at the present stage, but upon our views as to what is the most proper and orderly course in cases of this sort, when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals, if the companies see fit to take them. If the appeals are dismissed, as brought too late, the companies will be entitled to decrees. If they are entertained, and the orders of the commission affirmed, the bills may be dismissed without prejudice, and filed again."

In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 40, 29 Sup. Ct. 193, 195, 53 L. Ed. 382, the result in the Virginia cases is thus summarized:

"It is true an application for an injunction was denied in that case because the plaintiff should, in our opinion, have taken the appeal allowed him by the law of Virginia while the rate of fare in litigation was still at the legislative stage, so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule."

There, are, however, marked differences between the Virginia cases and those at bar. In fact, the inferences from the opinion of the

Supreme Court would seem to require this court to proceed with the exercise of its jurisdiction. After the orders of the Oklahoma commission became effective, they were obeyed by the railroad companies until, as they claim, it was demonstrated the rates prescribed were confiscatory. Whether they are right in this, or whether the test was a fair one, of course, is not now determined. Reference is merely made to the averments in the bills. If the effect of the rates upon the property and business of a company is doubtful, an experimental observance of the order prescribing them is a commendable course (*Knoxville v. Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *Willcox v. Consolidated Gas Co.*, *supra*); and by its adoption the company should neither lose any of its rights nor be embarrassed in the assertion of them, except so far as the results of a practical application of the rates may afford proof against its contentions. The complainants applied to the commission to certify to the Supreme Court of Oklahoma for review the records relating to the various rate orders, and to fix the terms and amounts of supersedeas bonds to be executed by them. The commission declined to do so. They then applied to the Supreme Court, which awarded writs of mandamus requiring the sending up of the records. The commission still declining to allow a suspension of the orders pending the appeals, complainants applied to the Supreme Court for that purpose, but their request was denied.

The result is that, though appeals have been taken and are pending, the various orders complained of are still in force, and complainants must either obey them or take the chance of the penalties for disobedience. Even if the rates complained of may be said to be still in process of formation, yet, if they are confiscatory, as alleged, an injury to complainants is being inflicted as fully and irreparably as though by a completed legislative act or order. It is none the less violative of their rights under the Constitution that the injury arises from an enforced compliance with a tentative or uncompleted rule. The doctrine of the Virginia cases rests on considerations of orderly procedure in equity and a due regard for the governmental departments of the states; but it did not appear in that case, as here, that the rates first promulgated were being enforced, and that the railroad companies could not obtain a suspension of them pending the appeals which the court said should have been taken. The difference between the cases is a vital one.

After the appeals were lodged in the Supreme Court of Oklahoma, motions were interposed on behalf of the state to dismiss them, on the ground that the records were incomplete and the fault was that of the railroad companies. The motions were denied. It is now urged that the applications for supersedeas should have been renewed after the denial of the motions to dismiss. But there was no such dependence or connection between the two proceedings as renders that course necessary. The applications to the commission and to the court for leave to give bonds suspending the operation of the orders were properly and seasonably made. It does not appear they were denied because premature, and there is nothing to show another effort would have

The matter of the passenger rate stands upon a somewhat different footing. The Constitution of Oklahoma provides:

"No person, company or corporation, receiver, or other agency, operating a railroad, other than street railroad or electric railroad, in whole or in part, within this state, shall demand or receive for first class transportation for each passenger, between points within this state on the portion of its road operated within this state, more than two cents per mile, until otherwise provided by law: Provided, however, the Corporation Commission shall have the power to exempt any railroad from the operation of this section upon satisfactory proof that it cannot earn a just compensation for the services rendered by it to the public, if not permitted to charge more than two cents per mile for the transportation of passengers within the state." Article 9, § 37.

Complainants did not invoke the jurisdiction of the commission, as authorized by the above proviso, but brought these suits after some experience with the rate prescribed. It cannot be assumed the commission would have failed to give them relief if they were entitled to it; but the questions now before the court are whether they should have first gone there before bringing these suits, or were absolutely required to seek their remedy in the commission and the Supreme Court of the state as tribunals of exclusive jurisdiction. The doctrine of the Virginia cases does not apply, because the prescription of the passenger rate had passed the legislative stage, and had become a completed rule of action. As regards the question here, the constitutional provision is not different from an act of the Legislature definitely fixing rates and committing to some particular state tribunal jurisdiction to determine their reasonableness, and if found unreasonable then legislative power to substitute other rates in their stead. The situation presented is that of a case calling for judicial inquiry and determination, and the second question is whether they may be had in this court, or must be had in the state tribunals. Upon that, the following principles, believed to be firmly imbedded in the jurisprudence of this country, are decisive: When the jurisdiction of a court of the United States is invoked upon sufficient grounds, it cannot be relieved of its duty to take cognizance and proceed, either by constitutional provision or by legislative act of a state. If, according to recognized principles of jurisprudence, the case is in its essential features a civil action at law or in equity, it matters not that the state may have denied the complaining party access to its courts, or may have designated some particular local tribunal, to the exclusion of all others, state and national. The test is the existence of a controversy and its character, and the presence of grounds of federal jurisdiction, not whether the courts of the state are open, or to what extent. The exercise of jurisdiction so invoked is the right of the litigant under the supreme law of the land. It is a duty of the court which may not be avoided. *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 40, 29 Sup. Ct. 192, 53 L. Ed. 382; *Spencer v. Watkins* (C. C. A.) 169 Fed. 379.

The pleas of defendants should be overruled.

In re ROTH & APPEL

(District Court, S. D. New York. June 3, 1909.)

BANKRUPTCY (§ 314*)—PROVABLE CLAIMS—RENT ACCRUING AFTER BANKRUPTCY—“FIXED LIABILITY ABSOLUTELY OWING AT THE TIME OF THE FILING OF THE PETITION.”

Installments of rent which a bankrupt had agreed to pay at times subsequent to the filing of the petition in bankruptcy against him do not constitute “a fixed liability * * * absolutely owing at the time of the filing of the petition,” within the meaning of Bankr. Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), and claims therefor are not provable debts against the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

In the matter of Roth & Appel, bankrupts. Petition to review referee's decision on motion to expunge claim of Adolph Boskowitz. Claim expunged.

The following is the opinion of Townsend, Referee:

The bill of particulars prefixed to the proof of claim is as follows:

“To rent due for the months of February, March, April, May, and June, 1908, of the fifth loft in premises Nos. 704-706 Broadway, New York City, at the rate of \$250 per month..	\$1,250 00
To deficiency of rent for the months of July, August, September, October, November, December, 1908, and January, 1909, at the rate of \$75 per month.....	525 00
Total	\$1,775 00”

It arises under a written lease, a copy of which is also attached to the proof of claim. The lease is dated August 14, 1907. The parties are the claimant, as lessor, and the bankrupt firm, as lessee. The lease is for a term of five years, beginning February 1, 1908, and ending January 31, 1913, at an annual rent of \$3,000, payable monthly in advance, or \$250 monthly in advance. The lease contains an ingenious provision that if the rent be not paid, or if the lessee be declared bankrupt, the lease shall terminate, and the lessor shall have the right to re-enter, in which case the lessee agrees to pay the lessor on the 1st day of each month, as upon rent days, the difference between the reserved rent of \$250 and such rent as the lessee may collect from other sources, up to the end of the term remaining at the date of the re-entry. The claimant concedes that a petition in involuntary bankruptcy was filed against the firm January 20, 1908, followed by an adjudication in bankruptcy May 27, 1908. The claimant also concedes that on April 29, 1908, he agreed to lease the premises to another party, and that re-entry was had by him July 1, 1908. Apparently the new tenant was to pay the claimant \$175 a month rent, being \$75 less each month than the bankrupt's agreement.

The proof of claim was filed with the referee July 14, 1908, and is made up as stated at the outset. The trustee moves to expunge the claim. The claimant contends that proof of claim is within subdivision 4 of section 63a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), that this subdivision is not limited by subdivision 1 of the section, but may be regarded as inclusive of that subdivision, and cites In re Smith (D. C.) 17 Am. Bankr. Rep. 112, 146 Fed. 923, a case decided in Rhode Island, in July, 1906. It should be remarked that that case arose on notes upon which the bankrupt's liability as indorser became fixed after both the filing of the petition and adjudication in bankruptcy (not depending upon any contingency or factor yet to occur), but within the year limited for the filing of claims by subdivision “n” of section 57 of the bankruptcy act. The judge in that case allowed the proof of claim to stand, observing that the claim before him was no longer contingent, but had become a present liability. He held that, both

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

upon authority and upon a fair view of the subject-matter, the act (meaning the two subdivisions of section 63a before referred to), should receive such a construction as to permit the proof of such claim if filed within the year and the bankrupt receive a discharge from the liability. In line with *In re Smith*, see *In re Dunlap Carpet Co.* (D. C.) 20 Am. Bankr. Rep. 882, 163 Fed. 541.

Where the rent reserved in a lease is payable in installments at stated dates, a lessee is not liable for any installment until the date arrives and he is in default, and his liability in this regard, whether in contract or in damages, continues to the end of the term for each installment as it becomes due, with proper credit for any rent which the lessor may meantime collect for the same period from any new tenant. In *re Hevenor*, 144 N. Y. 271, 273, 39 N. E. 393. The situation is not altered between the lessor and the lessee by the fact that the bankruptcy of the lessee supervenes. I agree with the intimation in *Collier on Bankruptcy* (6th Ed.) 521, and the reasoning of such cases as *In re Ellis* (D. C.) 3 Am. Bankr. Rep. 564, 98 Fed. 967 (Mass., Lowell, J.), and *Watson v. Merrill*, 14 Am. Bankr. Rep. 453, 458, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719 (C. C. A. 8th Circuit), holding that the adjudication in bankruptcy does not terminate the lease. I see no reason why the adjudication in bankruptcy, or yet the ultimate discharge of the bankrupt, should terminate the bankrupt's existing contracts. The adjudication merely determines that the bankrupt is such, having committed certain acts of bankruptcy, and the discharge is merely (section 17) a release to him from certain liabilities provable within a year subsequent to his adjudication (section 57n), whether then actually proven or not, and does not affect his subsequent or future liabilities.

Under *In re Jefferson*, 2 Am. Bankr. Rep. 206, 213, 93 Fed. 948 (D. C. Kentucky), and *In re Hinckel Brewing Co.*, 10 Am. Bankr. Rep. 484, 123 Fed. 942, where Judge Ray, in the Northern district of New York, held that the adjudication terminates the lease, it is clear that rent not due, at least at the date of adjudication, cannot be proven under either subdivision 1 or subdivision 4 of section 63a. For convenience I state that in *Re Jefferson*, the adjudication on a voluntary petition was March 23, 1899. The lease was for five years from February 15, 1896, and the rejected claim was for one year's rent subsequent to the date of bankruptcy. It does not appear when the claim was filed, but it is apparent from the report that the rent had not become payable when the claim was filed. In *Re Hinckel Brewing Co.*, the adjudication was October 21, 1902, on a petition filed February 13, 1902. The claim filed November 26, 1902, was for rent from the last date it was paid, to wit, January 1, 1902, to October 21, 1902, and the judge in his decision as a matter of fact allowed rent down to the date of adjudication: a receiver occupying until and after the date of adjudication, which it is stated, when made, terminated the lease, and no rent accruing thereafter could be proved or allowed as a debt against the bankrupt estate. The case is not satisfactory, and the judge was clearly of the opinion that rent was provable up to the date of adjudication, and not confined to the date when the petition was filed.

The cases cited in the trustee's brief do not deal with the precise situation before me, where the lease must be regarded as a continuing contract, not terminated by the adjudication in bankruptcy, and an attempt is made to prove installments of rent that have actually become due and payable subsequent to the date when the petition was filed or the date of the adjudication, if not contemporaneous, and within the expiration of one year from the date of the adjudication.

In *Watson v. Merrill*, 14 Am. Bankr. Rep. 453, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, *supra*, where the lease, as stated, was held to be a continuing contract, the petition was filed February 6, 1903, and the adjudication followed April 2, 1903. The lease was for 10 years from October 1, 1902, at the rate of \$60 a month, in advance. The rent had been paid to and including February, 1903. Shortly subsequent to March 2, 1903, the claimant had attempted to prove for 115 months at in reality \$60 a month, the rent reserved in the lease, less its so-called real rental value of \$40 a month, and the referee allowed the claim under the name of damages, but finding and crediting the so-called rental value at a higher sum. In this case, therefore, there was no rent unpaid at the date of filing the petition, and apparently but two installments of rent unpaid at the date of the presentation of the claim, and the claim

before the court in respect to 113 months was manifestly contingent and unfixed. It was under these circumstances that the court held "that a claim for damages for a breach of a contract in a lease to pay installments of rent for the use of the premises at times subsequent to the filing of the petition in bankruptcy is not provable under the bankruptcy law of 1898."

In *Atkins v. Wilcox*, 5 Am. Bankr. Rep. 313, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118 (C. C. A. 5th Circuit), the adjudication was October 3, 1899, on a voluntary petition. The rejected claim was presented October 31, 1899, on 12 rent notes given under a lease of May 4, 1899, for one year to begin October 1, 1899. On November 21, 1899, the proof of debt was filed. The rent for October and November, 1899, was paid by the trustee as an expense of administration. The referee rejected the claim for the months of December, 1899, to September, 1900, inclusive. The court points out that at the date of the adjudication and at the date when the debt was proved there had been no default in the payment of rent under the lease, which is not the situation before us. The court, while not deciding that the adjudication terminated the lease, or the reverse, rejected the claim, apparently because of the entirely contingent character which no doubt it bore.

In *Re Silverman* (D. C.) 2 Am. Bankr. Rep. 15, an involuntary petition was filed January 18, 1899, followed by an adjudication February 2, 1899, and the rejected claim was filed March 15, 1899, and was of a highly contingent character for prospective commissions for the balance of a year expiring September 6, 1899. This case, therefore, is of little cogency for present purposes.

In *re Jefferson* has already been considered, *supra*. It held, moreover, that the adjudication terminated the lease.

In *Bray v. Cobb* (D. C.) 3 Am. Bankr. Rep. 788, 100 Fed. 270 (North Carolina), the petition and the adjudication were November 30, 1898. The rent claimed was for 16 months to February 1, 1900. Plainly this rent was of a contingent character. Its allowance by the referee was reversed by the judge: he confining the proof to the date of filing of the petition which was the same as the date of the adjudication, which adjudication he also held terminated the contractual relations of the bankrupt.

In *re Collingnon*, 4 Am. Bankr. Rep. 250, was decided in the Northern district of New York, in April, 1900, by Referee W. H. Hotchkiss, whose qualifications in the law of bankruptcy are well known. There the lease was for two years from January 1, 1899, at \$50 a month, in advance. The petition in bankruptcy and the adjudication were of the same date, July 28, 1899. Two months' rent was then unpaid, for which the landlord proved and received dividends. The trustee paid for use and occupation up to October 1, 1899. For the 13 months beginning December 1, 1899, the landlord relet to a new tenant for \$504. While the trustee was still in possession, or before October 1, 1899, the landlord presented a claim for rent to accrue subsequent to the bankruptcy, which the landlord sought to have allowed, less the credits above mentioned. The claim was disallowed, on the ground that installments of rent accruing after the time of the bankruptcy are not provable debts against the bankrupt's estate and are not affected by his discharge, and that the claim did not constitute a present debt but was essentially contingent in its character. The referee points out that a claim capable of valuation would probably be admitted to proof at any time before the winding up of the estate. The referee gives his reasons, which are those of expediency, for establishing as a "line of cleavage," determining the date as to which indebtedness becomes provable in bankruptcy, the date when the petition is filed.

In *Re Mahler* (D. C.) 5 Am. Bankr. Rep. 453, 105 Fed. 428 (Michigan, November, 1900; referee's decision reported in 2 Nat. Bankr. N. 70), the judge, while not passing on the question whether the bankrupt remained liable under the covenants of his lease, rejected the claim as contingent. The lease was for 5 years and 2 months from March 1, 1896, the rent being payable monthly in advance. The bankrupt was adjudicated January 3, 1899, upon his own petition. March 11, 1899, the landlord filed a claim, not only for the rent due to the date when the petition was filed and the adjudication made, or January 3, 1899, but a claim under the lease for the rent accruing for the remainder of the demised term expiring May 1, 1901. Subsequently, and on August 15, 1899, the claimant filed a petition, alleging that at that date the rent theretofore

contingent had become absolutely due to September 1, 1899. The referee held that the rent thus accruing subsequent to the adjudication in bankruptcy was not a provable claim against the estate of the bankrupt, and that such rent so accruing remained a liability of the lessee, unaffected by the discharge. The judge affirmed the referee's disallowance of the claimant's petition filed August 15, 1899, apparently because the claim did not fall within subdivision 1 of section 63a. The claim does not appear to have been presented for allowance under subdivision 4 of section 63a.

The following cases have also been examined by the referee:

In re Shaffer (D. C. Mass., Lowell, J., 1903), 10 Am. Bankr. Rep. 633, 124 Fed. 111. In this case the judge merely follows his decision in *Re Eills* (D. C.) 3 Am. Bankr. Rep. 564, 98 Fed. 967, *supra*. The particulars of the claim before him do not appear in the report or the material dates, but apparently the claim was of a contingent character and for damages not then ascertainable. The judge's language lends itself to an implication that if they had been ascertainable they would have been provable as of the date of bankruptcy or as of the date of re-entry, which latter date obviously might fall at any time within the year provided in section 57n for the proving of claims.

In re Pittsburgh Drug Co. (W. D. Pennsylvania, 1908) 20 Am. Bankr. Rep. 227, 164 Fed. 482. In this case, there was a lease for two years from May 1, 1906, the rent payable in monthly installments. The lease also contained a provision that in case of default in payment, or in case of the beginning of bankruptcy proceedings or the appointment of a receiver, the entire balance of rent should thereupon become due and payable. The rent due September 1, October 1, and November 1, 1906, being unpaid, a receiver was appointed by the state court November 23, 1906. Because of this appointment, a petition in bankruptcy was filed against the lessee November 26, 1906, and a receiver in bankruptcy appointed. This receiver or the trustee in bankruptcy occupied the premises until May 1, 1907, and the landlord refused to accept a surrender of the premises. It appeared from the landlord's proof of claim that at the date when the petition was filed against the lessee, a balance of rent for September, 1906, and the entire rent for October and November, was due and payable. In addition, the landlord claimed rent until September 1, 1907; the claim for this rent being based upon the provisions of the lease that if default be made in the payment of rent, or if a receiver be appointed, the rent for the entire term should become due and payable. The court did not pass on the question whether the claim was provable under subdivision 1 or subdivision 4 of section 63a, but in affirming the action of the referee held that under the lease the appointment of the receiver by the state court November 23, 1906, made the rent for the entire term fall due at that date, which was three days prior to the filing of the petition in bankruptcy, and that the debt thus created was one provable in bankruptcy. The case also involved a question, not material here, in respect to priority for the claim under the state statute, and a question as to the provability of taxes and insurance payable after the filing of the bankruptcy petition and not yet due, which it was sought to prove under the covenant of the lease before referred to. As to the latter question, the court held that these items, as they could not possibly be liquidated at the date of the default, could not be said to become due by that default, and therefore disallowed their proof as not being a fixed liability at the time of the filing of the petition. No question arose as to the effect of subdivision 4 of section 63a. In substance, the decision was to the effect that the entire rent for the term became due on the date when there was a breach of the covenant in the lease by the appointment of a receiver in the state court, and thus became a fixed liability at the time of the filing of the petition in bankruptcy, and therefore provable under subdivision 1 of section 63a.

In re Rubel (D. C. Wisconsin, 1908) 21 Am. Bankr. Rep. 566, 166 Fed. 131. In this case a petition was filed against the bankrupt March 30, 1907, and a receiver in bankruptcy appointed, and an adjudication in bankruptcy followed on April 12, 1907. The receiver and the trustee occupied until May 1, 1907. The claim of the lesser was for rent or damages to the date of expiration of the lease, or May 1, 1908. The referee allowed the claim for the March rent to be proven, and allowed the April rent to be paid as an expense of administration, and disallowed the claim arising subsequent to May 1, 1907. The ac-

tion of the referee was affirmed by the judge, citing cases already referred to, as holding that rent which had not accrued at the time of adjudication could not be proven. Of these cases he remarks that they are not in accord as to the method of reasoning by which the conclusion is reached. Obviously the claim the judge had before him was as to 12 months' rent, an unliquidated one at the date the claim was filed, and then neither due nor susceptible of liquidation. In conformity with the decisions, he rejected it under subdivision 1 of section 63a. There was not, and could not have been, any attempt to offer to prove the claim under subdivision 4 of section 63a.

The review of the decisions shows that much has been written. The accord is rather in the results reached than in the reasoning. There has been little or no discussion of the province of subdivision 4 of section 63a. In large part the claims dealt with by the reported cases, and rejected as not provable under subdivision 1 of section 63a, have been claims contingent in character at the date of filing, and not such as could be offered under subdivision 4 of section 63a. The unsatisfactory state of the law is therefore my only excuse for adding or inviting further writing on the subject involved.

I regard the contract of lease as not terminated by the adjudication. Under the reasoning in *Re Smith* (D. C.) 17 Am. Bankr. Rep. 112, 146 Fed. 923, and in *Re Dunlap Carpet Co.* (D. C.) 20 Am. Bankr. Rep. 882, 163 Fed. 541, notwithstanding *In re Mahler*, supra, I regard installments of rent falling due and payable after the date of the filing of the petition or the date of adjudication, which may or may not be contemporaneous, and within the period of one year limited by subdivision "n" of section 57, as provable under subdivision 4 of section 63a, unless it be held (as I am not prepared to hold) that the expression as provable under subdivision 1 of a fixed liability evidenced by an instrument in writing absolutely owing at the time of the filing of the petition is the exclusion from provability under subdivision 4 of a fixed liability on such an instrument absolutely owing at any later time. As seen, this has not been so held in respect to commercial paper, nor apparently was it the view of Referee W. H. Hotchkiss in *Re Collingnon*, 4 Am. Bankr. Rep. 250, 252. The reasons of this learned referee in this case, before referred to as those of expediency, seem to me the only ones for confining a claim for rent provable in bankruptcy to the rent absolutely owing and actually due at the time of the filing of the petition.

In accordance with these views, I will grant an order expunging the claim filed July 14, 1908, to the extent of \$450, or, in other words, for the deficiency of rent claimed for the months of August, September, October, November, and December, 1908, and January, 1909. In all other respects the trustee's motion is denied. I hope a final expression of opinion on the provability of rent under either or both of subdivisions 1 and 4 of section 63a may be obtained from the judges of this district. Any party desiring a review may take the foregoing memorandum as the referee's certificate under General Order 27 (89 Fed. xi, 32 C. C. A. xxvii) of the question presented, to wit, whether installments of rent due and payable after the date of the filing of the petition or the date of adjudication, if these two dates be not contemporaneous, are provable under section 63a of the bankruptcy act.

James, Schell & Elkus (Robert P. Lewis, of counsel), for the motion.
Levy & Rosenthal, opposed.

HOUGH, District Judge. The hopeless confusion produced by conflicting decisions on the subject under review requires an authoritative ruling, which this court cannot give. The matter should be promptly taken to the Circuit Court of Appeals, and settled, at least so far as this circuit is concerned. Therefore I shall do no more than briefly indicate what seems to me the reason of the matter, adding only that my view is supported especially by *Watson v. Merrill*, 14 Am. Bankr. Rep. 453, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719.

It must be admitted (and is not denied by any party to this litigation) that the rent reserved in a lease is payable only at the dates prescribed

in the lease, and until that date arrives, and payment is not made, the lessee is not liable for any installment, whether sued on his rent contract or for damages measured by it. It appears to me plain that this situation, as between lessor and lessee, is not altered by any bankruptcy on the part of the lessee. Bankruptcy does not terminate the lease. This must be so from the very nature of bankruptcy, which does not destroy, but conserve, property, and the leasehold estate is property, which may (and frequently does) become the property of the trustee and inure to the benefit of creditors. It is impossible to conceive of a trustee in bankruptcy selling a lease, if bankruptcy destroy the same lease.

If the lease survives adjudication and is rejected by the trustee (i. e., not appropriated as belonging to the estate), it is necessarily an existing and continuing contract; and such contract requires parties thereto. Who are these parties? The landlord is one. The trustee in bankruptcy, not having appropriated the lease, is not the other. Therefore that other must be the bankrupt lessee. Such being the case, does the bankrupt's continuing liability on a lease, which has survived adjudication and been abandoned by the trustee, give rise to a provable debt?

There are obvious reasons of expediency and equity why such claims should not be provable. A landlord is a species (speaking very loosely) of preferred or secured creditor, in that his rent is presumed to be no more than a fair measure of the value of the use of his land, and that land he can always recover if his rent is not paid. If the trustee pays his rent (as rent), he has appropriated the lease. If no one pays that rent, the presumption of law is that the landlord, on getting back his land, can obtain from other tenants the value of its use. It is therefore inequitable to permit a landlord, not only to recover and relet the demised premises, but to share *pari passu* with other creditors not so favorably situated. In the second place, the admission of landlords' claims arising and continuing to arise after adjudication, and after condition of the lease broken, tends to delay the settlement of estates, and should not be encouraged, unless the law absolutely requires it.

For these reasons I prefer to concur in the reasoning and conclusion of *Watson v. Merrill*, *supra*, and that case, in my opinion, is not consistent with the doctrine that subdivision 1 of section 63a is modified or enlarged by subdivision 4 of the same section. Inasmuch as the lease survives adjudication, the only "fixed liability" thereunder is rent due at the time of filing the petition. Nor can I think that section 57n affects the matter at all. That claims "shall not be proved" subsequent to a "year after the adjudication" is not an enlargement of the class of provable claims, but merely a restriction of the time wherein provable claims may be presented. In other words, section 57n merely limits the time within which such claims as are described in section 63 may be proven.

It is directed that the claim presented be expunged.

Ex parte LUNG FOOT.

(District Court, N. D. New York. November 22, 1900.)

1. ALIENS (§ 32*)—EXCLUSION OF CHINESE—PROCEEDINGS AND REVIEW.

The decision of an immigration inspector that a Chinese person was not entitled to re-enter the United States as a native of this country, if made after a full and fair hearing and affirmed on appeal by the department, is final.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—PROCEEDINGS FOR DEPORTATION OF CHINESE—EVIDENCE—"JUDGMENT."

A certificate, made by a United States commissioner, that a certain Chinese person was tried before him for being unlawfully in the United States and discharged, is not a "judgment," nor copy of a judgment, and is not admissible in evidence to prove the fact so recited.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

3. ALIENS (§ 32*)—EXCLUSION OF CHINESE—FINALITY OF DECISION.

A Chinese person, denied admission to the United States after a full and fair hearing, who accepts such decision and deportation without appealing, is concluded thereby, and cannot, by applying for entry at a different port, have a rehearing on the same questions.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

In the matter of the application of Lung Foot for writ of habeas corpus. Writ dismissed.

H. E. Owen, for the United States.

George J. Moore, for petitioner.

RAY, District Judge. The only question at issue before the Chinese inspector and inspector of immigration of the United States, E. G. Sperry, was whether Lung Foot was born in the United States. The burden was on him to prove this fact to the satisfaction of said inspector. The Supreme Court has decided that a Chinese person cannot prevail in habeas corpus proceedings by showing that the decision of the inspector was wrong. If a fair, full hearing was given and had, full opportunity to present evidence, and a question of fact was presented and decided, and the action taken was not arbitrary, then the decision of the inspector, affirmed by the department, is final. *Chin Yow v. United States*, 208 U. S. 8, 11, 28 Sup. Ct. 201, 52 L. Ed. 369; *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

There was no oral testimony sufficient to establish that said Lung Foot was born in the United States. A certificate of one Felix W. McGettrick, formerly United States commissioner for the district of Vermont, was presented, dated February 22, 1897, certifying that on February 19, 1897, one Lung Foot was tried on the charge that, in violation of a section of the Revised Statutes of the United States he "did unlawfully come and was within the United States"; that he was tried on such charge, and "upon a full hearing upon said charge * * * it was adjudged by me that said Lung Foot had the lawful

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

right to be and remain in the United States, and he was accordingly discharged." This is not a judgment, or a copy of a judgment or decision. There is no law authorizing such a certificate, or making it evidence. *Ah How v. United States*, 193 U. S. 65, 78, 24 Sup. Ct. 357, 48 L. Ed. 619. Again, it is partly printed and partly written, and the written parts which give days of the month and the name of the person alleged to have been tried and discharged are in a different handwriting and ink from the other written parts, showing that the one who filled it out did not have Lung Foot in mind when he put in the main portion of the writing. It was long ago shown before this court that these certificates were issued promiscuously by McGettrick for a consideration. A weak attempt was made to show by oral evidence that such a trial was had, and that it was then shown that Lung Foot was born in the United States. This alleged fact is not satisfactorily proved, even if such a judgment can be proved by parol. If the evidence shows anything, it establishes that McGettrick took no evidence in writing, made no written decision, and entered no judgment. He is living in Boston, Mass., and he gives no evidence. The ground of Lung Foot's discharge, if he was tried and discharged, is not satisfactorily shown. It does not satisfactorily appear that it was adjudged that he was born in the United States.

The return shows that Lung Foot went to China, and with this certificate in his possession attempted to smuggle himself into the United States by way of Mexico and Texas in September, 1908; that he was arrested on a warrant duly issued by a United States commissioner and given a hearing, and that he then and there produced this same certificate. He offered no evidence, except his own statement. On that statement and certificate he was ordered deported, and was deported as not having established his right to enter the United States. No appeal was taken. In 1909 he renewed his attempt to enter by way of Malone, N. Y., and this is the resulting proceeding. It seems to me that the proceeding before Inspector Barnard in Texas, in 1908, brought up the alleged proceedings in Vermont in February, 1897, and what occurred then. Lung Foot then and there had an opportunity to present all his evidence and to have a full and a fair hearing. So far as appears, he did have. It seems to me that his rejection at that time is final as to the questions presented here. Every question presented here could have been presented and decided there. Clearly the inspector necessarily decided that Lung Foot was not born in the United States, and that it had not been determined by Commissioner McGettrick that he was born here.

Can a Chinese person claim admission at one port of entry on the ground he was born in the United States, accept an adverse decision by the inspector in charge, submit to deportation, and then apply at another port of entry, before another inspector, and have the whole matter reconsidered and re-examined? I think not. There must be a final and a conclusive determination somewhere, at some time, and it cannot be that a Chinese person is entitled to a rehearing on the question of his place of birth and consequent citizenship on additional or even newly discovered evidence every time he sees fit to raise the

question by making a new application for admission. Persons of Chinese descent seeking admission to the United States may select the port of entry at which they will apply, or, if they do not apply at all, may seek to enter clandestinely; but they take the chances of a trial or hearing before the tribunal or officer having jurisdiction where arrested.

Lung Foot sought deliberately to enter by way of Mexico and Texas. He was arrested, given a full and fair hearing before a commissioner of the United States, who had evidence before him of the Vermont proceeding, presented by Lung Foot; and the commissioner necessarily decided that Lung Foot was not born in the United States, and that the Vermont proceeding before McGettrick did not adjudicate that he was. The petitioner had the right to appeal to the Commissioner of Commerce and Labor, and, if the decision was adverse, to test his right on habeas corpus. He took no appeal, but, as stated, submitted to that decision, and was deported accordingly. Those questions cannot be retried. *Chin Yow v. United States*, 208 U. S. 11, 28 Sup. Ct. 201, 52 L. Ed. 369; *United States v. Ju Toy*, 198 U. S. 253, 260, 25 Sup. Ct. 644, 49 L. Ed. 1040; *United States v. Sing Tuck*, 194 U. S. 161, 166, 24 Sup. Ct. 621, 48 L. Ed. 917; *Lem Moon Sing v. United States*, 159 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082.

The record here shows (1) that all the questions raised were determined adversely to the petitioner in 1908, by a United States commissioner having jurisdiction of the person and subject-matter, and that no appeal was taken; and (2) that it was not satisfactorily shown to the inspector that Lung Foot was born in the United States. He was therefore properly excluded.

The writ is dismissed, and Lung Foot remanded to be dealt with according to law.

In re McCORD.

(District Court, S. D. New York. February, 1909.)

BILLS AND NOTES (§ 264*)—ACCOMMODATION INDORSEMENT—LIABILITY OF INDORSERS INTER SESE.

The mere fact that indorsers of a note are accommodation indorsers, and known to each other to be so, is not sufficient to change the general rule of law that prior indorsers are liable in solido to subsequent indorsers who have paid the note; but an express agreement is necessary to render them liable ratably as between themselves.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 612; Dec. Dig. § 264.*]

In the matter of William M. McCord, bankrupt. On review of decision of referee. Order modified.

The following is the opinion of Olney, Referee:

In this proceeding, Leo Oppenheimer, as receiver (now trustee) in bankruptcy of Frank Squier, filed a claim against the estate of William M. McCord, bankrupt. William M. McCord was adjudicated a bankrupt in December, 1907. Thereafter, in January, 1908, Frank Squier was adjudicated a bankrupt, also, in the Southern district of New York. The claim filed by Leo

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Oppenheimer, as receiver, arises by reason of 15 notes and interest thereon, aggregating \$39,138.85. The trustee of McCord, bankrupt, moved that the claim of Oppenheimer, as receiver, be expunged in whole or in part. Testimony was taken on the motion, and briefs of counsel submitted.

My conclusion, from the testimony, is that the bankrupt William M. McCord, and the bankrupt Frank Squier, were, with others, accommodation indorsers of the paper in question, and that each knew that the other was such accommodation indorser. Neither McCord nor Squier received any benefit from the said notes. The notes were discounted, and the proceeds of such discount was received by, or used for the benefit of, the Manufacturers' Mercantile Company or the Meers Artificial Leather Company. The first eight notes mentioned in the proof of claim, aggregating, with interest, the sum of \$18,638.85, were taken up and paid by Squier before his failure, and are now held by his trustee in bankruptcy. Some of these notes were taken up before the bankruptcy of McCord, and some after the McCord bankruptcy. The remaining seven notes were not taken up by Squier, and are not held by his trustee in bankruptcy.

The trustee contends that Oppenheimer, the trustee of Squier, can only prove on the notes which Squier had taken up prior to McCord's bankruptcy. But it has been settled by decisions of the courts that the holder of a note indorsed by a bankrupt can prove thereon against the bankrupt estate, although the note had not become payable at the date of the bankruptcy, provided the note was duly protested, and the bankrupt notified thereof after the bankruptcy. *Re Gerson* (D. C.) 5 Am. Bankr. R. 89, 105 Fed. 891; *Re Gerson*. 6 Am. Bankr. R. 11, 107 Fed. 897, 47 C. C. A. 49. Here all the notes were duly protested, and the indorsers duly notified. The holders of the notes at the time of their protest, therefore, could have proved on the notes. Under subdivision "i," § 57, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 560, 561 [U. S. Comp. St. 1901, c. 3443]), upon failure of the holders of the notes to prove thereon against the bankrupt, any other party liable to the holder could prove thereon in the creditor's name. Hence Squier, after he had taken up eight of the notes, had the right to prove thereon against the bankrupt estate, and to his right Oppenheimer, as trustee, succeeded.

The question arises: For what amount can Squier's trustee prove? All the indorsers of the notes were accommodation indorsers, and known to each other so to be. The first note mentioned in the proof was a note of the Meers Artificial Leather Company for \$3,406.38, indorsed by McCord, Henry Berg, H. & J. T. Slade, and Squier, and delivered, so indorsed, to the payees, C. H. Pope & Co. in payment for merchandise sold by Pope & Co. to the leather company. Squier paid and took up this note. Then the other accommodation indorsers became liable to pay Squier their pro rata share of said note. Each of the other indorsers was liable in contribution to pay to Squier one-fourth of said note; there being, with Squier, four such accommodation indorsers. This must be so, unless the New York statute, entitled the "Negotiable Instruments Law" (Consol. Laws N. Y. c. 38), has changed the rule of law in that respect.

The counsel for Squier's trustee contends that this statute has changed the rule, and that McCord, and in fact each of the prior indorsers, is liable to Squier's trustee for the whole amount of the note; and the counsel cites sections 55 and 114 of the statute in support of his claim. Section 55 provides that an accommodation party to a negotiable instrument is liable to a holder for value, notwithstanding that such holder, at the time of taking the instrument, knew the accommodation party received no value. The section does not mean that one accommodation indorser is necessarily liable to another accommodation indorser, who takes up the paper, for the full amount of the instrument. The extent of the liability depends upon the agreement among themselves, express or implied, of the several accommodation indorsers. When two or more accommodation indorsers lend their names in order that a third person can borrow money from some other person on the instrument thus indorsed, the implied agreement is that each accommodation indorser shall be liable as between themselves for his proportionate share of the sum mentioned in the instrument. The provision in section 114 that any person who indorses a negotiable instrument before delivery is liable to the parties subsequent to the payee, it seems to me, states what is the presumption, in the

absence of any evidence showing what the facts are as regards the rights and liabilities of the various parties as between themselves. In other words, this section was not intended to change the well-established rule of law that parol evidence is always admissible to show what the true relations of the various parties are in fact. See *Witherow v. Slayback*, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507, and cases there cited; also *Kohn v. Consolidated Butter & Egg Co.*, 30 Misc. Rep. 725, 63 N. Y. Supp. 265.

I do not think the statute was intended to change this rule of evidence. In the case at bar, Squier, an accommodation indorser, takes up the paper, paying its full amount to the holder. It is contended, under the statute, he can recover the full amount from the next three indorsers. If he can recover the full amount, then the indorser from whom he recovers can recover the full amount from the next prior indorser, and the result would be that the first indorser would have to bear the entire burden, which by the implied agreement all the accommodation indorsers were to share pro rata. There would be no justice in such a result. As to the eight notes first mentioned in the proof of claim, Squier's trustee can prove against McCord's estate for McCord's pro rata share of liability as one of several accommodation indorsers.

With respect to the seven remaining notes mentioned in the proof, the holders thereof have filed proofs thereon herein, with the exception of the note of the Meers Artificial Leather Company, payable to the order of Squier, for the sum of \$2,500, payable February 7, 1908, which note was also indorsed by McCord, the bankrupt; Squier and McCord both being accommodation indorsers. Pursuant to section 57, subd. "1," the holder of the note having failed to prove thereon, Squier's trustee has, apparently, the right to prove thereon in the name of the First National Bank of Bound Brook.

An order may be entered in accordance with the foregoing opinion. The attention of the trustee is called to the fact that a great number of notes, aggregating a large amount, of this same general character, have been proved herein by the holders, and that all such proofs should be carefully examined, to see that none of these notes are proved twice.

James, Schell & Elkus (Robert P. Levis and James N. Rosenberg, of counsel), for the motion.

Garvan, Armstrong & Conger (John S. Keith, of counsel), opposed.

HOLT, District Judge. I am not able to concur with the conclusion of the referee in this case in respect to the eight notes which remain in controversy. Seven of those eight notes were made by the Meers Artificial Leather Company, and were indorsed by McCord, the bankrupt, by Frank Squier, and by two or three others; each indorsing for the accommodation of the makers. The other note was made by H. & J. T. Slade, and indorsed by McCord and Squier; each indorsing for the accommodation of the makers. The money received from the discount of these eight notes was paid either to the Meers Artificial Leather Company or to the Manufacturers' Mercantile Company. Neither McCord nor Squier ever obtained any consideration or benefit for his indorsement. On each of these notes McCord's indorsement was prior to that of Squier. At the maturity of these notes, Squier was called upon by the holders to pay them, and did pay them. He subsequently went into bankruptcy, and his trustee in this proceeding has proved for the full amount of the notes against the estate of the bankrupt. The referee has held that McCord, Squier, and the other indorsers were all accommodation indorsers, and that each knew that the others were such, and for that reason he has held substantially that all these accommodation indorsers are sureties as between themselves, and that each is liable only for his proportionate share of the amount

due on the notes. The referee has accordingly reduced the claim of the trustee of Squier from the total amount paid on the notes, for which the claim was filed, to the bankrupt's proportionate share of such amount.

It is undoubtedly well settled that accommodation indorsers can, by agreement among themselves, restrict the liability of each to his proportionate share, or, indeed, make any other arrangement as to their liability to each other which they see fit to make. But it is, of course, fundamental in the law of commercial paper that, in the absence of any such agreement, an indorser who pays a bill or note has recourse against each prior indorser for reimbursement. I do not understand that the mere fact that indorsers are accommodation indorsers, and known to each other to be so, is sufficient, without proof of an express agreement, to change the general rule of law that prior indorsers are liable in solido to subsequent indorsers who have paid a note. There must be, as I understand the rule, a specific agreement, as between the various indorsers, that they shall only be liable ratably. If there is no such agreement, the law fixes their liability in accordance with the order of the names on the paper. *McCarty v. Roots*, 62 U. S. 432, 16 L. Ed. 162; *Easterly v. Barber*, 66 N. Y. 433; *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109; *Egbert v. Hanson*, 34 Misc. Rep. 596, 70 N. Y. Supp. 383. Each of these accommodation indorsers indorsed each of these notes in the same order. McCord, the bankrupt, indorsed first, the others next, and Squier last. In the absence of evidence of a specific agreement to the contrary, the order of the indorsements indicates an understanding between the indorsers that Squier, if he paid the notes, was to be entitled to recourse against each of the others, and that McCord, being the first indorser, in substance guaranteed each of the other indorsers against loss. I have read over the evidence, and there is no proof of any specific agreement between the indorsers.

I think, therefore, that under the fundamental principles governing the law of mercantile paper and the express provisions of the Negotiable Instruments Law, §§ 55, 114, 118, Squier's trustee is entitled to prove his claim against the bankrupt's estate for the full amount paid on the eight notes in question.

THE MUIRFIELD.

(District Court, N. D. Florida. November 13, 1909.)

1. SHIPPING (§ 49*)—CONSTRUCTION OF CHARTER PARTY—DISPATCH MONEY.

A provision of a charter party for the allowance to the charterer of dispatch money for lay days saved in loading construed.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 49.*]

2. SHIPPING (§ 50*)—CONSTRUCTION OF CHARTER PARTY—LIABILITY FOR TONNAGE DUES.

Under a provision of a charter party requiring the charterer to pay tonnage dues, he was liable for such dues actually imposed, although based on a resurvey by the customs officers while in port, which gave the vessel an additional tonnage over that shown by her British registry.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 50.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit by W. L. Wittich, as W. L. Wittich & Co., against the British steamship Muirfield, and cross-libel by the master of the steamer. Decree for cross-libelant.

Reeves & Watson, for libelant.

Blount, Blount & Carter, for cross-libelant.

SHEPPARD, District Judge. W. L. Wittich libeled the British steamship Muirfield, which he had loaded with cargo pursuant to charter, and claims by his libel a balance due him on account of dispatch money earned because of time saved to the vessel out of the lay days allowed in the charter party for loading cargo.

The master of said steamer filed a cross-libel, asserting that, notwithstanding the charter party provided that the charterer, Wittich, should pay all the tonnage dues and port charges, he had refused to pay the additional tonnage tax assessed by the customs officials here, amounting to \$58.38, by reason of the increased tonnage under American re-measurement. The charterer refused to pay this additional tax, because the charter party stipulated the tonnage of the vessel at 1,957 tons British net register. Under the charterer's construction of the charter party, he was required to pay tonnage dues according to the British measurement on a basis of 1,957 tons.

There being no dispute as to the facts, the contentions between the parties are submitted upon an agreed statement of facts; the solution of the question at issue depending wholly upon an interpretation of the charter party. Counsel conceded at the argument the first proposition was entirely unique, and that the most diligent search for authorities had failed to shed any light on the mooted question.

It is agreed that the charterer had $24\frac{1}{2}$ lay days, Sundays and legal holidays excepted, unless used, in which to load the vessel. It is conceded that none of the excepted days were used. It is further agreed that the charterer was to receive 2d. sterling per net register ton per day dispatch money for every day saved, including Sundays and legal holidays. It is agreed that the loading began on the first lay day, which was June 5, 1908, and was finished and the vessel cleared on June 15th, actually consuming nine lay days loading, including the 15th; but it is specially provided in the charter party that the vessel might be cleared on the day the loading was completed without counting it as a lay day, or for dispatch money. Charterer claims $20\frac{1}{2}$ days' dispatch, insisting that, by reason of the above provision, the clearance day was not to be counted in the computation of lay days. The master's contention is that the $24\frac{1}{2}$ days stipulated for began on June 5th, and concluded July 3d at noon; that, notwithstanding the charterer was entitled to 24 hours to clear the vessel, the charterer was not entitled to dispatch money for the excepted holiday and Sunday which intervened between the 3d of July, which was the expiration of the lay days, and Monday, July 6th, the last day for clearance.

By reference to the computation of lay days made by the charterer and used by counsel to illustrate his argument, it will be observed that, by omitting the 15th of the month, the day on which the vessel finished loading, the lay days would have expired Monday, July 6th, at noon—

thus extending the days saved, for which he would claim dispatch money, beyond the 4th and 5th of July, thereby claiming $20\frac{1}{2}$ dispatch days.

Let us see if a fair and reasonable interpretation of this contract will admit of this construction of the charter party providing for the time to be consumed in loading the vessel.

The rule for ascertaining the intention of parties by such provisions is that, when the time is definitely fixed or described, so as to be calculable beforehand, there is an absolute obligation of the charterer to have the work completed within the period specified, whatever circumstances occur. Now, by reference to the charter party, we find the lay days allowed definitely fixed before the performance of the charter party was entered upon.

The charter provided lay days, at $1\frac{1}{4}$ per 100 tons net register, Sundays and legal holidays excepted, unless used, which would allow the charterer $24\frac{1}{2}$ days from June 5th, the day the loading began. It will be seen that the $24\frac{1}{2}$ days would have expired on July 3d at noon. According to the general rule for construing such provisions in a charter, the lay days under this contract expired at noon July 3d. A different interpretation of the provision for lay days, it seems, would allow the charterer dispatch money on the fiction that the delayed clearance days, to wit, the 4th and 5th of July, were saved to the ship. A memorandum computation which follows here illustrates the rationale by which is reached the above interpretation of that provision of the charter party.

Lay Days of the British Steamship Muirfield under Charter of May 8, 1908, to W. L. Wittich & Co.

June 4—Notice.	June 20—14th lay day.
5—1st lay day.	21—Sunday.
6—2d lay day.	22—15th lay day.
7—Sunday.	23—16th lay day.
8—3d lay day.	24—17th lay day.
9—4th lay day.	25—18th lay day.
10—5th lay day.	26—19th lay day.
11—6th lay day.	27—20th lay day.
12—7th lay day.	28—Sunday.
13—8th lay day.	29—21st lay day.
14—Sunday.	30—22d lay day.
15—9th lay day—actual clearance day.	July 1—23d lay day.
16—10th lay day.	2—24th lay day.
17—11th lay day.	3— $24\frac{1}{2}$ —lay day expires at noon. Could clear.
18—12th lay day.	4—Final clearance day.
19—13th lay day.	

Days to Which W. L. Wittich is Entitled to Dispatch Money for British Steamship Muirfield.

June 16—1.	June 26—11.
17—2.	27—12.
18—3.	28—13.
19—4.	29—14.
20—5.	30—15.
21—6.	July 1—16.
22—7.	2—17.
23—8.	3— $17\frac{1}{2}$, being entitled to only one-half day.
24—9.	
25—10.	

The fifteenth clause of the charter party provides that charterers or their agents shall pay wharfage, custom house and quarantine dues, consular fees, pilotage in and out, etc. Charterer paid tonnage dues and port charges estimated on a basis of 1,957 tons British admeasurement, but insists that he is not liable for the additional tonnage tax levied by the customs officials on a resurvey of the vessel while in port, pursuant to the requirements of Rev. St. U. S. § 4153, as amended by Act Aug. 5, 1882, c. 398, § 1, 22 Stat. 300, and Act March 2, 1895, c. 173, § 1, 28 Stat. 741 (U. S. Comp. St. 1901, p. 2812), and section 4154, as amended by Act Aug. 5, 1882, c. 398, § 2, 22 Stat. 300 (U. S. Comp. St. 1901, p. 2821).

It would appear the additional tax is one of the custom house dues that by the terms of the charter were imposed upon the charterer, and, if it were not so intended, charterer should have exempted himself from such alleged extra charges by some definite exception, as that he would be liable only for tonnage dues on the tonnage expressed in the vessel's register.

Giving the clause of the charter as to lay days the construction indicated, and interpreting the provision as to custom house dues to include the legitimate charges made at the custom house necessary to the vessel's clearance, it follows that judgment will have to go against the charterer on his claim for dispatch money for 2½ days, as well, also, as the additional tonnage dues which the master paid.

UNITED STATES v. BREAKWATER CO.

(District Court, D. New Jersey. November 15, 1900.)

MASTER AND SERVANT (§ 18*)—CONTRACTORS FOR PUBLIC WORK—VIOLATION OF EIGHT-HOUR LAW—INFORMATION.

Act Aug. 1, 1892, c. 352, 27 Stat. 340 (U. S. Comp. St. 1901, p. 2521), which provides that it shall be a misdemeanor for any officer or agent of the United States, or any contractor for public work, to intentionally require or permit any laborer or mechanic to work more than eight hours in any calendar day, except in case of extraordinary emergency, makes it a separate offense in case of each laborer or mechanic so required to work more than eight hours, and a criminal information against a contractor for violation of such provision must set out the names of, or otherwise identify, the persons so alleged to have been unlawfully employed, that the accused may meet the charge intelligently, and be able to plead a conviction or acquittal in bar of any subsequent prosecution.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 18.*]

On motion to quash criminal information against the Breakwater Company. Motion sustained.

Francis C. Adler and John F. Lewis, for the motion.

Walter H. Bacon, Asst. U. S. Dist. Atty., opposed.

RELLSTAB, District Judge. The act upon which this criminal information is founded is entitled "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the public works of the United States and of the District of Columbia," approved August 1, 1892 (Act Aug. 1, 1892, c. 352, 27 Stat. 340, 4 Fed. St. Ann. p. 779 [U. S. Comp. St. 1901, p. 2521]). It expressly limits and restricts the services and employment of *all* laborers and mechanics by any contractor or subcontractor upon any of the public works of the United States to eight hours in any one calendar day, and makes it unlawful for such person, whose duty it shall be to employ, direct, or control the services of *such* laborers or mechanics, to require or permit *any* such laborer or mechanic to work more than eight hours in any such day. See section 1. It also declares that any such person, whose duty it shall be to employ, direct or control *any* laborer or mechanic, who shall intentionally violate any of the provisions of this act, shall be guilty of a misdemeanor, and for *each and every such* offense shall, upon conviction, be punished, etc. See section 2. (The italics are mine.)

The information alleges that the defendant—

"was a contractor upon public works of the United States, to wit, a certain jetty construction at Cold Spring Inlet; that as such contractor it was the duty of the said the Breakwater Company to employ, direct, and control the services of laborers and mechanics employed and working thereon; and on the 1st day of July, 1909, * * * did willfully, intentionally, and unlawfully require and permit said laborers and mechanics to work more than eight hours in the calendar day last aforesaid, to wit, ten hours and fifteen minutes in such day."

The grounds assigned in support of this motion are as follows:

"(1) Because it nowhere appears in and by the said information who are the laborers and mechanics the defendant is alleged to have intentionally required and permitted to work more than eight hours in one calendar day as set forth in the said information.

"(2) Because the information does not specially name the individual laborers and mechanics whom the defendant is alleged to have intentionally required and permitted to work more than eight hours in one calendar day as set forth in the said information.

"(3) Because it does not appear upon the face of the affidavit supporting the information that the more than eight hours in one calendar day which the defendant is alleged to have required certain laborers and mechanics to work was not occasioned by an extraordinary emergency within the meaning of the exception stated in the act of Congress for the breach of which this information is made."

The last ground was abandoned on the argument, and properly so, as it related only to the affidavit annexed to the information.

The assistant United States district attorney concedes that, if this act denounces as a misdemeanor the employment of each person on a given day for more than the restricted hours, the criminal information is defective. This concession is undoubtedly correct; for, if the defendant can be punished for each and every person so employed, it is entitled to know from such information who is the laborer or mechanic that it is said to have so employed, not merely to help in its defense as to such particular person, but for its protection if subsequently called upon to defend a like charge covering the same day. In an indictment for an offense, whether created by statute or otherwise, the facts constituting said offense must be set out with clearness and certainty sufficient for identification, in order that the accused may meet the

charge intelligently and may be able to plead a conviction or acquittal in bar of any subsequent proceedings. *State v. Spear*, 63 N. J. Law, 179, 42 Atl. 840; *Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399; *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830. See, also, cases in 27 Cent. Dig. 456.

The act makes it unlawful to require or permit any laborer or mechanic to work more than eight hours in one calendar day, except in cases of extraordinary emergency, and denounces the intentional employing of any laborer or mechanic beyond the restricted hours as a misdemeanor, and provides a penalty for each and every such offense. This language forbids a construction that but one offense can be committed in a given day. The only relation that the "day" has to the offense is in fixing the measure of time during which the permitted hours of labor are to take place. It is the employment of any of the prescribed persons for more than the restricted hours that is prohibited. If such transgression is repeated by the employment of other laborers or mechanics on the same day, each of such prohibited employments constitutes a distinct and separate offense.

The criminal information does not say whether one or more laborers or mechanics were thus employed. It does allege, after reciting that the defendant was a contractor employed upon certain public works of the United States, and that as such it was its duty to direct and control the services of laborers and mechanics employed on such work, that it did, on the day named, require and permit said laborers and mechanics to so work, etc. It does not say how many, or whom they were, either by name or other identification. Nor does it say that the names of the persons so employed were unknown. It argumentatively appears that all the laborers and mechanics who were under the direction and control of the defendant were so unlawfully employed. But this, even if it were the purpose of the pleader to so charge, cannot be done argumentatively. The criminal information, like an indictment, must allege the offense with certainty.

It is to be noted that the act does not prohibit the employment beyond the restricted hours of all employes, but only such as are embraced within the terms "laborers and mechanics." Undoubtedly the mere designation of identified persons as laborers or mechanics is sufficient to put the defendant to its defense; but the failure to designate the number and to identify the persons alleged to have been unlawfully employed is unjust to both the government and defendant. The government has a right to ask for separate convictions for each and every person so unlawfully employed in a given day, and the defendant has the right to have the persons identified, that it may intelligently defend the present charge, and, if subsequently called upon to defend for the same cause, to plead former jeopardy.

The motion to quash is granted.

ROCHFORD v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. November 20, 1909.)

No. 1,946.

1. TRIAL (§ 178*)—DIRECTION OF VERDICT—EFFECT OF MOTION.

A motion for an instructed verdict upon the ground of an insufficiency of the evidence presupposes that the witnesses testifying to the facts adduced to make a case for the party against whom the motion is made are worthy of credit, and challenges the sufficiency in law of such facts to sustain a verdict based thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 402; Dec. Dig. § 178.*]

2. TRIAL (§ 140*)—PROVINCE OF COURT AND JURY—CREDIBILITY OF WITNESSES.

The credibility of a witness is peculiarly a question for the jury, under proper instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

Credibility of witnesses as question for jury, see note to Missouri, K. & T. Ry. Co. v. Collier, 88 C. C. A. 143.]

3. TRIAL (§ 139*)—TAKING CASE FROM JURY—WEIGHT AND SUFFICIENCY OF EVIDENCE.

The mere fact that there is a preponderance of the evidence in favor of the party moving for an instructed verdict does not require the judge to take the case from the jury, even though it might justify the granting of a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

4. TRIAL (§ 139*)—TAKING CASE FROM JURY—WEIGHT AND SUFFICIENCY OF EVIDENCE.

If a plaintiff has produced material evidence sufficient, if believed and uncontradicted, to warrant a verdict, no amount of contradictory evidence will authorize the judge to take the question of its effect and weight from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

5. TRIAL (§ 178*)—DIRECTION OF VERDICT—EFFECT OF MOTION.

On a motion by defendant for an instructed verdict, it is the duty of the trial judge to give the plaintiff the benefit of every fair inference which might reasonably be drawn from the evidence by the jury, when guided by sound processes of reasoning and applicable principles of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401, 402; Dec. Dig. § 178.*]

6. MASTER AND SERVANT (§ 285*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY—CAUSE OF INJURY.

In an action by a switchman against the railroad company to recover for an injury by being struck by a switch engine while operating a switch in the yards, the allegations of the petition and the evidence in support thereof held sufficient, as to the manner in which the injury occurred, to require the submission of the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 174 F.—6

Action by George Rochford, by his next friend, Alice Rochford, against the Pennsylvania Company. Judgment for defendant on directed verdict, and plaintiff brings error. Reversed.

D. F. Anderson, for plaintiff in error.

W. C. Boyle, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. This is an action in tort by the plaintiff in error for an injury sustained while in the line of his duty as a yard switchman for the defendant railway company. At the close of all the evidence the court instructed the jury to return a verdict for the defendant. This is the only error assigned.

Rochford claims to have been struck, while handling a yard switch, by the tender of a yard engine while backing up. It was his duty as head brakeman to follow the engine and open and close switches. The switch he was required to handle in this instance was what is called a "double slip switch." It lay between two substantially parallel tracks, connecting them, and allowing movement in either direction by turning the lever placed about its center. The length of the entire switch was 42 feet. Thus it was 21 feet from the axle of the operating lever to the switch points at either end. The tracks connected by this device ran east and west and were parallel to one another; the device being just on the south side of the southerly of the two tracks. The switch bar or lever was a bar with a ball on the upper end, having a slot to enable the operator to grasp it. When set for a movement, this lever arm lies close to the ground parallel with the tracks; the lever being held secure between two iron posts forming a latch or catch. When this ball upon the end of the lever was pointing west, the switch was set for a western movement; and when pointing east, for an eastern movement. To change from one to the other, the operator, standing on the ground, grasped the iron ball, raised the lever up to a perpendicular position, and then pushed it clear over the other way, until the bar caught in the iron latch on the ground, which held it as set. The movement of the engine attended by Rochford involved the crossing of this double, or "puzzle," switch, as it is called, twice; that is, it came from the west upon one track, and was to be switched over and go east upon the other. Rochford rode upon the switchboard of the engine until opposite the switch lever, and then, getting off, crossed both tracks, grasped the ball of the lever, it being set for the westerly movement of his engine, raised it up, and turned it down to the ground, so that the ball was pointing east. In the meantime his engine was standing west of the switch points, waiting for a signal from Rochford that the switch was set. The claim of Rochford was that before he gave this signal, and before he had completed the operation of changing the switch, the engine moved backward, without warning, and struck him.

The evidence for the defense tended strongly to show that he did give the signal, which was then repeated by his conductor, and that

he was endeavoring to step upon the switchboard behind the moving tender, when he fell and was run over. The learned trial judge said to the jury that he was convinced that the plaintiff was hurt in attempting to get upon the tender, and instructed a verdict against him.

If there is material evidence tending to make a case upon which the jury might reasonably find a verdict for the plaintiff, it must be found solely in his personal testimony; for there are no facts in any other part of the evidence upon which a verdict could rest. That the conductor of the switching crew was the superior of Rochford under the Ohio fellow servant act is not disputed. That it was the duty of the engineer not to move until Rochford signaled the setting of the switch is also conceded. But the engineer was on the wrong side to get a signal from Rochford. The conductor of the switch crew was on the ground some distance east, and in plain view of this switch and of Rochford. He testified that Rochford gave the ready signal, and that he communicated it to the engineer. The fireman, from his side of the engine, could see Rochford; and he also testified that he saw Rochford give the signal, and so notified the engineer. If the conductor gave such signal before Rochford did, and thus caused a premature movement of the engine, his act, it is conceded, would be the negligent act of one standing as a vice principal under the Ohio statute. Rochford's side of the matter is that he gave no signal, that the engine moved back without warning, and that he was struck while engaged in the operation of the lever. Now, it is clear that, if Rochford testified to facts which, if credited and uncontradicted, would make out a case upon which a verdict might be rested, it was error to withdraw the case from the jury.

In support of the action of the court in directing a verdict, two points have been urged: First, that Rochford's evidence as to what he was doing when struck by the engine is in conflict with the allegations of his petition and other conceded or demonstrable facts of the situation; and, second, is self-contradictory upon vital points. We may lay upon one side any question of the credibility of Rochford as a witness, either because he contradicts himself, or because he is contradicted by other witnesses as to the facts material to a verdict in his favor.

A motion for an instructed verdict, upon an insufficiency in law of the evidence, presupposes that the witnesses testifying to the facts adduced to make a case for the party against whom the motion is made are worthy of credit. It is as if the party making the motion had demurred to the evidence and is equivalent to saying:

"We concede the truth of the facts which are relied upon to make a case for the plaintiff, or a defense for the defendant; but they are insufficient in law to support a verdict, which must be founded upon such facts."

The credibility of a witness is peculiarly a question for the jury, under proper instructions by the court. 1 Greenleaf on Evidence (14th Ed.) § 10; 6 Cyc. p. 694. Neither is the mere fact that there is a preponderance of the evidence in favor of the party moving for an instructed verdict enough to require the judge to take a case from the jury, even though it might justify a new trial. City, etc., Ry. v.

Svedborg, 194 U. S. 201, 24 Sup. Ct. 656, 48 L. Ed. 935; *Mt. Adams, etc., Ry. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596. If the plaintiff has produced material evidence, sufficient, if believed and uncontradicted, to warrant a verdict, no amount of contradictory evidence will authorize the trial judge to take the question of its effect and weight away from the jury. *Railroad Co. v. Slattery*, 3 App. Cases, 1155; *Insurance Company v. Doster*, 106 U. S. 30, 32, 1 Sup. Ct. 18, 27 L. Ed. 65; *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780.

But it is said that the testimony of the plaintiff upon the facts material, and, indeed, vital to any recovery by him, are in flat contradiction with undeniable physical conditions, which make his evidence incredible and create no real conflict of testimony. *Penn. Co. v. Whitney* (C. C. A.) 169 Fed. 572, 576. *Byers v. Carnegie Co.*, 159 Fed. 347, 86 C. C. A. 347, 16 L. R. A. (N. S.) 214 That a connection had been made before the engine moved in the direction of Rochford must be conceded. No movement of the switch itself was possible with the weight of even the rear wheels of the tender upon the switch points. It follows, therefore, that the operation of the setting of the switch must have been completed before the movement of the engine, at least far enough to make a sufficient connection to enable the engine to move out upon the switch as set for the movement out.

Upon this state of facts counsel say that it follows that the averment of the plaintiff's petition and the testimony of the plaintiff himself that he was struck while operating the switch is necessarily untrue and incredible. It was the duty of the trial judge, and also the duty of this court, when his action is assigned as error, to give the plaintiff the benefit of every fair inference which might reasonably be drawn from the evidence by the jury, when guided by sound processes of reasoning and applicable principles of law. Now it is said that the pleading estops the plaintiff by in substance and meaning charging that the movement of the engine which struck him occurred while he was operating the switch.

Recurring to the way this switch was handled: When Rochford started the movement, the lever was down on the ground, and the ball upon its end pointed west, or toward the engine, standing 21 feet away and just beyond the ends of the switch points to be moved. His back, when raising this lever up, was, as he says, toward the engine, and so continued while he pushed it down upon the other side, so that the ball would point east. The last operation connected with setting was to latch the switch lever bar down by means of a device close to the ground. Rochford says that he had some trouble about this, and had to use his foot to press the bar into the latching appliance. All of this time his back was to the engine. This operation of latching was for the purpose of holding the switch as set; the points being in connection with the rails from which the engine should come at one end and with the rails upon which it was to move at the other. The fastening of the latch, when the switch was set, must be fairly considered as a part of the operation of the switch lever. Neither does it necessarily follow that the points were not in proper connection with the rails at either end after the lever was pushed down, so as to point

east, although the operation of latching remained to be done as a security against accidental movement out of connection.

The allegation of the pleading was not, therefore, such a definite statement as to the stage of his operation of the switch lever as created an irreconcilable conflict with testimony tending to show that the engine might move upon the switch points before the operation of latching the bar down into its new position had been finished; and the jury might reasonably infer from the nature of the mechanism that such movement was possible before it was fastened down, even against a general statement to the contrary. Now Rochford testified that he did have difficulty in fastening down the lever bar, and had to use his foot to put it between the low posts forming the latch. That this was regarded by him as a part of the movement of operating the lever, and was the part which engaged him at the moment before his contact with the moving tender, is made plain by him in the course of his original examination, when, after speaking of his trouble in the matter of latching, he says:

"I went to straighten up. I stepped a little to the north, and had hardly gotten straightened up, when the engine hit me."

This account of the matter he repeated more than once upon his cross-examination. It must, however, be conceded that more than once upon his cross-examination he described the lever bar as only half way down, the ball standing upright, when he was struck. But he later restated the matter as in his original examination, by saying that the bar was down and pointing east, and the latch fastened, and that he was struck when raising up to turn and give the signal. The question as to whether the jury should believe the one statement or the other, or believe the witness at all, was a question for the jury. If, notwithstanding his contradictions, the jury should believe that the operation of latching had been just finished, and that he was hit when in the act of raising and turning to give the signal, he had a case to go to the jury upon the main issue as to whether he had not given the signal before the engine moved, or had done so, and was attempting to take his proper place upon the switchboard, and was hurt through one of the risks assumed as incident to his employment.

It is next suggested that he must have been endeavoring to get upon the switchboard when hit, because, if he stood where he says he stood, he could not have been hit as he says he was. The distance from the switch handle to the outside of the nearest rail of the track upon which the engine was moving was 50 inches. The overhang of the tender, including the projecting iron ring for holding a pushing pole, was 27 inches. This left only 23 inches of clear space. If we assume that Rochford's body was not beyond the line of the bar he was handling, this was a small space of safety. If, however, his body was in part between the bar and the rail, or if, as he says, he was raising up from a stooped position, and slightly stepping toward the rail and turning, he might well be within striking distance of this passing engine. The question was clearly one for the jury.

The judgment must be reversed, and cause remanded for a new trial.

JENSON v. TOLTEC RANCH CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1909.)

No. 3,020.

1. CORPORATIONS (§ 399*)—PRINCIPAL AND AGENT—PRINCIPAL BOUND BY APPARENT AUTHORITY WITH WHICH IT CLOTHES ITS OFFICER OR AGENT.

A corporation, like an individual, is bound to innocent third persons by the apparent authority with which it clothes its officer within the scope of his authority and within the powers of the corporation to the same extent as by the actual power it confers upon him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602–1610; Dec. Dig. § 399.*]

2. CORPORATIONS (§ 425*)—CORPORATION BOUND BY LONG ACQUIESCENCE IN LIKE ACTS OF OFFICERS OR AGENTS.

Where, without challenge by the other officers or by the stockholders of the corporation, an officer has exercised a power within the general scope of his actual authority and within the powers of the corporation to do certain acts in its name and on its behalf for such a length of time as to justify others in believing that his acts and management were within his lawful powers and approved by the corporation, the stockholders and the corporation are alike estopped from denying, to the prejudice or injury of parties who have acted in reliance upon his apparent authority, that he had actual authority to do similar acts in its behalf.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1700; Dec. Dig. § 425.*]

3. CORPORATIONS (§ 425*)—PRINCIPAL AND AGENT—ESTOPPEL TO DENY OFFICER'S AUTHORITY.

An officer of a corporation, who was empowered to sell and convey its land without the signature of any other officer, in its name bought and sold land, borrowed money, and secured its repayment by the pledge of its personal property and a land contract, and conducted all the business of the corporation for six years without protest or objection. He then borrowed money of a bank and secured its repayment by the conveyance of some of the land of the corporation.

Held, the corporation and its officers and stockholders were estopped from denying that he had authority so to do.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1700; Dec. Dig. § 425.*]

4. CORPORATIONS (§ 487*)—ULTRA VIRES—CONSIDERATION OF CONTRACT, A PART WITHIN AND A PART WITHOUT POWERS OF PROMISOR, NOT FATAL TO ITS ENFORCEMENT.

It is no defense to an action upon a contract executed by the promisee that a divisible part of its consideration was without the powers of the promisor corporation, if the other part was valuable, legal, and within them; for the promisee may waive the part without the powers of the promisor and recover upon the consideration within its powers.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 487.*]

5. CORPORATIONS (§ 487*)—CONTRACT TO REPAY MONEY EXPENDED FOR CORPORATION FOR ULTRA VIRES PURPOSE—LENDER'S KNOWLEDGE OF PURPOSE NO DEFENSE.

It is no defense to a suit to enforce a contract performed by the promisee to repay money loaned to or paid for a corporation, and it is no defense to a mortgage to secure such repayment that the lender or payor knew that the borrower intended to use, or was using, the money thus paid for an illegal purpose, or for a purpose beyond its corporate powers, provided

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the promisee did not combine to induce, and did not share in the benefits of, such use.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 487.*]

6. CORPORATIONS (§ 446*)—CONVEYANCES ULTRA VIRES AVOIDABLE IN EQUITY ONLY ON CONDITION PROPERTY RECEIVED OR ITS VALUE IS RESTORED.

Equity restores to corporations property with which they have parted by means of conveyances or contracts beyond their powers only on condition that they first restore the property, or the value of the property, which they have secured thereby, pursuant to the rule that "he who seeks equity must do equity."

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 446.*]

7. CORPORATIONS (§ 440*)—CONTRACTS—ULTRA VIRES—FACTS—CONCLUSION.

The T. Co., a corporation empowered to buy, sell, convey, mortgage, and deal in land and other property bought, without corporate authority so to do, stock of the P. Co., a corporation empowered to construct and operate an electrical plant and waterworks, and agreed to pay \$18,750 therefor. The two corporations requested the bank to guarantee a proposed contract of the P. Co. for pipe to the amount of about \$9,700, and to pay the checks of the P. Co. upon it for the expenses of improvements. It was about to make to an amount not exceeding \$18,750, in consideration that the T. Co. would convey to a trustee certain of its land and would pledge the stock it had bought to secure the repayment to the bank of the money so advanced. The bank granted the request, the T. Co. conveyed the land to a trustee and pledged the stock to secure the repayment of the money to be advanced, the bank paid out \$16,386.30 on the checks of the P. Co. in reliance upon this security, and then sued the T. Co. to foreclose the mortgage upon the land.

Held: (1) The contract of loan and the conveyance of the land by the T. Co. to secure the repayment of the money advanced by the bank were within the powers of that corporation and enforceable.

(2) Conceding that its purchase of the stock of the P. Co. was beyond its corporate authority, and that the bank knew it, those facts were not fatal to the contract of loan or to the mortgage.

(3) The fact that the indemnity for the guaranty of the contract of the power company with the pipe company was a part of the consideration of the loan contract was not fatal to a recovery by the bank thereon, because the loan of the money was a valid consideration for that contract, the agreement to repay it was within the corporate power of the T. Co., and the promisee might waive its contract of indemnity and rely upon the valid consideration.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 440.*]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Utah.

Bill by Joseph M. Jenson against the Toltec Ranch Company and the Box Elder Power & Light Company. Decree for defendants, and complainant appeals. Reversed and remanded, with directions.

The Toltec Ranch Company was a corporation of the state of California, empowered to buy, sell, mortgage, and deal in land, live stock, and general merchandise. Its home office was in San Francisco; but all its property was situated and all its business was conducted in the state of Utah by D. P. Tarpey, who was its president, general manager, and treasurer, who was authorized to buy, sell, and convey land for it, and who, from 1896, when it was organized, had conducted all its business under five directors, who held one share of stock each, and who acquiesced in all that he did. Its capital stock consisted of 1,000 shares, of which M. F. Tarpey of San Francisco, a brother of its president, held 995 shares as trustee to secure the repayment to him of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a debt of about \$57,000. Joseph M. Jenson, the complainant, was one of the owners of a private bank called the Bank of Brigham City, and acted as its president. The Toltec Company had an account with that bank, in which it had deposited funds and against which it had drawn checks that were honored for more than six years. It had borrowed money of that bank about 50 times, and had given its notes, a land contract, and notes of third persons to it as security for the repayment of the money it borrowed at various times. The Box Elder Power & Light Company was a corporation authorized to buy and lease land, and to buy, sell, operate, and deal in machinery and appliances to generate and distribute light and power. It was anxious to construct a new pipe line, an electric plant, and other improvements for the purpose of furnishing power and light to Brigham City, and to that end it had negotiated a contract of purchase of pipe and other materials for about \$9,735.08 from the Excelsior Wooden Pipe Company; but the latter company had refused to enter into the contract of sale until the Power Company's promise to pay the purchase price was guaranteed. The capital stock of the Power Company consisted of 1,000 shares, each of the par value of \$100.

Thereupon the Toltec Ranch Company and one Chase agreed with the Power Company that each of them would purchase of that company 298 of its shares, and that in consideration of the delivery of that stock to them they would pay to the Power Company \$18,750, to be used by that corporation in the construction of its pipe line and electric plant, and Chase agreed with the Toltec Company to deliver his share of this stock to the Toltec Company and to authorize it to pledge it to secure the repayment of money it was to borrow. Chase performed his part of this contract, so that the Toltec Company acquired the control of 498 shares of the stock of the Power Company. The Toltec Company, Chase, and the Power Company then made this contract with the bank. The bank, at the request of the Toltec Company and the Power Company, agreed, in consideration of the conveyance by the Toltec Company to Jenson as trustee of certain lands, which are the subject of this suit, and of its pledge of the 498 shares of stock of the Power Company, to secure the repayment to it of the moneys to be advanced by it, to guarantee the payment by the Power Company of the purchase price of the pipe and materials to be bought by it of the Excelsior Company, and to pay its checks on account of this purchase price and on account of other expenses of constructing its pipe line and electric plant, to an amount not exceeding \$18,750, and the Toltec Company agreed to convey the land and to pledge the stock to secure the repayment to the bank of the moneys it should expend, either on account of this guaranty or on account of the payment of the checks of the Power Company. In fulfillment of this agreement the Toltec Company conveyed the land and the 498 shares of stock to Jenson as trustee on June 25, 1903, the bank guaranteed the payment of the purchase price of the pipe and materials on July 3, 1903, and thereafter paid upon the checks of the Power Company \$9,735.08 for the pipe, and other sums for other expenses of construction, so that the whole amount thus advanced by it was \$16,386.30. On November 2, 1903, the bank had paid out \$14,000 of this amount, and it then requested the Power Company to execute, and it did make, its promissory notes for that amount, and it paid interest thereon for about two years, but it has never paid more, and it now denies liability thereon.

The Toltec Company refused to repay to the bank any part of the \$16,386.30, and Jenson, who had become the sole owner of the claim of the bank, brought suit against the Toltec Company and the Power Company, and prayed for a judgment against each of them and for the sale of the land to pay the debt. The Toltec Company denied all the material averments of the bill, and filed a cross-bill in which it alleged that the deed of the Toltec Company was beyond the powers of that corporation, because it was made to secure the payment of a guaranty of another's debt and to borrow money to pay the purchase price of the stock of another corporation, and it prayed that the complainant be required to reconvey the land to it, and that it might be absolved from all liability on account of its purchase of the stock of the Power Company. Issues were joined on the allegations of the bill and answer by all the parties to the suit, and upon the averments of the cross-bill by the Toltec Company; but the Power Company was not made a party to the cross-suit. Evidence was taken

which established the facts that have been recited in the earlier part of this statement, and upon the final hearing the court dismissed the bill, and entered a decree that the complainant should reconvey the land to the Toltec Company, because its conveyance to Jenson to secure the guaranty of the bank and to secure its payment of the checks of the Power Company was beyond the powers of the Toltec Company and dehors the authority of its president.

Cornelius A. Boyd (Charles C. Richards, on the brief), for appellant.

C. C. Dey (John A. Street, on the brief), for appellee Toltec Ranch Co.

Hiram E. Booth, E. O. Lee, and Carl A. Badger, for appellee Box Elder Power & Light Co.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). A corporation, like an individual, is bound to innocent third persons who act without reasonable cause to believe that a defect of power exists, by the apparent authority with which it clothes its agent within the scope of his general authority and within the powers of the corporation, to the same extent as by the actual power it confers upon him. *Merchants' Bank v. State Bank*, 77 U. S. 604, 644, 19 L. Ed. 1008; *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. Bryant*, 65 Fed. 969, 973, 13 C. C. A. 249, 253; *Dysart v. Missouri, Kansas & Texas Ry. Co.*, 122 Fed. 228, 231, 58 C. C. A. 592, 595. Where, without challenge by the other officers or stockholders of a corporation, an officer has exercised the power, within the general scope of his actual authority and within the powers of the corporation to buy and sell property, to borrow money, and to secure its repayment by the pledge of a land contract and some of its personal property, to conduct all its business, and to do these things in its name and on its behalf for such a length of time as to justify others in believing that his acts and his management were within his powers and were approved by his corporation, its directors and stockholders, the corporation, its officers and stockholders, are alike estopped from denying, to the prejudice or injury of those who have acted in reliance upon his apparent authority, that he had actual authority to do acts of a similar nature on its behalf. *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; *G. V. B. Mining Company v. First Nat. Bank*, 95 Fed. 23, 30, 36 C. C. A. 633, 640.

For more than six years before the transaction at issue, D. P. Tarpey had managed all the business of the Toltec Company, had bought and sold real and personal property for it and in its name, had borrowed money many times, and had secured its repayment, sometimes by the pledge of personal property and once by the assignment of a land contract. No stockholder or officer of the company had ever objected to any of his acts, and the bankers of Brigham City had no notice that any of them were disapproved or unauthorized. The corporation was expressly empowered under its articles of incorporation to buy, to sell, to convey, and to mortgage its real estate and to hypothecate its personal property. Tarpey was its president, its general manager, and its treasurer, and he was expressly authorized to sell

and to convey its land without the signature upon its deeds of any other officer of the corporation. In this state of the case there is no escape from the conclusion that the Toltec Company and its stockholders are estopped from denying that he had full authority to borrow money for it and in its name, to secure the repayment of that money by a conveyance of its land, or by the pledge of its personal property, and to do any other act within the limits of the lawful powers of the corporation.

The Toltec Company, by Tarpey, requested the bank to guarantee the contract with the Pipe Company and to pay the checks of the Power Company to an amount not exceeding \$18,750, and it agreed to and did convey its land to Jenson, as trustee, in order to induce the bank to advance this money and to secure the repayment of it after it should be thus expended. The bank granted its request and paid out \$16,386.30 thereon. The legal effect of this transaction was that the Toltec Company borrowed this amount from the bank and mortgaged its land to secure the payment of its debt. Why, then, should not the mortgaged land be applied to the payment of this obligation? Counsel answer, because the Toltec Company had no corporate power to purchase the stock of the Power Company, so that it never owed that company \$18,750, and it had no corporate power to indemnify the bank for guarantying the obligation of the Power Company to pay the Excelsior Company for the pipe. In support of these propositions they cite decisions in suits to enforce contracts which were beyond the powers of the defendant corporations, such as *Park Hotel Company v. Fourth Nat. Bank*, 86 Fed. 742, 747, 30 C. C. A. 409; *Humboldt Mining Co. v. American Manufacturing Min. & Mill. Co.*, 62 Fed. 356, 361, 10 C. C. A. 415; *Evans v. Johnson*, 149 Fed. 978, 980, 79 C. C. A. 488; *In re S. P. Smith Lumber Co. (D. C.)* 132 Fed. 620, 621; *De La Vergne Co. v. German Savings Inst.*, 175 U. S. 40, 59, 20 Sup. Ct. 20, 44 L. Ed. 65; *Vandagriff v. Rich Hill Bank*, 163 Fed. 823, 824, 90 C. C. A. 129; *McCormick v. Market Bank*, 165 U. S. 538, 550, 17 Sup. Ct. 433, 41 L. Ed. 817; *Ward v. Joslin*, 186 U. S. 142, 152, 22 Sup. Ct. 807, 46 L. Ed. 1093. But this is not a suit upon a contract beyond the powers of the defendant corporation. Conceding, without deciding, that the indemnity for the guaranty and the purchase of the stock were ultra vires the Toltec Company, how does that fact bar the bank from the application of this security to the payment of the money borrowed of it by the Toltec Company? This is not a suit to enforce the Toltec Company's agreement to purchase the stock of the Power Company, or its contract of indemnity for the guaranty. Neither of those contracts is the basis of, or is in any way material to, this suit. Neither the bank nor Jenson was a party to the contract for the purchase of the stock, and the contract of indemnity for the guaranty has been executed and is not material to the validity of the contract of loan, because the latter contract is supported by another valuable consideration which is within the powers of the Toltec Company. The payment of the checks of the Power Company at the request of the Toltec Company was ample consideration for the agreement to repay the money so advanced and for the conveyance

of the land to secure it; and a contract or obligation which is executed by the promisee, and is sustained by a legal and valuable consideration which the promisor had the power to give, may not be defeated because the promisor also agreed to give another consideration which it was beyond its corporate power to bestow. The promisee may waive the unauthorized consideration and rely upon that which was within the power of the corporation. *Lincoln Sav. Bank & Safe Deposit Co. v. Allen*, 82 Fed. 148, 152, 27 C. C. A. 87, 91; *Navigation Co. v. Winsor*, 20 Wall. 64, 70, 22 L. Ed. 315; *Illinois Trust & Sav. Co. v. Arkansas City*, 76 Fed. 271, 280, 22 C. C. A. 171, 180, 34 L. R. A. 518; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.* (C. C.) 11 Fed. 1, 4, and cases cited in the note on page 12.

The Toltec Company had undoubted power to borrow \$16,386.30 of the bank and to mortgage its land to secure the repayment of this money. It exercised that power. It borrowed the money and conveyed the land to secure its repayment. The only purpose of this suit is to apply that land, the title to which was conveyed by the Toltec Company to Jenson, to the purpose for which it was deeded, to the payment of that debt. But the bankers knew, say counsel for the Toltec Company, that the money which that company was borrowing from it, and which it requested the bank to pay to the Power Company, would be applied by the Toltec Company and the Power Company to the payment of the former's unenforceable obligation to pay for the stock which it had not the corporate power to buy.

In *Farmer v. Russell et al.*, 1 Bos. & Pul. 295, it was held that if A. is indebted to B. on a contract forbidden by law, and pays the money to C., for the use of B., a court will give judgment in favor of B., against C., for the money, although B. could not have recovered against A. In *Armstrong v. Toler*, 11 Wheat. 258, 273, 6 L. Ed. 468, goods of Armstrong, Toler, and others had been shipped from New Brunswick to the United States during the War of 1812, in violation of the law. They were seized by the government and delivered to the agents of the claimants on the stipulation of Toler to abide the event of the suit. Thereupon Toler delivered to Armstrong the latter's part of the goods, in consideration of his promise to pay Toler his proportion of any sum for which Toler might become liable if the goods were eventually condemned. They were condemned. Toler paid their appraised value, and sued Armstrong for his proportion of it. Armstrong defended on the ground that his promise arose out of, and was made to carry out, the illegal contract of purchase and importation; but Chief Justice Marshall said:

"The general proposition stated by Lord Mansfield, in *Falkney v. Reynous*, that if one person paid the debt of another, at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law has never been held to alter the case."

The purchase of the stock by the Toltec Company was not prohibited by either the moral or the civil law. It was merely unauthorized. The bank did not request or induce the Toltec Company to make that purchase, and it never derived any benefit from it. It did not request the

Toltec Company to borrow money of it to pay the checks of the Power Company for the construction of the electric plant and other improvements. On the other hand, the Toltec Company besought the bank to make the loan, and offered to convey, and did convey, its land to Jensen, as trustee, to induce the bank to advance this money and to secure its repayment. This contract was not beyond the powers of the Toltec Company. The considerations which induced it, the debt and the conveyance of the land to secure its performance by the Toltec Company on the one hand, and, on the other, the promise to advance and the subsequent payment of the money, were new considerations subsequent to and apart from the purchase of the stock; and the fact that the bank knew that the money was to be applied, and was applied, to the payment of its purchase price, constitutes no defense to this suit to enforce its agreement to pay its debt for money borrowed. It is no defense, to a suit to enforce a contract that has been performed by the promisee to repay money loaned to or paid for another and to foreclose a mortgage to secure that repayment, that the lender or the payor knew that the borrower intended to use, or was using, the money for an illegal purpose, or a purpose beyond its corporate powers, where the lender or payor did not combine or conspire with the borrower to induce such a use and did not share in the benefits thereof. *Wald's Pollock on Contracts* (3d Ed.) 485; *Armstrong v. Toler*, 11 Wheat. 258, 273, 6 L. Ed. 468; *Armstrong v. American Exchange Bank*, 133 U. S. 433, 469, 10 Sup. Ct. 450, 33 L. Ed. 747; *Hanover Nat. Bank v. First National Bank*, 109 Fed. 421, 48 C. C. A. 482; *Kansas City Hydraulic Press Brick Co. v. National Surety Co.* (C. C. A.) 167 Fed. 496, 501; *Waterbury v. McKinnon*, 146 Fed. 737, 77 C. C. A. 294, 296; *Ingraham v. National Salt Co.*, 130 Fed. 676, 681, 65 C. C. A. 54, 59; *Taylor v. Mining Company*, 79 Cal. 285, 287, 21 Pac. 753; *Illinois Trust & Sav. Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197, 201; *Holman v. Johnson*, 1 Cowp. 341; *Faikney v. Reynous*, 1 Burr. 2069; *Pellecat v. Angell*, 2 Crompt., Mees. & Ros., 311; *Hodgson v. Temple*, 5 Taunt. 181; *Marion Trust Co. v. Crescent Loan & Investment Co.*, 27 Ind. App. 451, 61 N. E. 688, 691, 87 Am. St. Rep. 257; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 909, 12 Am. St. Rep. 412; *First National Bank v. Dovetail Body & Gear Co.*, 143 Ind. 550, 40 N. E. 810, 812, 52 Am. St. Rep. 435; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Thompson v. Lambert*, 44 Iowa, 239, 245.

There are other considerations, upon which it is unnecessary to dwell, which would lead to the same practical result in the case in hand. If the loan contract had been, like the contract to purchase the stock of the Power Company, beyond the corporate powers of the Toltec Company, there would be no equity in the restoration to the Toltec Company of its land, or the restoration of the stock to the Power Company, before the moneys which these corporations procured of the bank upon these securities were repaid to it. Courts of equity do not restore money or property to corporations that have obtained them by means of contracts or conveyances beyond their powers, until those corporations first restore the money or property they have secured thereby, or its value. He who seeks equity from these courts must first do

equity. *Logan County Bank v. Townsend*, 139 U. S. 67, 72, 77, 78, 11 Sup. Ct. 496, 35 L. Ed. 107; *Central Transportation Co. v. Pullman's Car Company*, 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55; *Pullman's Car Company v. Transportation Company*, 171 U. S. 138, 150, 151, 18 Sup. Ct. 808, 43 L. Ed. 108; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473; *In re Hovey's Estate*, 198 Pa. 385, 48 Atl. 311, 315; *Dunlop v. Mercer*, 156 Fed. 545, 553, 86 C. C. A. 435, 443.

The argument of counsel that the Toltec Company derived no benefit from the loan contract because, at its request, the proceeds of it were paid to the Power Company, and hence that it could not be required to return anything as a condition of the reconveyance of its property, has received careful consideration. But it is not convincing. The Toltec Company obtained, and it never returned, but pledged to the bank, the stock of the Power Company. Notwithstanding the invalidity of its purchase, it was liable to the Power Company to return that stock, or to pay, not its purchase price under the contract, but its value at the time of its conversion. It could not keep the stock without any liability. It kept it, and converted it to its own use by its pledge of it to the bank. While its contract of purchase was not enforceable, its possession of the stock and its conversion of it to its own use rendered it liable on the quantum meruit for the value of the stock at the time of its conversion, and this value, in the absence of other evidence, was its purchase price. *Logan County Bank v. Townsend*, 139 U. S. 67, 72, 77, 78, 11 Sup. Ct. 496, 35 L. Ed. 107. At the request of the Toltec Company the money which that company borrowed, \$16,386.30, was applied to the payment of that liability, and under the rule and the authorities which have been cited above the Power Company cannot recover the stock until it repays to the Toltec Company this sum of money. It cannot, therefore, be held that the Toltec Company derived no benefit from this loan contract. It secured all the benefit that could be derived from it, and the fact that the stock may have become worthless since it caused this \$16,386.30 to be paid on its liability is not material to this suit, because, if that payment had not been made, its liability to the Power Company would have been greater by that amount.

The conclusion of the whole matter is that the loan contract and the conveyance of the land to secure the repayment of the money were within the powers of the Toltec Company, and were enforceable, and that, if they had been ultra vires of that company, the bank fully performed its part of the contract, and the Toltec Company would not have been entitled to a reconveyance of its land until it had repaid the \$16,386.30 and interest, which it received and applied to the payment of its liability to the Power Company. The evidence has convinced that the bank advanced its money at the request of both defendants, and that they are both indebted to it therefor, but that between the two defendants the Toltec Company is the principal debtor and the Power Company its surety.

The decree below must be reversed, and the case must be remanded to the Circuit Court, with directions to dismiss the cross-bill, to ascer-

tain the amount of the debt, and to enter a decree for the complainant for the relief prayed in his bill. It is so ordered.

NOTE.—The following is the opinion of Marshall, District Judge, in the court below:

MARSHALL, District Judge. The plaintiff seeks to have a deed executed in the name of the Toltec Ranch Company declared a mortgage to secure two certain promissory notes made by the defendant the Box Elder Power & Light Company, and a balance of an open account against that defendant, and for a foreclosure of the mortgage. The indebtedness, while in the name of the Box Elder Power & Light Company, is alleged to be the indebtedness of both of the defendants. The answer of the Toltec Ranch Company denies its liability for this indebtedness, and alleges a want of authority to enter into the transaction in the corporation, and also in its president, who executed the deed, and by cross-bill seeks to have a reconveyance of the property so deeded, and also to have declared void a subscription to one-half of the capital stock of the Box Elder Power & Light Company. No subpoena was sued out on this cross-bill; but it was served on the counsel for the plaintiff, and the plaintiff has answered. No service was had on its codefendant, and no answer interposed by that defendant. The Box Elder Power & Light Company answered the plaintiff's bill and admitted the execution of the notes, but alleged that the indebtedness was that of D. P. Tarpey, or of the Toltec Ranch Company, and that its notes were unauthorized, because given as security for the debt of another.

The facts, so far as necessary to a decision, are these: D. P. Tarpey, the president and general manager of the Toltec Ranch Company, in the name of that company, undertook to subscribe for one-half of the capital stock of the Box Elder Power & Light Company, and, in payment of this subscription, agreed to pay to the credit of that company into the Bank of Brigham City (a copartnership composed of the plaintiff, Jensen, and John Pingree), the sum of \$18,500. The Box Elder Power & Light Company needed ready money, and also required a bond for the execution by it of a certain contract it had entered into. Tarpey and the officers of the Box Elder Power & Light Company entered into an arrangement with the Bank of Brigham City, by which the bank executed the bond and agreed to advance the needed money, and Tarpey, to secure it, in the name of the Toltec Ranch Company, executed the deed in question, and also pledged to it one-half of the capital stock of the Box Elder Power & Light Company so subscribed for. Throughout the transaction Tarpey acted in the name of, and under the claimed authority of, the Toltec Ranch Company. That company, by its articles of incorporation, was authorized "to carry on the business of buying, owning, holding, leasing, hiring, contracting for, selling, mortgaging, hypothecating, trading, trafficking, managing, and generally dealing in land and live stock; also for the purpose of carrying on a general merchandise and mining business in the United States of America, the republic of Mexico and the Dominion of Canada." By resolution of the board of directors of the Toltec Ranch Company, D. P. Tarpey was authorized "to sell or contract to sell any and all such parts of the real estate of the said company and any and all water rights of the said company to whomsoever he may see fit, on such terms and conditions and for such prices as he may deem advisable, and execute, in the name of the company, deeds or contracts for deeds conveying the land or lands and water to such parties as may be necessary, and he is further empowered to affix the name and corporate seal of said company to all such instruments"; and this appears to have been the only express authority vested in him, and was the resolution recited in the deed to the plaintiff as authority for its execution.

D. P. Tarpey's relations to the Toltec Ranch Company were somewhat indefinite. He came to Utah from California with money furnished by his brother, M. F. Tarpey, for the purpose of dealing in railroad land. The inference seems justified that at that time the interest of M. F. Tarpey was that of a creditor, and the entire profits of the enterprise were understood to belong to D. P. Tarpey. After some years of such dealing, and after M. F. Tarpey had advanced a large sum of money, and profit had not resulted, the Tol-

tec Ranch Company was formed to take over the business. About one-quarter of its stock was then issued to M. F. Tarpey, trustee, and one share was issued to each director, including D. P. Tarpey. The remainder of the shares were held in the treasury of the company. The stock held by M. F. Tarpey, trustee, was to secure him for his advances. Some time thereafter, but prior to the transaction in question, there was an accounting between M. F. Tarpey and the company, at which it was determined that the corporation owed M. F. Tarpey \$57,500, and all of the treasury stock was then issued to him as trustee. It is fairly to be inferred that all of this stock was held by him to secure the repayment of his advances. There seems to have been no definite agreement as to the ownership of the stock after the payment of the indebtedness of the company; but, in view of the prior transactions between the brothers, it is probable that any net profits were tacitly understood to belong to D. P. Tarpey. After a certain period in the history of the company M. F. Tarpey became distrustful of the business capacity of his brother, and intended that the ultimate profits of the speculation should be given to D. P. Tarpey's wife and children; but there is no evidence that D. P. Tarpey ever assented to this, and it is not important here.

The argument is made that D. P. Tarpey was in fact the Toltec Ranch Company and could embark it in any business that he wished. This cannot be conceded. The state chartering a corporation has an interest that such corporation be restricted to the business it is authorized to transact, and the creditors of the corporation have an especial interest in such restriction. M. F. Tarpey was the only substantial shareholder, and, even if the shares held by him were for his protection as a creditor, it was necessary for that protection that the company should not be permitted to embark in any speculation foreign to the business it was authorized to transact. It is next contended that the Toltec Ranch Company is estopped to plead *ultra vires* because it had held D. P. Tarpey out as an unlimited agent. There is no evidence that any officer or agent of the company, other than D. P. Tarpey, ever had any notice of the particular transaction until after its completion and shortly before its repudiation to the plaintiff's knowledge, or that the company ever received any benefit from it. There is, likewise, no evidence that any such officer or agent ever had any notice of any similar transaction on the part of D. P. Tarpey, or of any attempt by him to transact business in the name of the company which was beyond its corporate powers. So that there is nothing in the record on which to predicate the plaintiff's contention. Beyond this, the want of power inhered in the corporation. It is not a case of the failure to observe some formality in the doing of an act the corporation was competent to perform. The attempt here was to do something that the corporation could not do in any form, and was, therefore, *ultra vires* in its strict sense, and could not be ratified. All of the facts were known to the plaintiff at the time of the execution of the deed, except, perhaps, the exact corporate powers of the Toltec Ranch Company; and of those powers he was required to take notice when he undertook to transact business with that company.

It follows that the case of the plaintiff against the Toltec Ranch Company wholly fails, and that the defendant is entitled to a decree on its cross-bill for a reconveyance. No relief can be granted to the Toltec Ranch Company against the Box Elder Power & Light Company in respect to the subscription for shares, because no service of the cross-bill was had on that company, nor has it voluntarily appeared to it. No relief can be given the plaintiff on the notes of the Box Elder Power & Light Company, because the equity of the plaintiff's bill has wholly failed, and its remedy on the notes is at law. The principle is stated in *Dowell v. Mitchell*, 105 U. S. 430, 432, 26 L. Ed. 1142, that "the rule is that, where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill which turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice." No relief was sought by the plaintiff with respect to the shares of the Box Elder Power & Light Company held by him.

The bill of the plaintiff will be dismissed without prejudice to an action at law on its notes and indebtedness, and the defendant the Toltec Ranch Company will have a decree for the reconveyance of its land.

MESA MARKET CO. v. CROSBY et al.

(Circuit Court of Appeals, Eighth Circuit. October 11, 1909.)

No. 2,842.

1. LANDLORD AND TENANT (§ 5*)—CONTRACTS OF SALE—VALIDITY OF CONDITION—CONVERSION OF CONTRACT INTO LEASE ON DEFAULT.

A provision in a contract for the sale of real estate, under which the purchaser is given possession, that if he shall make default in the performance of any of his engagements the vendor may resume possession and terminate all rights of the purchaser, and that in such case the contract shall become one of lease, and any payments by the purchaser or improvements made on the property shall be considered as rental, is valid and enforceable.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 3; Dec. Dig. § 5.*]

2. VENDOR AND PURCHASER (§ 148*)—BREACH OF CONTRACT BY VENDOR—DEMAND FOR PAYMENT IN PARTICULAR MANNER.

Where vendors of real estate in Colorado resided in Boston, in the absence of a contrary provision in the contract, the purchase money was payable there; and where tender of the deed was made by their agent in Colorado, a demand for payment by certified check was for less than legally demandable, and did not constitute a substantial breach of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 293; Dec. Dig. § 148.*]

3. VENDOR AND PURCHASER (§§ 133, 350*)—ACTION BY PURCHASER FOR BREACH OF CONTRACT—DEFECT IN TITLE—BURDEN OF PROOF.

Under a contract for the sale of real estate, which required the vendors to convey "by a good and sufficient warranty deed in the usual form," they are not bound to convey by a title deducible of record; and where the purchaser refused to accept the deed tendered, and sued at law for damages for breach of the contract, on the ground that the deed tendered did not comply with its requirements, he assumes the burden of proving that it did not convey a good title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234-237; Dec. Dig. §§ 133, 350.*]

4. COVENANTS (§ 68*)—COVENANTS RUNNING WITH THE LAND—COVENANT BY CONTRACT PURCHASER TO KEEP BUILDINGS IN REPAIR.

In a contract for the sale of real estate, under which the purchaser is given possession, and which provides that it shall be binding on the heirs, executors, assigns, and successors of the respective parties, a covenant by the purchaser to make all repairs proper and needful for the suitable maintenance of the buildings and improvements then on the property is one which runs with the land and is binding on an assignee of the purchaser.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 65, 66; Dec. Dig. § 68.*]

5. APPEAL AND ERROR (§ 173*)—ISSUES AND QUESTIONS IN LOWER COURT—ASSERTING NEW DEFENSE IN APPELLATE COURT.

Where the answer to a cross-complaint in an action at law, pleading a counterclaim, was merely a general denial, and the issue of fact thus joined was tried, submitted to the jury, and determined without objection, and without any other defense to the counterclaim being suggested, the question whether defendant was barred by estoppel from maintaining such counterclaim cannot be considered for the first time in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1102; Dec. Dig. § 173.*]

Philips, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

Action by the Mesa Market Company against Henry V. Crosby, as administrator of the estate of Lucy Crosby, deceased, and others. Judgment for defendants on cross-complaint, and plaintiff brings error. Affirmed.

This was an action at law brought by the Market Company to recover damages for an alleged breach of an agreement made by defendant Crosby and other heirs of one Henry D. Fales to sell and convey to plaintiff's assignor, the Colorado Implement Company, certain lots of ground situate in the city of Pueblo, Colo. The agreement bore date May 6, 1899, and obligated the heirs, upon the payment of \$12,000 in certain installments and at certain fixed times, to sell and convey "by a good and sufficient warranty deed in the usual form" the lots in question to the Implement Company. It provided that possession be forthwith given to the Implement Company, and retained by it until default should occur in the performance of some of the stipulations of the agreement on its part; that the Implement Company and its successors should pay all taxes and assessments as and when they became due, and make all repairs proper and needful for the suitable maintenance of the buildings and improvements on the premises; that upon default by the Implement Company in the performance of any of its engagements the heirs should have the option to resume possession of the premises, including improvements made thereon, and thereby terminate all rights of the Implement Company under the contract; and in such event any installments of the purchase price which might have been paid and any improvements which might have been made were to be considered as the rental of the premises during occupancy by the Implement Company. It was alleged in the complaint that although the plaintiff was ready, willing, and able to make full payment, as permitted by an alternative provision of the contract allowing anticipation of final payment, in 1905, and although the plaintiff then tendered such payment and demanded the required deed of conveyance, the defendants declined and refused to make it unless the plaintiff would pay the further sum of \$3.25, which the defendants claimed to have been compelled to pay for telegraphic service connected with the deal, and would also make the payment of the amount due in the form of a certified check payable to William P. Hale. It was claimed that these requirements were unwarranted, and constituted a breach of the contract by defendants, which justified plaintiff in refusing to accept the deed tendered by them. Plaintiff also alleged that the defendants broke the contract by refusing to execute and tender to it "a good and sufficient warranty deed in the usual form," in this: That the deed offered did not convey a marketable title deducible of record.

The defendants, for answer to the complaint, denied that plaintiff was ready, able, or willing to pay the amount due as required by the contract, and denied that plaintiff ever tendered such an amount to the defendants, but averred that they were ready and willing to convey a good and sufficient title by warranty deed in the usual form to plaintiff, and offered to do so, but that plaintiff without lawful excuse refused to receive the same and make payment therefor, according to the terms of the contract. Defendants then by way of cross-complaint or counterclaim alleged that the plaintiff, while in possession of the premises as assignee of the Implement Company from March 25, 1902, until March 6, 1906, failed to make the repairs thereon which were proper and needful for the suitable maintenance of the premises, and thereby violated the stipulation of the contract obligating the Implement Company and its successors so to do, and damaged the defendants in the sum of \$5,000, for which they prayed judgment against the plaintiff. The answer to this cross-complaint merely denied that plaintiff had failed to make the required proper and needful repairs.

Upon these issues the cause went to trial before a jury. The court instructed a verdict in favor of the defendants on plaintiff's cause of action, and submitted the issue of fact tendered by the counterclaim to the jury for

its determination. The jury found for defendants thereon, and assessed their damages in the sum of \$750. Thereupon the case was brought here on error. The errors assigned are that the trial court erred in instructing a verdict for the defendants upon plaintiff's cause of action for two reasons: First, because the evidence showed that the defendants exacted, as a condition to their conveying the property to the plaintiff, the payment of \$3.25 for money paid by them for telegraphing incident to closing the deal, and also required payment of the amount due under the contract in the form of a certified check payable to William P. Hale; and, second, because the record showed that the defendants did not and could not offer to convey the premises "by a good and sufficient warranty deed in the usual form," as required by the contract, in this: That they did not and could not tender a marketable or perfect title as shown by the land records. It is also claimed that the court committed certain errors in submitting the counterclaim to the jury, which will be stated in the opinion.

Miles G. Saunders and Alva B. Adams, for plaintiff in error.
Robert S. Gast, for defendants in error.

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). To avoid unprofitable repetition, the Implement Company and its assignee, the Mesa Market Company, will be referred to indiscriminately in this opinion as the purchaser, unless otherwise specified.

The contract in question was primarily one for the sale of real estate. The purchaser was to be given quiet and peaceable possession, and any default in the performance of the undertakings imposed upon it entitled the vendors to resume possession and terminate the right to purchase. If the option should be exercised, all installments of purchase price paid and all improvements added to the premises were to be regarded as rental of the premises during the occupancy of the purchaser. In other words, the lawful exercise of the right to resume possession ipso facto converted the contract of sale into one of lease. There is abundant authority to the proposition that where a purchaser goes into possession of premises under a contract of purchase, and afterwards makes default and refuses to complete the purchase, he may be treated as a tenant at the option of the vendors, and be held liable for use and occupation, even without a stipulation in the contract to that effect. 2 Warvelle on Vendors, § 882; Whittier v. Stege, 61 Cal. 238; Woodbury v. Woodbury, 47 N. H. 11, 90 Am. Dec. 555; Patterson v. Stoddard, 47 Me. 355, 74 Am. Dec. 490; Smith v. Wooding, 20 Ala. 324.

But we are not compelled to so hold in this case, because the contract of purchase by necessary implication of its provisions creates the relation of landlord and tenant as a consequence of default by the purchaser in the performance of its engagements. In October, 1905, the vendors asserted the right to resume possession because of a default in the payment of \$4,000 which became due, as a part of the purchase price, on May 6, 1905, and later, in March, 1906, secured possession by a voluntary surrender thereof by the purchaser, not, however, until they had instituted a suit for that purpose. The evidence conclusively shows the failure to make the required payment by the purchaser and the exercise of the right to terminate the contract obligation to sell

by the vendors. These propositions are not seriously controverted; but the purchaser's contention is that prior to such termination it tendered the amount due according to contract, and that the tender was wrongfully refused.

The contention of the vendors is that the purchaser never tendered payment at all, but that they were ready to and did tender a conveyance conforming in all respects to the requirements of the contract, and that the purchaser refused to accept and pay for the same. The controversy between the parties is, therefore, reduced to a question as to which first committed a breach of the contract.

Much discussion was had by counsel as to whether the Market Company made a legal tender of the purchase price of the lots, as it was required to do before demanding a deed (*Michigan Home Colony Co. v. Tabor*, 141 Fed. 332, 72 C. C. A. 480); but this need not be considered by us. The parties seem to have passed beyond that issue by continuing negotiations for the consummation of the deal thereafter, and the only questions for our consideration, according to the assignment of errors, are (1) whether the vendors first broke the contract by exacting as conditions to making the conveyance the payment of the telegraphic charges and requiring that payment be made in a certified check as already stated; (2) whether they did so by not tendering a deed conveying a marketable title—that is, one deducible of record. Of these things in their order.

Little attention need be given to the claim that the contract was broken by demanding payment of the telegraphic charges. That was a trifling matter, and during subsequent negotiations the demand was waived, and the matter was left exclusively to the plaintiff's sense of fairness. Little also need be said concerning the next question. The vendors lived in Boston, and, if a proper legal tender was made to their agent in Colorado, it should have been in lawful money. The demand for a certified check was not for a check or other exchange on Boston, which, being the place of defendants' residence, in the absence of a provision of the contract to the contrary, was the place of payment, and the place where the tender should have been made, but was for a certified check merely. This demand would have been satisfied by a certified check drawn on a bank at the home of the purchaser in Colorado, and, if made, was for less than the vendors were entitled to, and constituted no substantial breach of the contract.

The real contest was not over these trifles, but arose over the conceded fact that the vendors did not tender a deed to the purchaser conveying a title shown by the land records of the county where the land was situated to have stood in their names. The contract, signed by Lucy Crosby, Herbert W. Hastings, Ada F. Gates, and Sophia W. Watson, obligated them to sell and convey the described lots by "a good and sufficient warranty deed in the usual form," and recited as an accepted fact that they constituted the only heirs at law of Henry D. Fales, deceased. The deed tendered was a warranty deed, signed and acknowledged by Lucy Crosby, Ada F. Gates, Sophia W. Watson, and Elizabeth E. Hastings, and contained the following recital:

"The said premises were part of the estate of Henry D. Fales, deceased intestate, of Brookfield aforesaid, the said Lucy Crosby, Ada F. Gates, and

Sophia W. Watson, together with Herbert W. Hastings, of said North Brookfield, being the sole heirs at law of the said Henry D. Fales, and the said Elizabeth E. Hastings being the widow and sole heir at law of the said Herbert W. Hastings, deceased intestate. Reference is hereby made to the records of the probate court in and for the county of Worcester aforesaid; administration having been taken out on the estate of the said Henry D. Fales May 16, 1899, and administration having been taken out on the estate of the said Herbert W. Hastings, September 4, 1900."

It thus appears that the deed tendered was executed by the parties who agreed to do so, except in so far as Herbert W. Hastings was concerned. So far, then, there was a strict compliance with the obligation to convey. Mr. Hastings having died, Mrs. Hastings, representing herself to be the widow and only heir at law of Mr. Hastings, joined with the other defendants in the following covenant of warranty found in the deed:

"That they are well seised of the premises above conveyed as of good, sure, perfect, absolute, and indefeasible estate of inheritance in law in fee simple, and have good right, full power, and authority to grant, bargain, sell, and convey the same, in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatsoever kind or nature soever."

By these and other covenants the deed purported to be, and was without doubt, "a warranty deed in the usual form," warranting that the grantors were possessed of a good, unincumbered title in fee simple absolute to the premises conveyed. The deed tendered, therefore, responded to the obligation imposed upon the vendors by the contract. If the vendors failed to convey or offer to convey the lots as required by the contract, the purchaser had his election of remedies. It might have rescinded the contract and recovered back any part of the purchase price which it had paid, or it might have affirmed the contract and resorted to a court of equity to secure specific performance by the vendors, or it might, as was done in this case, have sued the vendors at law for damages for the breach of the contract. It elected to pursue the last-mentioned remedy. It went into a court of law and tendered an issue, namely, that the defendants, the vendors, did not tender to it a sufficient deed as required by the contract. It apparently did not desire the lots on the terms of the contract. It rejected the equitable remedy, by which it might have secured them upon terms possibly requiring a demonstration of title of record, but chose the strict action at law to recover damages for a breach of the contract.

In doing so it assumed the usual burden of proving the affirmative of the issue tendered by it. It matters not that this was negative in its character. The right of recovery depended upon proof that the vendors failed to tender a deed conveying good title. Neither the contract nor the pleadings based thereon imposed any obligation upon the vendors to convey a title deducible of record, and the mere fact that the one tendered does not appear to be such a title constituted no breach of the contract. A marketable title, or one deducible from the land records, is one which equity often requires to be established in suits for specific performance by vendors against purchasers, and the numerous authorities cited by plaintiff in its brief, viewed in the light of the equitable issues presented in those cases, cannot be gainsaid or

questioned; but they have no application to actions at law, like the present, where the right of recovery depends, not upon equitable consideration, but upon proof of a specific breach of the contract sued on.

Maupin, in the second edition of his treatise on Marketable Title to Real Estate, says, in section 2:

"A distinction is to be observed between the action to recover damages for breach of the contract or failure of the title and an action to recover back the purchase money, in this respect, namely: That in the former action the plaintiff cannot recover unless he shows that the title is absolutely bad, while in the latter he will be entitled to a return of the purchase money if there be a reasonable doubt about the title."

And in section 283 he says:

"If a purchaser sues to recover damages against his vendor for breach of the contract, it is not enough to show that the title has been deemed insufficient by conveyancers. He must prove the title to be bad."

In *Meyer v. Madreperla*, 68 N. J. Law, 258, 53 Atl. 477, 96 Am. St. Rep. 536, the Court of Errors and Appeals of New Jersey, after an interesting discussion of the differences between equitable and legal remedies for breach of contracts of sale, concludes its opinion thus:

"To recover at law for a breach of such a contract, it must be shown that the title tendered was not a title good at law. The discretionary power of a court of equity with respect to a title which is doubtful, though good, is not within the province of a court of law, or a jury therein. * * * Mr. Sugden remarks: 'Whether courts of law were at liberty to follow in the footsteps of equity, and to hold that a title may be too doubtful to be forced on a purchaser, is a question on which eminent judges have differed with each other, and even with themselves.' But, he adds, 'it appears to be ultimately settled that courts of law cannot adopt the equitable rule, and are bound to decide the legal question upon which the right to recover must depend.'"

For want of proof, therefore, by the plaintiff, upon whom the burden rested, that the warranty deed as tendered failed to convey a good and unincumbered title in fee simple, the purchaser failed to prove a breach of the contract as made, and failed to establish the issue of fact upon which its right of recovery depended. It follows the court committed no error in directing a verdict for defendants on plaintiff's cause of action.

Passing, now, to the counterclaim, whereby the vendors sought to recover damages from the purchaser for failure to make repairs, it may first be observed that many of the assignments of error are so general as to require or permit of no consideration at our hands, and many of them are not based on proper exceptions taken to adverse rulings. There are two, however, which fairly present these questions: (1) Whether the Mesa Market Company, in accepting the assignment of the contract from the Implement Company, assumed the personal obligation resting on the latter company to make repairs; and (2) whether the counterclaim, as pleaded by the defendants, stated a cause of action.

In 1902 the plaintiff, Mesa Market Company, took an assignment of a contract which, according to its provisions, was liable to be converted into a lease, and from that date until March, 1906, it remained in possession of the premises, claiming all the rights conferred by the

contract upon its assignor. It brought this suit on one of its covenants, and sought to recover for its alleged breach. The last clause of the contract stipulated as follows:

"It is mutually agreed that this agreement shall be binding upon the heirs, executors, assigns, and successors of the respective parties of the first and second parts hereof."

From the foregoing it cannot be doubted that the Mesa Market Company became bound, as between it and its assignor, to keep the covenant of the contract requiring its assignor to—

"make any and all repairs proper and needful for the suitable maintenance of such buildings and improvements as are now on the said premises."

This stipulation, in our opinion, is also a covenant running with the land, and inures to the benefit and advantage of the vendors as against any assignee. The test is: If a covenant is such that its performance or nonperformance must affect the nature, quality, value, or mode of enjoyment of the demised premises, it is not a mere personal covenant, but one that runs with the land, and binds assignees of the covenantor, as well as the covenantor and his personal representatives. *Taylor's Landlord & Tenant* (8th Ed.) §§ 260, 261, 444, and cases cited.

It is suggested, however, that there is some difficulty in enforcing this liability in the present case, because of the fact that the vendors exercised the right of avoiding the contract for nonperformance by the purchaser, and availed themselves of their contract right to appropriate the amounts paid and the improvements made by the purchaser. This, it is said, is tantamount to an election to forfeit the payments and improvements made by the purchaser, and exhausts the remedy of the vendors. The principles announced in *Railway Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693, and *Davis v. Wakelee*, 156 U. S. 680, 690, 15 Sup. Ct. 555, 39 L. Ed. 578, are invoked to defeat the vendors' right to any other remedy than the one first resorted to by them. In other words, it is said they cannot "mend their hold." There are, in our opinion, two answers to this objection: First, the facts of this case do not warrant the application of that doctrine; and, second, the pleadings do not permit it.

As already pointed out in the statement of the case, the plaintiff, in its answer to the cross-complaint or counterclaim of the defendants, merely takes issue with the allegation of the cross-complaint that the plaintiff had failed to make the required and needful repairs. This issue of fact alone was joined, and no other defense was suggested by the pleadings. On this issue the case was tried below, and the trial court was not asked to pass on, and did not pass on, the question now suggested as decisive of the case; and, of course, no assignment of error is predicated on any adverse ruling on that question. Moreover, learned counsel for the plaintiff neither in the court below nor here have made any such contention. In view of these facts, the question suggested is not before us, and we refrain from discussing it.

The assignment of error that the counterclaim, as pleaded, states no cause of action, is, in our opinion, without merit. The defendants, by way of cross-complaint, set forth the covenant of the contract,

which required the purchaser to make any and all repairs proper and needful for the suitable maintenance of the buildings and improvements, alleged its violation, and specified the particulars thereof. This was quite sufficient. In fact, we do not see how it could be made better.

Several errors in admitting evidence over plaintiff's objections are assigned; but in most instances no exceptions were preserved to the rulings of the court. In such cases the formal assignment presents no question of law for consideration by the appellate court. Such assignments as are based on exceptions duly taken at the time have been examined and found untenable.

Some other questions were argued by counsel for plaintiff in error, all of which have received careful consideration; but they fail to disclose any prejudicial error of which it can complain.

The judgment of the Circuit Court is affirmed.

PHILIPS, District Judge (dissenting). After the best consideration I can give, I find myself unable to concur in so much of the foregoing opinion as affirms the action of the Circuit Court in rendering judgment for the defendants on the counterclaim. The sixth paragraph of the contract between the vendors and the vendee provided as follows:

"(6) The party of the second part [plaintiff in error] agrees that in case of any default of or failure to perform this agreement in whole or in part, either in the payment of installments recited or in any respect whatsoever, upon 10 days' written notice sent through the United States mail addressed to the party of the second part, at Pueblo, Colo., this agreement shall be void, and the party of the first part, its agents or representatives, may immediately thereafter resume possession of the premises herein described, retaining whatsoever sum may have been paid hereunder, and any and all improvements which may have been made on the said premises, and all right, title, and interest, in law and in equity, of the party of the second part, shall terminate, and the party of the second part shall ever be debarred from all rights, remedies, and actions, either in law or in equity, founded upon or existing under this agreement; such sum and such improvements so retained by the party of the first part being considered the rental of said premises for the time of occupation thereof by the party of the second part; all payments falling due subsequently to the peaceable delivery of the said premises to the party of the first part being canceled."

It will be observed that in case of any default or failure to perform the agreement in whole or in part, either in the payment of installments or in any other respect whatever, the option or right was given to the vendors, upon 10 days' written notice, to declare the agreement void and to enter into possession. This election the pleadings and the proofs show the vendors exercised. The petition alleges:

"That on or about October 1, 1905, the defendants served upon the plaintiff a written notice to give over and surrender possession of said premises, and declaring said contract repudiated and canceled, and alleging as a reason for said repudiation that plaintiff and the said the Colorado Carriage & Implement Company had failed to make the payments required by said contract."

This specific allegation was not denied in the answer. Both the pleadings as well as the evidence show that the notice to the plaintiff to quit and surrender possession was based entirely upon the ground that the vendee or its assignee had failed to make payment of install-

ments as required by the contract. Nowhere was the forfeiture declared placed upon any other ground; and no claim was ever asserted by the defendants respecting the contract being breached, by reason of the failure to keep the property in repair, until after this litigation arose between the parties. Having thus placed its right to declare the forfeiture upon said specific ground, and having retaken possession of the property under such declared forfeiture, the law declares that the defendants estopped themselves from afterwards asserting any other ground of default or dereliction on the part of the vendee or its assignee. In *Railway Company v. McCarthy*, 96 U. S. 267, 24 L. Ed. 693, the court laid down the following proposition:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

This court applied the same doctrine of the law in *Kansas Union Life Insurance Co. v. Burman*, 141 Fed. 835, 842, 73 C. C. A. 69, citing in support thereof a number of decisions to the effect that where the party, in taking action or asserting a right, bases it upon specific ground, he cannot, after litigation arises between the parties, assume another position. In the *Burman Case*, where the plaintiff sued for breach of contract with him as agent for the insurance company, in his letter of resignation or retirement from the agency he placed his action upon certain designated failures on the part of the insurance company in keeping the contract, and when litigation ensued undertook to rely upon other ground. This court said:

"This rule should have especial application to this case, for the palpable reason, that, had Burman assigned as a reason for resigning his agency the neglect to renew the license, he would have afforded the company an opportunity to remove the objection. By not assigning the delay or omission as a reason for his refusal to continue his agency, and making no claim in his letter of resignation that the insurance company was unwilling to go ahead with the salary contract, he in effect said such ground is not relied on."

So here the presumption of law is that, if the vendors had made the claim that the contract was not being kept on account of failure to make repairs of the building, the assignee might have saved its rights by making the required repairs and prevented forfeiture therefor. The very provision requiring 10 days' notice in the contract before such forfeiture was to secure to the vendee its locus penitentiae.

More conclusively, yet, against the right to maintain the action set up in the counterclaim, are the express provisions of the contract that in the event of failure of the vendee to perform the agreement in whole or in part, either in the payment of installments recited or in any respect whatsoever, upon 10 days' written notice, "this agreement shall be void." It then proceeded to declare specifically what the results and liabilities of the vendee would be in such event: (1) The vendor could immediately resume possession of the premises; (2) retain whatever sums had been paid on the contract, and all improvements made on the premises; (3) all right, title, and interest, in law or in equity, of the vendee, should terminate, and the vendee should ever be debarred

from all rights, remedies, and actions, either in law or equity, founded upon or existing under the agreement; (4) that such sum and the improvements so retained by the vendor should be considered as equivalent of rental of the premises for the time the same were occupied by the vendee or his assignee; and (5) that all subsequent maturing payments should be cancelled. From which it is clear that the parties to the contract, in its very inception, stipulated among themselves, under seal, what the forfeitures, losses, and rights of the respective parties should be in the event of the declared forfeiture and retaking possession by the vendor. They thus consented to put a certain and definite limit to what the rights and losses should be. Neither party could add to or subtract therefrom. Parties have the right to make their own contracts, whether provident or improvident, and to affix the liabilities for a breach thereof. The vendors having made their election to re-take the demised premises, with the advantages of the specified forfeitures, whereupon the agreement should become void, they were precluded from afterwards suing on the dead agreement to enforce other claimed liability under the contract.

In *Seanor v. McLaughlin*, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467, the court, in discussing the question of the plaintiff's right to remedies either to treat the contract as in existence and predicate action for damages for breach thereof or to declare forfeiture as therein provided, said the party could not do both, "for the contract or obligation to which the bond was collateral no longer existed." So here the contract gave the vendor the option to declare it at an end for any breach thereof, and to enter and take possession, with an express enumeration of what the vendor in such instance could have or what the vendee should forfeit and lose. On the maxim "*Facit cessare tacitum*," no further right of action or liability could be predicated upon the agreement, which had become void by the declared act of the party. The vendee may have been in arrears in the payment of accrued taxes or premiums on the insurance, or he might have paid one-half the purchase money. But, as the contract provided specifically what the consequences of his derelictions might be in the event of the vendor declaring forfeiture and taking possession, he was in position to say: I will surrender the possession and submit to the specific consequences, as they are exclusive of any and all other liabilities.

"The established rights and remedies for the breach of an agreement are as effectually contracted for as the performance of the act stipulated." *Cresswell Ranch & Cattle Co. v. Martindale*, 63 Fed. 87, 11 C. C. A. 33.

So in *Warren-Scharf Asphalt Paving Co. v. Laclede Construction Co.*, 111 Fed. 695, 696, 49 C. C. A. 552, Judge Thayer, speaking of a cognate question, said:

"The parties to the agreement had in mind both a temporary and a permanent suspension of the work, and, in language which cannot be misunderstood, stipulated that the defendant company might suspend operations under the contract, either temporarily or permanently (that is, abrogate the contract altogether), on 10 days' notice; and as if to make their purpose and intent more clear, and to put the matter beyond dispute, they further agreed that, if operations under the contract were suspended, the party of the first part should not have any claim for damages. In other words, the right was reserved by the defendant company to put an end to the agreement at any time on 10

days' notice, without liability for damages. It was entirely competent for the parties to enter into such an agreement."

In *Baltimore R. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, the court said:

"The right of private contract is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation, etc., unless it clearly appear that they contravene public right or the public welfare."

Some doubt is expressed in the majority opinion as to whether or not the questions above discussed are properly presented to this court for review. The reply of the plaintiff to the counterclaim is in effect a general denial. It specifically denies the allegations with respect to the alleged breach of the contract in not making repairs. It is now the well-recognized rule that matter of estoppel in such case need not be specifically pleaded, for the palpable reason that it is disclosed by the pleadings, the contract, and the evidence that the counterclaimant had made his election to demand and take possession because of express claimed breach and no other. The counterclaim being based upon the contract alleged in plaintiff's petition, and it appearing from the whole record and evidence that the damage claimed was for failure to make improvements, it was a matter of law as to whether or not the plaintiff was entitled to recover; and these questions were sufficiently raised by the exceptions taken to the charge of the court, to wit:

"Plaintiff excepts to the instruction of the court, instructing the jury that a personal judgment may be rendered against the plaintiff upon the covenant in the contract providing for the making of repairs."

Among the assignments of error are the following:

"The court erred in receiving and entering the verdict of the jury upon the issues made by the defendants' counterclaim and plaintiff's replication over plaintiff's objection and exception.

"The court erred in instructing the jury that they should return a verdict against plaintiff on the issues presented by defendants' counterclaim, and in not instructing them to return a verdict for the plaintiff thereon."

It was a matter of substantive law, arising upon all the evidence before the court, that the defendant could not recover on the counterclaim. If so, it was error to instruct the jury that there might be a recovery. Therefore the exception to the charge and the assignment of error is broad enough to entitle the plaintiff in error to have the question of law reviewed.

The judgment based on the counterclaim, in my opinion, should be reversed.

CHESAPEAKE & O. RY. CO. v. STANDARD LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. July 15, 1909.)

No. 866.

CARRIERS (§ 32*)—DISCRIMINATIONS—CONTRACT GIVING PREFERENCE TO SHIPPER.

A lumber company, which was a shipper of railroad ties, made a contract with a railroad company in 1899 by which it agreed to build a tie hoist for loading ties at a station, and the railroad company agreed to haul its ties to a designated point for \$8.50 per car, and to return to the lumber company 10 per cent. of the freights so received to apply on the cost of the hoist until entirely paid for, when it was to become the property of the railroad company. In the meantime, however, it could be used only by the lumber company. The rate given was materially less than the published rate, which was charged other shippers. *Held*, that such contract was one designed to give the lumber company an undue preference or advantage over other shippers, in violation of Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3155), and was illegal and not enforceable in any part.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. § 32.*]

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Huntington.

Action by the Standard Lumber Company against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

This is an action in assumpsit, brought by the Standard Lumber Company, a corporation of the state of Kentucky, against the Chesapeake & Ohio Railway Company, a corporation of the state of West Virginia, to recover \$25,000 damages for a breach of contract set out in the declaration, and hereinafter printed in full. The declaration claims the right to recover, first, overcharge for freight; second, damages suffered by the Standard Lumber Company by reason of the alleged increase of freight rate over and above the amount set out in the contract; and third, the cost of building a tie hoist at Louisa, Ky., as provided for in the contract. At the time this contract was purported to have been made, the interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) was, in effect, prohibiting the making of any discrimination between shippers by a carrier, and, at the time the suit was brought, the Elkins act of 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]) was in force. The contract, as written, was between the Standard Lumber Company, the Chesapeake & Ohio Railway Company, and the Big Sandy Railroad Company; but it does not appear ever to have been executed by the Big Sandy Railroad Company, and the Chesapeake & Ohio Railway Company, by its plea of non assumpsit, puts the plaintiff upon proof of the execution of the contract, and requires that the authority of the party who purported to have signed the same be shown. The alleged contract is as follows:

"This memorandum of agreement made and entered into this 7th day of November, 1899, by and between the Standard Lumber Company, a corporation organized and existing under the laws of the state of Kentucky, party of the first part, and the Chesapeake & Ohio Railway Company and the Ohio & Big Sandy Railroad Company, parties of the second part, witnesseth: That the party of the first part is to build a tie hoist and connecting tracks intersecting the main line of the Ohio & Big Sandy Railroad Company, just east of their depot in said city, said tracks running through ——— street, in Louisa, and the property leased by George Stevens & Company, of Titusville,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Pennsylvania, north to the Big Sandy river, all at its own proper expense, except the rails, which are to be furnished by parties of the second part; and said parties of the first part are to maintain and operate the same and furnish to parties of the second part for transportation ties in car load lots, from time to time, until the matters hereinafter stated are consummated. In consideration of all of which, the parties of the second part agree that they will transport all ties coming over said hoist, for party of the first part, from Louisa, Kentucky, to Huntington, West Virginia, at a uniform rate of \$8.50 per car, and from the net revenue accruing to the C. & O. Ry. Co. from such traffic shall be deducted ten per cent., which shall be refunded to party of the first part in liquidation of said expense for building said hoist and tracks, until the amount refunded shall equal the cost of construction of same, at which time the said hoist and tracks shall be and become the property of parties of the second part. Said cost to be ascertained from actual bills of expense to be furnished said C. & O. Ry. Co. from time to time, as the work progresses.

"In testimony whereof, the parties of the first and second parts have caused their names and seals to be hereto affixed by their properly authorized officers, the day and date first above written.

"Standard Lumber Company.

"Per T. J. Reynolds, Pres.

"The Chesapeake & Ohio Ry. Co.,

By F. M. Whittaker, Frt. Tfc. Mgr.

"Witness:

"E. B. Enslow,

"R. A. Jeffers."

Upon the hearing, the Chesapeake & Ohio Railway Company, hereinafter referred to as the "railway company," the defendant below, demurred to the declaration, which demurrer was overruled, and it then filed the general plea of non assumpsit.

It is contended by the complainant that, at and prior to the time of the making of the contract above mentioned, the lumber company was engaged in the purchase and manufacture of railroad cross-ties on and along the Big Sandy river in the state of Kentucky. The lumber company, in order to get its ties to market, floated the same down the Big Sandy river to its mouth, where it empties into the Ohio river, at which point they were distributed by railroad or the Ohio river to the various purchasers. At that time the railroad company had built a branch line from Cattleburg, Ky., to the Big Sandy river, to a place called Louisa, which is on the said river and about 25 miles from its mouth, and thus came in competition with transportation by means of the said Big Sandy river. It is also insisted by the plaintiff that the motive of the railroad company in entering into the contract was to secure the business which had theretofore been transported by the river, and that, accordingly, in compliance with the terms of the contract, the lumber company constructed, at great expense, a tie hoist and connecting track at Louisa, and commenced the delivery of ties to the railroad company in cars furnished by it; that this continued for about a year, when the railroad company advanced the rate of \$8.50 per car of 200 ties, the cars having a capacity of from 300 to 400 ties. Later on the rate was changed to 5 cents per tie, making the rate from \$10 to \$17 and \$18 per car; that the lumber company continued to ship ties, but by reason of the contract paid the increased rate under protest, and finally, not being able to continue its business at a profit at the rates given, it sold out its tie business. The complainant below seeks to recover from the railroad company the freight charges in excess of the amount set out in the contract, the damages suffered by reason of its being unable to fulfill certain contracts made upon the faith of the contract rate, and expenses incurred by it in building the tie hoist.

The court below held that the contract on its face was a valid contract, and that the fact that it was not executed by all the parties was not sufficient ground for demurrer, but that it was a question for proof as to whether it had been agreed to and carried into effect by the action of the railroad company; but the court further held that the railroad company had a right to change its freight rates, notwithstanding the contract, and that the lumber company

was not entitled to recover anything for overcharge or damages growing out of the change of rates, but that it could recover under the contract whatever the jury might find from the evidence it was entitled to for building the hoist. The case was submitted to the jury under instructions from the court, and a verdict was found in favor of the lumber company in the sum of \$4,439.54.

F. B. Enslow (Simms, Enslow, Fitzpatrick & Baker, on the brief), for plaintiff in error.

C. N. Davis (C. W. Campbell, G. S. Wallace, and E. A. Marsh, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and DAYTON, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The first and second assignments of error are as follows:

"First. The contract is shown to be incomplete upon its face, and there were no allegations in the declaration that the signatures of the Ohio & Big Sandy Railroad Company were waived by either of the parties, or that it was agreed upon and acquiesced in by the defendant without ever having been signed by the Ohio & Big Sandy Railroad Company; because, if the said contract had been ratified by the parties thereto, the declaration should have so stated, and suit should have been brought against both parties; because the contract shows on its face that, under the laws and statute governing railways and railway rates, the said contract was contrary to the statute, and incapable of being enforced, and not binding on either party. The trial court, however, taking the view of the statute contrary to the defendant's contention, overruled said demurrer and permitted the contract to go to the jury as evidence of the alleged agreement, holding that, although the railroad company could not be permitted to make a contract as to rates, and would have a right to change the same, still the plaintiff might recover in the action the money expended by it. The overruling of the demurrer and this view of the court as to the effect of the contract is assigned as the first error.

"Second. At the time the contract was claimed to have been executed, namely, in November, 1899, up to the time of the first shipment of ties over said road, the legal rate on ties shipped over the Ohio & Big Sandy Railroad and the Chesapeake & Ohio Railway, from Louisa, Ky., to Huntington, W. Va., was 3 cents per 100 pounds, or about 6 cents per tie. The tariff arranged under the contract for ties over the hoist in question was \$8.50 per car, or about 4½ cents per tie, while the rate per car not taken over the hoist was \$10, the difference of about one-half cent per tie in favor of the plaintiff, who operated the hoist. The tariff sheets introduced in evidence on the examination of W. F. Hite, division freight agent, showed this to be the fact, and showed the discrimination in favor of the plaintiff. The defendant, taking the view that the contract under the circumstances was illegal, and the illegality violated the same entirely and prevented the plaintiff from recovering on it, sought to show, in addition to the published rates, that the special rate allowed to the plaintiff and provided for in the contract was a discrimination in favor of the plaintiff, not allowed to other shippers over the road under like conditions and like circumstances, and therefore the whole contract was void. The court, however, while taking the view of the case that the railway company could not give the special rate provided for in the contract, held that the defendant was, however, liable to the plaintiff in this action for the money expended, and, holding that view of the cause, refused to permit the defendant to show the jury the facts showing that said rate was a discrimination, and the allowance of 10 per cent. on the freight bills a rebate. The defendant also claimed that to allow the plaintiff to recover under the contract would be to permit and make a discrimination in favor of the plaintiff over the other shippers, and thereby give the plaintiff an advantage over the other shippers of ties from Louisa on the same road and to the same destination, who were not permitted to participate in the rate claimed by the plaintiff or the advanta-

ges given it, and that the whole contract was but an effort on the part of the plaintiff to obtain an advantage in shipments under the contract; that said contract, not having been executed by the parties thereto, was never in fact in force, and that to allow the plaintiff to take advantage thereof would be in effect a violation of the interstate commerce laws governing rates and rebates, and would permit the plaintiff to be repaid the expenses of transporting its ties from the river to the railroad, which expense was not paid to other shippers and was illegal in its inception. And the defendant also claimed that if the plaintiff was permitted to recover for money expended in building a side track and a tie hoist for its own benefit, to be used until the rebates were paid for the cost of construction, and that then the hoist and side tracks were to go to the defendant, the plaintiff must show that it had complied with its contract, and had put itself in a position to transfer the track and hoist to the railway company; and, taking this view of the case, it offered to prove that the rate made was not made for any other party except for the plaintiff, that no party was given the same privilege, and, in addition, that the plaintiff had never put itself in a position to transfer the property to the railway company, but that it had itself sold and disposed of the greater part of the property, and applied the money to its own use, and had never conveyed the same, or offered to convey the tie hoist and side track, with the right to use the same, to the company; but the court, taking a contrary view of the case, refused to permit the defendant to show the discrimination, or to show that the track and hoist had ever been constructed on land to which the plaintiff had a right, or on which it had made arrangements for the use thereof, or transfer to the railway company on the payment of the cost thereof, and the defendant assigns this view of the contract and rulings of this court hereunder as the second ground of error."

These assignments of error embody the main points involved in this controversy; the principal question being as to whether the agreement between the Standard Lumber Company and the Chesapeake & Ohio Railway Company constitutes a valid contract, and this necessarily involves a consideration of section 3 of the interstate commerce act, as well as section 1 of what is known as the "Elkins Act." Section 3 of the interstate commerce act provides that:

"It shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular company, * * * etc.

Section 1 of the Elkins act, which was passed February 19, 1903, reads as follows:

"That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereto, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties as are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporations to offer, grant, or give, or solicit or accept, or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed

by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practised. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concessions, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: Provided that any person or any officer or director of any corporation subject to the provisions of this act or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein. * * *

The foregoing provision was adopted subsequent to the date of the agreement in question. At the time this contract was entered into between the parties the interstate commerce act of 1887 was in effect, and this act prohibits the making of any discriminations between shippers by carriers. While the contract purports to be between the Standard Lumber Company, the Chesapeake & Ohio Railway Company, and the Big Sandy Railroad Company, it does not appear to have been executed by the Big Sandy Railroad Company, and this is assigned as one of the causes on demurrer by the railway company.

The interstate commerce act requires:

"That all charges for services for handling property shall be reasonable and just; that no rebates, no drawbacks or other devices by which any person shall pay, or the carrier receive, a greater or less compensation shall be allowed; and that no undue influence or advantage shall be given to any person or traffic."

By an additional act, passed March 2, 1889, the interstate commerce act was amended so as to compel the carrier by mandamus to give all carriers similar terms and as favorable conditions as those given by a common carrier for traffic under similar conditions to any shipper. Where the parties to a contract agree to do an illegal act, such agreement is void. Under the head of "Contracts," *Cyclopedia of Law and Procedure*, vol. 9, p. 569, it is said:

"If the direct object of the parties is to do an illegal act, the agreement is void, and it is immaterial that either or both did not know that the object was illegal; for, as a general rule, ignorance of the law is no excuse."

Are the terms of the agreement in question in violation of the statutes to which we have just referred? In other words, is the agreement as to rates void? Is such an agreement inherently unlawful? Are its terms and conditions unenforceable? These are questions that must be carefully considered in determining the merits of this controversy.

The railway company insists that it now has the right to complain of the illegality of the contract, and to escape payment by reason of

such illegality, inasmuch as, at the time the contract was made, both the common law, as well as the act of 1887, expressly required a common carrier to transport traffic for all without unreasonable discrimination, either in charges or the facilities of actual transportation. *Southern Ry. Co. et al. v. Tift*, 148 Fed. 1021, 79 C. C. A. 536. This case was affirmed by the Circuit Court of Appeals for the Fifth Circuit, also in 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124.

It is insisted by the railway company that, in refusing to comply with this contract, it is simply obeying the plain mandate of the statute, and that it would be liable under the Elkins act, notwithstanding the fact that said act was passed subsequent to the execution of this contract. In the case of *United States v. Great Northern Railway Company (C. C.)* 157 Fed. 288, Hough, District Judge, in referring to this phase of the question, said:

"First. Although it may be assumed that no indictment could have been found under the interstate commerce act against the carrying corporation, yet, the arrangement above outlined was under that act alone illegal and unenforceable. *Texas & Pacific Ry. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011. The said unlawful arrangement was not completed until 1904, when the moneys were paid. *United States v. Hanley (D. C.)* 71 Fed. 675. When the transaction was completed the Elkins act had made each and every part thereof not only unlawful, but a criminal offense. One part thereof, and certainly the most important, was giving the rebate and accepting the same, and it is a refinement of language to say that the rebate was given or accepted until the amount thereof was paid. This occurred in 1904, and this act was the crime complained of in the indictment. A solvent contractor may be said to have given some pecuniary advantage to another when he has agreed to give it, his contract being enforceable in ordinary course of law; but if a man agrees to give another an unlawful pecuniary advantage, something not enforceable at law at all, it appears to me plain that the person to whom the promise is made has gotten nothing whatever until he has received and pocketed the pecuniary fruits of such illegal arrangement. If the payment and acceptance of the rebate constituted a crime in 1904, I do not think that the passage of the Hepburn act prevented the finding of this indictment. On the contrary, within the period of the statute of limitations, I think the Elkins act is in full force as to offenses committed prior to the passage of the Hepburn bill, and can add nothing to the views expressed in *U. S. v. Standard Oil Company (D. C.)* 148 Fed. 719, *U. S. v. Chicago, St. Paul, etc., Ry. (D. C.)* 151 Fed. 84, and the decision of this court, per Holt, J., in *U. S. v. D., L. & W. Ry.* (filed Feb. 14, 1907) 152 Fed. 269.

"Second. Assuming that the offense sought to be reached by this indictment is the giving—i. e., the paying—of rebate moneys in 1904, the Elkins act is not ex post facto. It did not impose a punishment for an act which was not punishable when it was committed, nor did it impose additional punishment for such act, nor did it change the rules of evidence; and, if it did none of these things, it does not transgress the constitutional limitation referred to."

That the construction of the tie hoist in question inured to the benefit of the Standard Lumber Company, in that it gave such company a preference over other companies similarly situated, is apparent from an inspection of the agreement. In other words, it cannot be denied that the payment back to a shipper, as in this instance, of 10 per cent. on the freight bills paid by the shipper to the railway company, must necessarily result in the shipper getting its property transported at a lower rate than that indicated in the published schedules. Landis, District Judge, in the case of *United States v. Chicago & Alton Ry. Co. et al. (D. C.)* 148 Fed. 647, in discussing this question, said:

" * * * The word 'rate,' as used in the interstate commerce law, means the net cost to the shipper of the transportation of his property; that is to say, the net amount the carrier receives from the shipper and retains. In determining this net amount in a given case, all money transactions of every kind or character having a bearing on, or relative to, that particular instance of transportation, whereby the cost to the shipper is directly or indirectly enhanced or reduced must be taken into consideration. Applying this test to the case before me, the net cost to Schwarzschild & Sulzberger Company has been made \$1 per car less than the published schedules represented that net cost would be. Viewing the transaction from the standpoint most favorable to the defendants, it amounts to the railway assuming the cost of getting the shipper's property to the carriers' rails for transportation—a substantial consideration not mentioned in, or contemplated by, the published schedules.

* * *

This agreement shows on its face that the railway company was to assume the cost of removing the shipper's property from the river to the carrier's rails for transportation. The fact that the shipper was to be reimbursed for the amount expended in the erection of the hoist clearly shows that it was the intention of the parties to thus indirectly give such shipper an advantage over other parties similarly situated. It could not be reasonably contended that, if the railway company had, in the first instance, erected this hoist, on its own account, it could have fixed a cheaper rate for a particular company engaged in delivering its ties over the same, and also denied the right to others to deliver their ties for transportation by the same method and at the same rate. Such conduct on the part of the railway company would undoubtedly have been in violation of the statute, and, when we come to analyze this contract, that is precisely what was proposed to be done by the terms thereof. If the agreement in this instance had been that the hoist in question was to be erected by the Standard Lumber Company for the railway company, and the lumber company paid for the same as provided therein, and it had been further provided that all shippers were to be given the privilege of removing ties from the river over the hoist thus erected for the purpose of being loaded by the carrier at a rate which applied alike to all shippers similarly situated, then, in that event, it would not have been subject to the objection that its terms contemplated the doing of an act which is made unlawful by the statutes to which we have referred.

In addition to what appears on the face of this contract, there is the further fact that this property, when sold by an employé of the lumber company, only brought the sum of \$200, which amount was applied to the payment of the debts of the lumber company. It also appears that the tariff rate published was \$8.50 per car, when the ties were taken over the hoist, as against a \$10 rate when loaded by other means. It also appears that the lumber company charged the railroad company \$1,500 for a boiler and engine, which their own agent testified was worth about \$150, and also charged \$3,505.70 for the material which went into the hoist; and it further appears that this material, when sold, only brought the sum of \$200, as hereinbefore stated. This clearly indicated a purpose on the part of the lumber company to do by indirection that which it could not do directly, by fixing a fictitious price on the property in question. It appears from an examination of the record that evidence was offered tending to show that there was a dis-

crimination, and that there were other parties engaged in shipping ties who did not enjoy the same privileges and benefits the lumber company enjoyed. However, this evidence, upon the objection of the plaintiff, was ordered stricken out by the court, and the action of the court in this respect eliminated the question as to whether the agreement relied upon by the defendant in error constituted a valid contract.

In the case of *Chicago & Alton Railroad Company v. United States*, supra, 156 Fed. 558, 84 C. C. A. 324, the Circuit Court of Appeals for the Seventh Circuit affirmed the ruling of the lower court. In that case the shipper constructed private tracks on its own property extending from a connection with the belt line railroad company to and around its buildings and used for loading cars for shipment. The railroad company made and published a schedule of through rates, including the belt line charge of \$1 per car to such packing company on such shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of its private tracks, thus making the rate charged \$1 less per car than that published and charged to shippers generally from the same point. The court held that the facts of that case constituted the giving of a rebate, in violation of section 1 of the Elkins act. In the syllabus it is stated:

"Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities; and the refunding by a railroad company, which made and published a schedule of through rates, including the belt line charge of \$1 per car to such packing company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private tracks, thus making the rate charged \$1 per car less than that published and charged to shippers generally from the same point, constituted the giving of a rebate, in violation of section 1 of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880])."

Also in the case of *Wight v. United States*, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258, it was decided that:

"Hauling goods on the Pittsburg, Cincinnati & St. Louis Railroad Company from Cincinnati to Pittsburg, and delivering them to a consignee in his warehouse from a siding connection, and hauling goods for him from and to the same cities on the Baltimore & Ohio Railroad Company, and delivering them to him from the stations of that road in Pittsburg, there being no siding connections, is transportation 'under similar conditions and circumstances,' within the meaning of section 2 of the interstate commerce act of February 4, 1887, and a rebate allowed by the Baltimore & Ohio Railroad Company to compensate for cartage to his warehouse is a discrimination against other shippers over that road to whom no rebate is allowed."

There the hauling was done by wagons, and in the case at bar the transportation was by machinery; and it is sought by the agreement in question to compel the railroad company to pay for the value of the machinery. The fact that the tie hoist thus erected was not thrown open to the public, and all shippers given an opportunity of hauling their ties by that method, shows conclusively that this hoist was not intended to be used by the railroad company for transportation purposes generally, but that the transaction was intended solely for the purpose of inducing this particular shipper to transport its ties over the lines of the railroad company. If the erection of this hoist had been

intended for general use, the railroad company certainly would not have permitted it to be sold at a nominal price, as it was; and this, among other things, shows most conclusively that the whole transaction was a subterfuge, by which one shipper was to be given an advantage over others similarly situated.

The Interstate Commerce Commission, "In the Matter of Allowances for Transfer of Sugar," in its decision rendered December 12, 1908 (14 Interst. Com. R. 627), in referring to the cases of *Wight v. United States*, supra, and *Chicago & Alton R. R. Co. v. United States*, supra, said:

"All the tariffs purport to make the allowance as compensation for transfer. It necessarily follows that if the allowance is to be sustained the transfer of goods to the possession of the carrier must be held to be the carrier's duty, for which the shipper making the transfer is entitled to compensation. Such is not the law, and the first to resist the attempt to impose such duty upon the carriers would be the carriers themselves. Within the present year this Commission has decided at least two cases in favor of carriers involved in this proceeding, and has held that the delivery of goods to a carrier and the receipt of goods from a carrier are duties devolving upon the shipper, for which the carrier cannot be compelled to pay. For carriers to undertake to make to shippers allowances based upon the performance by the shippers for themselves of services which they are legally bound to do for themselves is for the carriers to violate the act to regulate commerce."

It was also held by the Commission:

"That it is not a part of the carrier's duty to bear the expense of transfer of goods from the shipper to the carrier. For carriers to undertake to compensate shippers for performing services which the shippers are legally bound to do for themselves is for the carrier to violate the act."

The court below held that the lumber company was not entitled to recover anything for overcharge or damages growing out of the change of rates, but that it could recover under the contract whatever the jury might find from the evidence it was entitled to for building the hoist. In other words, the court was of the opinion that the contract in question was not binding upon the railroad company to the extent of preventing it from changing its rates, so as to make them uniform and apply alike to all shippers similarly situated; but, notwithstanding this ruling (which must necessarily mean that the contract was invalid in so far as rates were concerned), the court was of the opinion that the defendant in error was entitled, under the contract, to recover the cost of erecting the tie hoist.

When we view this agreement, together with the other evidence offered, in the light of the cases quoted, we are forced to the conclusion that the agreement in this instance is in violation of the provisions of the statutes enacted for the express purpose of regulating the conduct of a common carrier in its transactions with a shipper. An agreement which contemplates the doing of an unlawful act is absolutely void, and cannot be enforced for any purpose; and this is especially true in a case like this, where it was, on the one hand, the manifest purpose of the railroad company to give a shipper an undue advantage over other shippers similarly situated, and, on the other hand, the intention of the shipper to receive an undue advantage over another shipper under like conditions.

There are numerous assignments of error; but we do not deem it necessary to consider them seriatim, but will content ourselves with saying that we are of the opinion that the court erred in holding that the agreement in question constitutes a valid contract.

For the reasons stated, the judgment of the court below is reversed, with instructions to proceed in accordance with the views herein expressed.

Reversed.

METROPOLITAN LIFE INS. CO. v. WILLIAMSON.

(Circuit Court of Appeals, Fifth Circuit. October 4, 1909.)

No. 1,775.

1. INSURANCE (§ 668*)—LIFE INSURANCE—ACTION ON POLICY—SUICIDE—WHEN QUESTION FOR JURY.

Whether or not an insured, who died from the effects of an overdose of morphine, took the overdose accidentally, or with suicidal intent, so as to release the insurance company from liability on its policy under its terms, is a question of fact, which, unless the evidence is conclusive, is for a jury to determine.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1745; Dec. Dig. § 668.*]

Suicide as a defense to a life policy, see notes to *Ætna Life Ins. Co. v. Florida*, 16 C. C. A. 623; *Fidelity & Casualty Co. v. Egbert*, 28 C. C. A. 284.]

2. INSURANCE (§ 668*)—ACTION ON LIFE POLICY—QUESTIONS FOR JURY—DELIVERY OF POLICY.

Where a life insurance policy was found among the other papers of the insured after his death, and there was a conflict in the evidence as to whether it was delivered by an agent of the company, or merely left with the insured for examination, which was contrary to the rules of the company, the question of delivery was one for the jury.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 668.*]

3. INSURANCE (§§ 141, 665*)—LIFE INSURANCE—WAIVER OF CONDITIONS.

Although a life insurance company may have given its agents printed instructions not to take notes for first premiums, such rule or a like condition in a policy may be waived by the company, and the fact that it has been waived may be shown by either direct or circumstantial evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 256-261; Dec. Dig. §§ 141, 665.*]

Authority of insurance agent to waive prepayment of premiums, see note to *Smith v. Provident Sav. Life Assur. Soc.*, 13 C. C. A. 292.]

4. INSURANCE (§ 668*)—ACTION ON LIFE POLICY—QUESTIONS FOR JURY—WAIVER OF CONDITION.

Where an agent of defendant life insurance company was instructed by the company not to take notes for first premiums, nor to deliver policies until the first premium was paid in cash, and the policy contained a similar condition, but the agent admitted that he took such notes for perhaps 50 per cent. of the first premiums contracted for by him, and that he did so in case of plaintiff's husband, who died having the policy in his possession, the note being payable to the agent personally, and a letter from the president of the company to decedent was in evidence which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

recognized decedent as a policy holder, such evidence was sufficient to warrant the submission to the jury of the question whether defendant had not knowingly waived such condition.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 668.*]

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Action by Eliza A. Williamson against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. G. M. Thomas and Richard W. Walker, for plaintiff in error.

J. L. Andrews, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action on an insurance policy issued by the plaintiff in error, payable to the defendant in error, for \$5,000, on the life of Lawrence L. Williamson. The case was tried in the court below, and resulted in a verdict and judgment against the company for the amount of the policy. The main contention here is that the trial court should have instructed the jury to find for the company: (1) Because of defenses presented under the suicide clause of the policy; and (2) because the first premium was never paid, nor the policy delivered.

1. One of the conditions of the policy was that, "if the insured * * * die by his own hand or act, * * * the company shall not be liable. * * *" The insured died from the effects of a dose of morphine. There was evidence, consisting of oral declarations made by him shortly before his death and of letters written by him, tending to show that the morphine was taken by him with suicidal intent. But the letters were susceptible of the construction that the morphine was taken to alleviate pain and to secure sleep. The evidence showed that the insured had a wife and children, with whom he lived and to whom he was devoted. There was nothing in the evidence to show a reason for self-destruction. For several days before his death, he had suffered from neuralgia or other painful affliction, which deprived him of sleep. On the day of his death, at his wife's suggestion he returned home from his place of business about 10:30 o'clock in the morning for the purpose of getting needed sleep. When he reached home, he went with his wife to a quiet part of the house, and his wife left him there. Whether he took the morphine with suicidal intent or not is a question of fact. No one can read all the evidence, and say that it conclusively and unquestionably shows that he did so. It is not inconsistent with the evidence to conclude that he took an overdose accidentally—that he intended only to take an amount sufficient to relieve his suffering and to secure sleep. The trial court clearly should not be reversed for submitting the question as to suicide to the jury. The authorities on this point, in cases involving the same question, are conclusive. *Pythias Knights' Supreme Lodge v. Beck*,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741; Fidelity & Casualty Co. v. Love, 111 Fed. 773, 49 C. C. A. 602; National Union v. Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524.

2. There are several provisions in the policy to the effect that it is not to be binding till the actual payment of the premium and its acceptance by the company. We quote one:

"No obligation is assumed by this company upon this policy until the first premium has been paid and the policy duly delivered."

The contention of the company is that the jury should have been instructed for the defendant, because there was (1) no delivery of the policy and (2) no payment of the premium.

After the death of the insured, the policy was found among his other insurance policies and important papers in a trunk. Proof was offered of the declarations of Jackson, one of the company's agents, who had solicited Williamson to insure, that he had delivered the policy. The agents of the company testified that they had left the policy in the possession of Williamson; but their evidence tends to show it was so left for examination by Williamson. The record shows, however, that by the company's rules governing agents they were not permitted to leave a policy with an applicant for insurance before the actual payment of the premium:

"Specimen policy should be given to applicant who desires to hold and examine policy before paying premium."

From the facts shown by the record, the jury could reasonably have concluded that the policy was duly delivered.

Williamson did not pay the premium of \$181.25 in cash. He gave his note for that sum, payable to the company's agent individually. It was a note waiving exemption, which means, under the local law, that the maker could not claim the benefit of the exemption laws against the enforcement of the payment of the note. The agent testified that he had no authority to take the note; but he admitted that it was his practice to take notes under such circumstances for the first premium. His admissions to other witnesses and his evidence on the stand tend to show that he took notes for the first premium for "50 per cent." of the business done by him. He denied that he had in any way notified the company that he had taken the note; nor was it shown, unless inferentially, that the company knew that it was his custom to take notes for the first premium. The agent testified that he had no authority to take the note or deliver the policy till the cash was paid, yet he cheerfully said that he would have collected the note if the insured, Williamson, "had kept on living." In this connection, it should be remembered that, when first approached on the subject after Williamson's death, the agent denied that he had taken a note from Williamson, but admitted it later, when it probably became apparent that proof could be made that he had shown the note to others. It is not reasonable that the agent would have done 50 per cent. of his business by taking notes for first premiums and that the company would have remained in ignorance of it. A letter was in evidence from the president of the company to the insured, which recognized

him as having placed "some insurance" with the company. The letter clearly refers to the policy in question here, or, at least, there is nothing in the record to show that it could have other meaning.

It is a matter of common knowledge that insurance companies seek to extend their business by employing many agents, to whom they pay large commissions. The record does not show, except inferentially, just what part of the first premium on Williamson's policy would have been retained by the agent. It does show that the agent wanted at least one-fourth of the amount of the note for the first premium raised in cash, thereby indicating that only one-fourth was to be sent to the company. It cannot be doubted that the company would so select its agents and so deal with them that it would not be likely to lose anything by the agents' taking a note for the first premium. It would, of course, be done at the agents' risk. Although the company may have given its agents printed instructions not to take notes for first premiums, such rule, or a like condition in a policy, may be waived by the company (*Insurance Company v. Norton*, 96 U. S. 234, 24 L. Ed. 689); and the fact that it has been waived may be shown by either direct or circumstantial evidence. It would be wholly unfair and unjust to permit the company to extend its business and increase its income by allowing its agents to take notes for the first premiums, deliver the policies to the insured as operative, and leave the company, which had knowledge of such dealings, free to enforce the collection of the notes if the insured lived, and to repudiate the whole transaction if he died. *Insurance Company v. Wilkinson*, 13 Wall. 222, 233, 20 L. Ed. 617.

Considering all the evidence in the record, we think it was sufficient to carry the case to the jury on the point now considered. The jury may reasonably have inferred that the company's agent received, and was authorized to receive, the note as payment of the premium, or that the company had knowledge of the fact that the agent was receiving notes for first premiums, and had so received this one, and that, therefore, the provision requiring a cash payment before the delivery of the policy was waived.

The judgment of the Circuit Court is affirmed.

PARDEE, Circuit Judge. In this case I am compelled to dissent from the conclusion reached by the majority. This is a suit by the widow of L. L. Williamson to recover the amount of a life insurance policy. The policy contains this provision:

"If the insured within two years from the issue hereof die by his own hand or act, whether sane or insane, the company shall not be liable for a greater sum than the premiums which have been received on this policy."

One of the pleas was that within one year from the date of said policy the said Williamson intentionally or voluntarily died by his own hand or act. The great preponderance of the evidence shows that Williamson died by his own act, and, in any case other than one on an insurance policy would require a verdict to that effect. I do not think that the trial judge committed reversible error in submitting this issue to the jury; but I do think he would have been fully warranted

in setting aside the verdict rendered, because it was contrary to the evidence.

The policy contains these provisions:

"(1) No obligation is assumed by this company upon this policy until the first premium has been paid and the policy duly delivered, nor unless upon the date of delivery insured is alive and in sound health."

"(5) Premiums are payable at the home office in the city of New York; but, at the pleasure of the company, suitable persons may be authorized to receive such payments at other places, but only on the production of the company's receipt, signed by the secretary and countersigned by the persons receiving the payments."

"(9) The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received, except by agreement in writing, signed by either the president, vice president, secretary, or actuary, whose authority for this purpose will not be delegated. No other person has or will be given authority."

And the application, made a part of the policy, recites:

"The policy hereby applied for, if issued, shall not be in force until the actual payment of the premium and its acceptance by the company during the lifetime and good health of the person on whose life the insurance is applied for."

According to the undisputed facts in this case, the first premium was never paid, nor was the payment of said premium ever waived by the company. The only thing looking to a payment or a delivery of the policy was the fact that the local agents, without the knowledge or authority of the company, took a note payable to one of them some two months afterwards, and handed over the policy to the assured for examination, or, in the undisputed evidence of the agent, "to look over and see if it was what we told him it would be." There was some evidence, that ought to have been excluded, tending to show, but not proving, that there was a custom among insurance agents to take notes in payment of premiums. Under this state of contract and facts, it does not seem necessary to argue or cite authority to show that the defendant below was entitled to the affirmative charge requested. The contract is plain, the company did not waive, and the local agents had no right to, as was known and agreed to by Williamson.

As to any ratification by, or any estoppel against, the company, it can only be a pretense. The facts in *Union Central Life Ins. Co. v. Robinson*, 148 Fed. 358, 78 C. C. A. 268, 8 L. R. A. (N. S.) 883, decided by this court, are different from the case in hand; but the principles therein declared and followed, if applied here, require the holding that the acts of the local agents were in no sense binding on the insurance company.

Batson v. Fidelity Mutual Life Ins. Co., 155 Ala. 265, 46 South. 578, covers this case exactly, and I need say nothing more than quote:

"The third plea, on which issue was taken by the plaintiff, set up a failure by the assured to pay the initial premium on the policy, a nonpayment of which by the terms of the contract rendered the policy invalid. The provisions in the contract of insurance in the case before us are much the same as those in the case of *Powell v. Prudential Ins. Co. of America*, decided at the present term of this court and reported in 153 Ala. 611, 45 South. 208. The

principles of law stated in that case and the authorities there cited find ready application here. The contract here sued on provides in terms that it 'shall not be operative and binding until the actual payment of the initial premium and delivery of the policy during the lifetime and good health of the assured.' It is also stipulated in the contract and agreed to by the assured that no agent of the company has the power or authority 'to grant credit, or to extend the time for paying any premium, or to waive any forfeiture, or to bind the company by making any promise, or by making or receiving any representation or information; it being agreed that such power can only be exercised in writing by the president, vice president, actuary, or assistant actuary of the company, at its head office, and shall not be delegated.' The undisputed evidence is that the initial premium was never paid. The soliciting agent, who delivered the policy, together with the receipt introduced in evidence, instead of collecting and receiving from the assured the initial premium, as was his duty, and which only as such agent he had the authority and power to do, took the note of the assured for the initial premium, payable to himself individually at 30 days. This he had no authority to do, and the assured was informed of this want of authority in the agent by the terms of the contract. The note was never turned over to or accepted by the company, and it is not shown that the defendant company ever had any knowledge or notice of this act of the agent until after the death of the assured. The act of the agent in taking the note of the assured for the initial premium, without authority from the defendant company, and without any subsequent waiver on its part of the agent's unauthorized conduct, or ratification of said act of the agent, cannot in reason be said to constitute in law an actual payment of the initial premium within the meaning of the contract."

In *Assurance Company v. Building Association*, 183 U. S. 361, 22 Sup. Ct. 153 (46 L. Ed. 213), Mr. Justice Shiras, for the Supreme Court, says:

"What, then, are the principles sustained by the authorities, and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects."

If this be so, then the case in hand was wrongly ruled and decided in the Circuit Court.

NORTHWESTERN FUEL CO. v. DUNKLEY-WILLIAMS CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,529.

1. MARITIME LIENS (§ 30*)—SUPPLIES FURNISHED TO CHARTERER—CIRCUMSTANCES AMOUNTING TO NOTICE OF CHARTER.

One furnishing coal to a steamer on the order of a charterer, designated as "Chicago & Milwaukee Line," which was not a name, but merely a designation of the class of traffic the steamer was then engaged in, without inquiry as to the fact and terms of a charter, but in the belief that the vessel would be held in any case, is not entitled to a maritime lien, where any inquiry would have disclosed the charter and its terms, which required the vessel to be returned free from liens, and especially where the owner promptly mailed a letter to the lien claimant, notifying it of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charter, thus showing its own diligence in the premises, although receipt of the letter was denied.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 37, 38; Dec. Dig. § 30.*]

2. MARITIME LIENS (§ 28*) — SUPPLIES FURNISHED TO CHARTERER — RIGHT TO LIEN.

A provision in a charter party, which required the vessel to be returned free from liens, that the charterer should not permit liens to be created in excess of \$1,000 at any one time, a violation of which should entitle the owner to take possession, was for the benefit of the owner, and does not entitle one furnishing supplies to the charterer without inquiry to claim a lien to the extent of the \$1,000.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 46, 47; Dec. Dig. § 28.*]

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Libel in admiralty by the Northwestern Fuel Company against the steamer Petoskey; the Dunkley-Williams Company, claimant. Decree for libelant, for less than amount claimed, and libelant appeals. Affirmed.

The appellee, owner of the steamer Petoskey, chartered her to the Chicago Transportation Company from May 1, 1906, until December 10, 1906, for a consideration of \$5,000. The charter party provided that second party thereto should pay promptly all of the running expenses of the steamer, and not permit her to be under debts constituting a lien upon her for more than \$1,000 at any time. It further provided that for a breach of said last-named covenant, or any other of the conditions of the charter party, appellee might at once take possession of the Petoskey, operate her for the account of the second party thereto, holding second party liable for the amount of the excess of the consideration reserved over and above what might be realized from her earnings. It was further thereby provided that at the expiration of the charter party the steamer should be returned in as good condition, less ordinary wear, etc., as when received, and that at the time of such return she "shall be free and clear of all liens and incumbrances whatsoever created by the party of the second part, or its agents or employés, for which the said party of the second part was to be liable, or which it was to bear." It was also provided in said charter party that second party should save harmless appellee from expenses incurred in defending against liens and otherwise. The Chicago Transportation Company thereupon took possession of the Petoskey and engaged her, together with the steamer Peerless, in carrying passengers and freight between Chicago and Milwaukee, until October 10, 1906, when appellee took possession of her for breach of charter party. The indemnity bond required by the charter party was never furnished, though often asked for. At the time of the default liens to the amount of \$1,500 had accrued. On May 23, 1906, Miles E. Barry, for the second party to the charter party, signing himself "V. P. and G. M.," wrote appellant, under letter head "Chicago & Milwaukee Line," asking for its best price on coal for the steamer Peerless and Petoskey; "we to go to your dock after the coal." Appellant replied May 24, 1906, naming price and other information. On June 4, 1906, appellee mailed a letter to appellant, advising the latter of the charter party, of which letter appellant denies all knowledge. No further steps were taken, save that coal was delivered to the steamer from time to time at appellant's dock and charged to steamer Petoskey, and payments therefor were duly made on bills sent by appellant to "steamer Petoskey, c/o Chicago & Milwaukee Line," at the end of each month up to the month of August, 1906.

The libel was filed to recover for the deliveries of August, September, and up to October 15, 1906, amounting to the sum of \$1,621.80. On hearing in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

District Court the lien was disallowed for all coal delivered up to October 15, 1906, and sustained as to deliveries on that day, amounting to the sum of \$75.75, with interest from November 15, 1906, amounting to \$7.96, and costs, amounting to \$83.80, from which order this appeal was taken. The errors assigned are: That the court erred in not allowing judgment to go for appellant for the whole amount claimed; that the court erred in holding that under the allegations of the libel and the evidence, respectively, appellant was chargeable with notice that the steamer was operated by the Chicago Transportation Company under charter; that the court erred in holding that the circumstances were such as to charge appellant with notice of the charter party; that the court erred in not holding that under the charter party, even conceding notice to appellant that by the terms thereof the charterer was not authorized to pledge the vessel for supplies to the amount of \$1,000, yet under the circumstances the steamer was liable to appellant to the amount of at least \$1,000.

A. E. Boyesen, for appellant.

Charles E. Kremer, for appellee.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The test of liability herein is conclusively stated by the Supreme Court in the case of *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, as follows, viz.:

"One furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control or possession of a vessel under such a charter party cannot acquire a maritime lien, if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim."

It appears that libellant delivered the coal under the impression that the vessel would be liable therefor in any case. This accounts for its lack of diligence in making investigation as to the facts. The credit was not given to protect the owner's interest in the steamer, but that of parties for the time being operating the boat. Therefore the question for the court to pass upon is whether libellant had actual knowledge, or was chargeable with knowledge, of the charter party between appellee and the Chicago Transportation Company. The term "Chicago & Milwaukee Line" seems to have been merely descriptive of the class of traffic the *Petoskey* was engaged in, and did not constitute a name. This was of itself a circumstance calculated to raise inquiry. Any effort on the part of libellant to ascertain why the owner of the steamer should operate under such a phrase would have resulted in the discovery of the charter party and its terms. Nothing short of fatuous confidence in the liability of the steamer for supplies under all conditions can explain the failure to make investigation. Moreover, appellee introduces evidence to the effect that notice of the charter party was mailed to libellant. The latter denies receiving any such letter. While this may not be conclusive proof of notice as against libellant, it relieves appellee from all suspicion of negligence in the premises, if any would otherwise attach. That no evidence is adduced as to notice to other furnishers of supplies is not persuasive, since the item of coal would be the first to be looked after. We deem it clearly

shown that whatever negligence there was in the premises was that of libellant.

The attempt to construe the language of the charter party so as to give libellant the benefit of the clause prohibiting liens to accumulate in excess of \$1,000 we deem without merit. Appellee was entitled under the agreement to receive the Petoskey free of all liens. The \$1,000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter party for the benefit of appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: Paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putnam in the case of *The Surprise*, 129 Fed. 873, 64 C. C. A. 309, since here we find that libellant was put upon notice of the charter party.

The finding of the District Court is affirmed.

NOTE.—The following is the opinion of Quarles, District Judge, in the court below:

QUARLES, District Judge. This is a libel of the steamer Petoskey to recover for coal furnished to said steamer by said libellant at Milwaukee, a foreign port, between the 6th day of August and the 16th day of October, 1906. There is no dispute that the coal was furnished and that the prices charged therefor were reasonable.

It appears that on the 21st day of April, 1906, a charter party was entered into between Dunkley-Williams Company, of Chicago, the owner and present claimant of the steamer Petoskey, and the Chicago Transportation Company, of Chicago, Ill., whereby the latter chartered the steamer from May 1, 1906, to December 10, 1906. By the seventh section of the charter party it was provided that during the life of the charter party the charterer "shall promptly pay all of the running and operating expenses of the steamer, and shall not permit her to incur debts for amounts constituting a lien upon her for more than a thousand dollars at any one time." It was also provided that at the end of the season the steamer should be returned to the owners free and clear of all liens, and that the owners should be saved harmless from any costs or expenses. The charterer operated the steamer, together with the steamer Peerless, under the designation "Chicago & Milwaukee Line." This line was operated between Chicago and Milwaukee until October 9th, when the owners resumed possession of the steamer Petoskey, owing to the default of the charterer. The charter party provided for a bond of indemnity to protect the owners and the same was frequently demanded, but never given. The charterers defaulted, and the steamer was subject to \$1,500 of liens when returned to the owners.

The evidence shows that the steamer Petoskey came to the dock of the libellant at Milwaukee on the 11th day of May, 1906, and applied for coal to enable her to make her regular trip to Chicago. There was no agreement for any lien on the vessel, nor any definite agreement of any kind. Mr. Graham, the city agent of libellant at Milwaukee, was notified of the request, and instructed his employes at the dock by telephone to deliver coal to her, and this was done regularly from day to day as she made her trips. The engineer usually signed the receipts for coal, but sometimes such receipts were signed by the captain; the same being charged on the books of the libellant to the steamer, care of Chicago & Milwaukee Line. On the 23d of May the following

letter was received by the libelant from Mr. Barry, general manager of the Chicago & Milwaukee Line.

"J. G. Keith, President.

A. C. Helm, Secretary and Treasurer.

"Miles E. Barry, Vice President
and General Manager.

J. A. McCaulay, Auditor.

"Chicago Milwaukee Line Steamers.

"Chicago & Milwaukee Line

"The 'C. & M.' Line.

"E. F. Daly, Gen'l Ft. and Pass. Agt.,
Milwaukee, Wis.

"W. H. Ogborn, Ass't Gen'l Frt. and
Pass. Agt., Chicago.

"Jos. Goebel, Agent, Chicago.

"Milwaukee Office and Docks: East Water St. Bridge. Telephone
South 915.

"Chicago Office and Docks: North End Clark St. Bridge. Telephone
Central 2586.

"Chicago, May 23, 1906.

"Northwestern Fuel Co., Milwaukee, Wis.—Gentlemen: I wish you would name me your best price on the run of pile coal for the steamers Peerless and Petoskey. We to go to your dock after the coal. Would thank you to let me hear from you by return mail.

"Yours truly,

Miles E. Barry, V. P. & G. M.

"MEB/T."

This letter was answered by the libelant on the following day, as follows:

"Milwaukee, Wis., May 24, 1906.

"Miles E. Barry, Vice Pres. Chicago Milwaukee Line, Chicago, Ill.—Dear Sir: Replying to yours of May 23, the present price of run of pile coal put on board your steamers at our dock is \$3.15 per ton. If you know how much coal you will need from now to April 1, 1907, we will contract to furnish you that amount at \$3.40 per ton, giving you the benefit of our spot delivery price so long as such price remains lower than the contract price, namely, \$3.40. Under a contract at \$3.40, you would now buy coal at \$3.15, and continue to buy it at that price so long as the spot delivery price remains at that figure, and so on up to \$3.40. This guarantees you a price to April 1, 1907, not to exceed \$3.40. Hoping to receive a favorable reply, we remain,

"Yours truly,

Northwestern Fuel Co.,

"H. C. Graham, City Agt."

To this letter there was no response. Mr. Graham, the city agent of libelant, has a book which contained the names of all the steamers on the Great Lakes, together with the names and addresses of the owners thereof. When application was made by the Petoskey for coal, Mr. Graham consulted this book and learned the fact that Dunkley-Williams Company, of Chicago, were the owners. He knew that the Petoskey was running in the Chicago & Milwaukee Line. Accounts for coal furnished were regularly rendered each month by libelant to the "Chicago & Milwaukee Line," and such accounts for the months of May, June, and July were paid by checks signed by Barry, vice president and general manager of said line. Libelant made no inquiries to ascertain whether the steamer was chartered, or whether Dunkley-Williams Company were interested in the Chicago & Milwaukee Line. Mr. Graham, who did all the business for the libelant, testifies frankly that until the Chicago & Milwaukee Line defaulted, late in the season, he supposed that the vessel was herself responsible for all needed supplies that were furnished, without regard to ownership. He gave credit to the vessel upon the supposition that he would have a lien upon her in any event. The case must be ruled by *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

It is strenuously insisted in argument that *The Surprise*, 129 Fed. 874, 879, 64 C. C. A. 309, rules this case. In many of its features that case is similar,

but there is one distinguishing fact which counsel overlook. In *The Surprise* the furnisher dealt only with the master and his subordinates, and there appeared no fact inconsistent with the presumption that he was giving credit to the vessel. Up to the time that negotiations were opened between libellant and the Chicago & Milwaukee Line, the two cases were almost parallel, and if the same course of dealing had continued here, the doctrine of that case would be potential. But the correspondence between libellant and the owner pro hac vice, and the subsequent rendition of monthly statements to the Chicago & Milwaukee Line, and monthly payments by them for May, June, and July, indicate clearly to my mind that libellant extended credit to the Chicago & Milwaukee Line. No special contract resulted; but what may be called a tacit understanding may be gathered from the transaction, which is as destructive in its influence as a specific agreement. It showed the acceptance by libellant of the Chicago & Milwaukee Line as the paymaster. In every receipt given by the vessel for coal reference was made to the Chicago Line. The fact that the account on the books of libellant was kept with the steamer *Petoskey* is of very little significance under the authorities. The following cases deal with circumstances which are held *prima facie* to show an intent to give credit to the charterer: *The William Cook* (D. C.) 12 Fed. 919; *The Samuel Marshall*, 54 Fed. 396, 4 C. C. A. 385; *The Stroma*, 53 Fed. 281, 3 C. C. A. 530; *The Geo. Dumois* (D. C.) 66 Fed. 353; *The Cimbria* (D. C.) 156 Fed. 378, 387; *The Gen. Dumont* (D. C.) 153 Fed. 312.

Mr. Graham, the agent of libellant, knew before August, when the Chicago & Milwaukee Line first made default in payment, that Dunkley-Williams Company were the owners of the steamer *Petoskey*; that their place of business was 7 Rush street, Chicago, Ill.; that the Chicago & Milwaukee Line was operating the steamer; that this line had an office in Chicago, and also one in Milwaukee; that this line had negotiated for coal for the steamer for the season, although no explicit contract was closed; that for three months this line had paid the steamer's bills. These facts were amply sufficient to put him upon inquiry, and certainly would have induced a prudent man, supposed to have a knowledge of the law, to investigate the circumstances. The difficulty in the case arose from the fact that Mr. Graham was lulled into security by the popular notion that the furnisher of necessary supplies was entitled to a maritime lien upon the vessel in any event. This supposition accounts for everything that happened. He must be presumed to have known the law. It would be intolerable to allow one to predicate a claim of this nature upon his own ignorance or indifference. The owners knew nothing of the credit thus extended by libellant to the vessel. They endeavored to notify libellant seasonably in June by letter of the exact situation. Libellant claims that such letter was never received. Under the view I have taken, it is immaterial whether the presumption of its receipt was successfully rebutted. It indicates the good faith of claimant in the premises.

Under the facts the libellant and claimant appear on this record as two innocent parties, and the old maxim obtains that in such case he must suffer whose negligence was responsible for the loss. It is plain that libellant was chargeable with such knowledge as he would have acquired if he had made the necessary investigation. *The Lulu*, 10 Wall. 192, 204, 19 L. Ed. 906. Mr. Graham had merely to call up the Chicago & Milwaukee Line by telephone, or to address a letter to Dunkley-Williams Company at Chicago, to ascertain the existence and the terms of the charter party. Good faith required this.

A persuasive argument is made by libellant as to the construction and effect of the peculiar clause in the charter party—"and shall not permit her to be in debt for amounts constituting a lien upon her for more than the sum of one thousand dollars at any time." It is contended that if the libellant, being put upon inquiry, had examined the charter party, he would have been justified in construing this clause forbidding the charterer to incur liens exceeding \$1,000 in amount as an implied consent to liens up to that amount, and that, as there is no evidence that any liens had accrued up to the time this coal was furnished, it could not be held a fraud upon the owners to rely upon the security of the vessel within the limits thus fixed by the owners. This argument is specious, but not sound. The clause in question was inserted for the protection of the owner as against the charterer. It required the payment of claims by the charterer before they exceeded the limit. It is calculated to

enforce the duty imposed by the antecedent clause. It was not inserted for the benefit of third parties as a foundation of a claim upon the vessel. The real question for the furnisher to determine primarily was who was bound to pay the coal bills. This question is effectually set at rest by the language of the seventh article of the charter party: "That for and during the life of this charter party, the said party of the second part (the charterer) shall promptly pay all of the running and operating expenses of said steamer." On learning of this obligation on the part of the charterer, the duty of the libelant was plainly to deal with the charterer, and by that course only could it keep faith with the owners.

The language of Mr. Justice Harlan in *The Valencia* is equally applicable here: "We mean only to decide at this time that one furnishing supplies or making repairs on an order simply of a person or corporation acquiring the control and possession of a vessel under such a charter party cannot acquire a maritime lien, if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make such inquiry and chose to act upon a mere belief that the vessel would be liable for his claim."

This conclusion, predicated upon similar facts, is reached by Judge Lowell in the case of *The Underwriter* (D. C.) 119 Fed. 713, after a most thorough review of all the authorities. Judge Seaman gave his sanction to the same doctrine in *The C. W. Moore* (D. C.) 107 Fed. 937. See, also, *The Goldenrod*, 151 Fed. 6, 80 C. C. A. 246, and *The Wm. P. Donnelly* (D. C.) 156 Fed. 302, which follow and perhaps expand the rule laid down by the Supreme Court.

Therefore my conclusion is that the libelant is not entitled to a maritime lien, except only for coal furnished after the 9th of October, when the claimant took over the steamer. This amount appears to be \$75.75, for which amount, with interest thereon and costs, the libelant is entitled to hold the steamer.

CRUCIBLE STEEL CO. OF AMERICA v. HOLT.

(Circuit Court of Appeals, Sixth Circuit. November 16, 1909. On Rehearing. December 27, 1909.)

1. SALES (§ 474*)—CONDITIONAL SALES—EFFECT OF FAILURE TO RECORD CONTRACT—KENTUCKY STATUTE—"CREDITORS."

In Ky. St. 1903, § 496, providing that, until recorded, chattel mortgages shall not be valid against a purchaser for a valuable consideration without notice thereof, or against "creditors," and which applies also to contracts of conditional sale, the word "creditors," as construed by the state Court of Appeals, does not include general creditors, but only such as have acquired a lien.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1397; Dec. Dig. § 474.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

2. BANKRUPTCY (§ 184*)—PROPERTY VESTING IN TRUSTEE—PROPERTY HELD BY BANKRUPT UNDER CONTRACT OF CONDITIONAL SALE.

Title reserved by a contract of conditional sale, which, although unrecorded, is good as against the purchaser and his general creditors under the laws of the state, is also good as against his trustee in bankruptcy, although some of the creditors became such after the date of the contract.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

On Rehearing.

3. BANKRUPTCY (§ 468*)—APPEALS TO SUPREME COURT—FINDINGS OF FACT.

General Bankruptcy Order 36, par. 3 (89 Fed. xiv, 32 C. C. A. xxxvi), which provides that, in any case appealable under the act to the Supreme

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Court, "the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts and its conclusions of law thereon stated separately," does not require such a finding to be made in any case by a Circuit Court of Appeals, unless requested by a party before the entry of judgment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 468.*]

Appeal from the District Court of the United States for the Western District of Kentucky.

Suit by the Crucible Steel Company of America against O. G. Holt, trustee in bankruptcy of Davis, Kelly & Co., bankrupts. Decree for defendant, and complainant appeals. Reversed.

K. L. Bullitt, for appellant.

H. H. Nettelroth, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. The controversy between these parties involves the question of the right of the vendor of goods sold by the vendor, the Crucible Steel Company, by a conditional sale to the bankrupt under an agreement that the title was to remain in the vendor until payment of the purchase price. By the law of Kentucky, where the transaction occurred, such a sale amounts to a sale and a chattel mortgage back to the vendor, and is subject to the provisions of the statute of the state concerning the recording of chattel mortgages. The statute reads as follows:

"No deed, or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors until such deeds shall be acknowledged or proved according to law and lodged for record." Ky. St. 1903, § 496.

This contract for a conditional sale was not recorded. Certain parties became creditors of the bankrupt after the date of the contract, but before the filing of the petition in bankruptcy; and it is these parties in whose behalf the trustee makes this contest against the claim of the vendors in the contract of sale of the title and for the possession of the goods. The District Court rejected the claim of the vendor, and denied its petition.

In the case of York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the Supreme Court, reversing a judgment of this court, held that the trustee in bankruptcy takes the assets in precisely the same condition and with the like title as that by which they were held by the bankrupt, and further, that the inchoate equity of creditors who had not then secured a lien by some judicial proceeding could not be worked out in their behalf by the trustee in the bankruptcy proceedings. That decision necessarily negatives the application to such a case of the provision of Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), that "claims which for want of record, or for other reasons, could not have been valid liens as against the claims of the creditors of the bankrupt, shall not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be liens against his estate"; and the further provision of section 67b, that "whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate." Those provisions were not referred to in the opinion of the court, and, of course, their meaning and scope were not defined further than is done by the necessary implication from the decision; but it cannot be supposed they were overlooked. We note that in *Thomas v. Taggart*, 209 U. S. 385, at page 389, 28 Sup. Ct. 519, at page 520, 52 L. Ed. 845, Mr. Justice Day said:

"The rule is generally recognized that, if the title to property claimed is good as against the bankrupt and his creditors at the time the trustee's title accrued, the title does not pass, and the property should be restored to its true owner."

But when he says, "and his creditors," we must suppose he means creditors who have secured a lien; for he cites *York Mfg. Co. v. Cassell*.

Accepting, then, the decision in the case of *York Mfg. Co. v. Cassell* as authoritative, what were the respective rights of the Crucible Steel Company and the bankrupt in the goods in question at the date of the filing of the petition? As between them the mortgage was valid, though not recorded. No creditor had fastened any lien upon them, although several of them were in a condition, and had a right, to do so. These two facts were regarded as decisive by the Supreme Court in the case referred to, and they seem equally decisive here.

In the case entitled *In re Doran*, 154 Fed. 467, 83 C. C. A. 265, we discussed at some length the meaning and effect of the Kentucky statute relating to the recording of chattel mortgages, and as to whether general creditors are protected thereby; but we felt constrained to abide by the opinion of the Supreme Court in *York Mfg. Co. v. Cassell* as settling the grounds upon which cases of this sort must be determined. In the *Doran* Case the chattel mortgage had been filed before the filing of the petition. In the present case it had not. But we cannot perceive that the difference is important. The mortgage was valid as between the mortgagor and the mortgagee, whether recorded or not, and there is no express definition by the statute which extends the meaning of the word "creditors," so as to include general creditors having no lien.

Since the decision in the *Doran* Case, in which we noticed the apparently conflicting cases in the Kentucky Reports concerning the effect of the statute above quoted, counsel have discovered a case, marked "not to be reported," in 99 S. W. 631, *Besten & Langen v. People's Mess., etc., Co.*, and they refer to a recent case, *Swafford's Adm'r v. Asher*, 105 S. W. 164, and claim from them it is shown that the Court of Appeals has finally settled the law to be that general creditors who have become such while the mortgage remained unfiled are to be protected. The court below seems to have so held, and some of the language of the judges who delivered opinions in those

cases seem to favor that construction. But there was no determination by the court which disposes of the uncertainty we encountered in the Doran Case, but notwithstanding which we gathered the impression that the trend of the state decisions was against the contention of the trustee. We think we ought not to overrule our decision without a more positive demonstration that the law of Kentucky is to the contrary of what we there held.

The decree of the court below must be reversed, with direction to order the trustee to surrender the property in question to the petitioner.

On Rehearing.

Since our opinion was announced and the judgment entered in this case, November 2, 1909, a petition for rehearing has been filed, from which, and a recurrence to the record, it appears that the petitioner did not ask in the court below for the surrender of the possession of the goods in question, but for the enforcement of a lien thereon and a privilege of priority over general creditors in the proceeds of a sale of the goods, in consideration whereof it is apparent that the judgment should not have been for the return of the possession, but should have been a declaration that the petitioner was entitled to prove its claim as a creditor, and was entitled to a lien upon the goods in question for the unpaid purchase money and to the extent of the amount realized, or to be realized, upon the sale thereof, the trustee should accord to the petitioner a lien thereon paramount to the claims of general creditors and make distribution of the proceeds accordingly.

The judgment so entered will therefore be reversed and held for naught; and a new judgment will be entered in the form and to the effect as above indicated to be correct, with costs to the petitioner. The petition for rehearing will in other respects be overruled. But, before the entry of the judgment above directed, the court will, upon the request of the appellee now made, make and file a finding of the facts and conclusions of law as required by Order No. 36 of the General Orders in Bankruptcy prescribed by the Supreme Court (89 Fed. xiv, 32 C. C. A. xxxvi).

We think there was no error in entering the former judgment without a finding of facts and law, none having been requested. We agree with the Circuit Court of Appeals for the Seventh Circuit in holding, as it did in *Knapp v. Milwaukee Trust Co.*, 162 Fed. 678, 679, 89 C. C. A. 467, that the third paragraph of General Order 36 does not require such findings to be made without request, but is intended to give the party a right to such findings, to be conceded if he demands it, which we think he should do, either before the opinion of the court is given, or, if thereafter, before the judgment is entered.

WILLIAM GRACE CO. v. HENRY MARTIN BRICK MACH. MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,556.

1. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—LIABILITY TO SUIT—"DOING BUSINESS WITHIN THE STATE."

Under Hurd's Rev. St. Ill. 1908, c. 32, § 26, which authorizes service of process upon an agent of a foreign corporation only in case that corporation is doing business in the state, the presence in the state of a traveling salesman, representing a foreign corporation having no place of business there, with authority to take orders for goods, to be submitted to the corporation for approval, does not constitute "doing business within the state" by the corporation, which will subject it to suit therein.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520, 2524; Dec. Dig. § 642.*]

Foreign corporation doing business in state, see notes to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585; *Brown v. Chicago, R. I. & P. Ry. Co.*, 72 C. C. A. 622. Service of process on foreign corporations, see notes to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3; *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—LIABILITY TO SUIT—"AGENT."

A mere traveling salesman for a corporation, sent into another state on a special matter with specific instructions, but having general authority to solicit orders for goods, to be submitted to the company for approval, is not an "agent" of the foreign corporation on whom service of process against it may be made, under Hurd's Rev. St. Ill. 1908, c. 32, § 26.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2610, 2611; Dec. Dig. § 668.*]

For other definitions, see Words and Phrases, vol. 1, pp. 262-270; vol. 8, p. 7569.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the William Grace Company against the Henry Martin Brick Machine Manufacturing Company. Suit dismissed for want of jurisdiction, and plaintiff brings error. Affirmed.

Plaintiff in error, an Illinois corporation, brought suit at law against defendant in error, a Pennsylvania corporation, in the municipal court of Chicago, Ill., and caused service to be had upon one McClellan, as an agent of defendant in error. The cause was afterwards duly removed to the federal Circuit Court. On issue of agency for the purposes of service being raised by defendant in error, the Circuit Court found against plaintiff in error. The latter thereupon represented to the court that he was unable to procure other service of process and asked for a final order, whereupon the suit was dismissed for want of jurisdiction over the defendant. The cause is now before this court upon the alleged error of the Circuit Court in quashing service of summons.

The facts deduced from the affidavits are as follows, viz.: Defendant in error is engaged in the business of manufacturing brick machines at Lancaster, Pa. On March 9, 1908, the contract out of which this suit has grown was entered into between the parties hereto at Chicago, Ill., involving the sale and installation of certain brick-manufacturing machines in plaintiff in error's plant at Ormstown, Canada. Afterwards, some disagreement having arisen between the parties, McClellan, a mere traveling salesman for defendant in error, having no stock or official connection with defendant in error, was, on request of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff in error, sent to Chicago under instructions to confer with plaintiff in error in regard to such controversy, and to make to plaintiff in error certain definite propositions, with a view to adjusting the differences, and also to report to defendant in error any counter propositions plaintiff in error might make. It further appears that said McClellan had authority to take orders for brick machine manufacturing apparatus, but was required to report the same to his employer for approval, and that he had not the power to make an absolute sale, except as specifically directed by defendant in error. While in Chicago in reference to the matter in suit, he did solicit orders to be reported to his employer. He had nothing to do with negotiating or making the sale in question. After several interviews, plaintiff in error declined finally to meet the terms proposed by McClellan for defendant in error, and caused the latter to be at once served with process.

The errors assigned are that the court erred in quashing the service and in not holding that it had jurisdiction of defendant in error.

George F. Buckingham, for plaintiff in error.

S. S. Gregory, for defendant in error.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). Whether or not the service upon McClellan was good must be determined with reference to the Illinois law. If the municipal court obtained jurisdiction of the defendant in error by service upon him, that jurisdiction was not vitiated by the removal. Under the statute of Illinois (section 26, c. 32, Hurd's Rev. St. 1908) service can be had upon an agent of a foreign corporation only in case that corporation is "doing business" in the state.

The questions here presented are: (1) Was defendant doing business in the state of Illinois at the time of service or before? (2) Was McClellan an agent within the meaning of the statute of Illinois?

It does not appear that defendant in error ever maintained any office within the state of Illinois for the transaction of its business. On the contrary, it is positively denied. Nor had it ever had any resident agent in the state, or transacted any other business therein, save the soliciting of orders by mail or traveling salesmen, to be submitted to defendant in error for approval. Our attention has been called to no Illinois case holding that a foreign corporation, under these circumstances, would be held to be doing business in the state. On the other hand, the contrary is expressly held in *Havens & Geddes Co. v. Diamond et al.*, 93 Ill. App. 557, and in *March-Davis Cycle Mfg. Co. v. Strobridge Lithographing Co.*, 79 Ill. App. 683. In the former case it is said:

"The procuring of orders by traveling agents in this state, with or without samples, or the sale of goods in this state by samples, when the orders are sent to a foreign corporation for its approval in the foreign state, from which the goods are shipped by common carrier to the purchaser in this state, does not constitute 'doing business' in this state, where such foreign corporation has no place of business in this state."

To the same effect are the decisions of a great number of the state courts referred to at page 2160 of *Words and Phrases Judicially Defined*. The federal rule is clearly stated in *Wall v. Chesapeake & Ohio Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129, and *Fairbank & Co. v. Cin. & N. O. Ry. Co.*, 54 Fed. 420, 423, 4 C. C. A. 403, 38 L. R. A. 271.

In *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608, it is said:

"Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it."

In *Green v. C., B. & Q. Ry. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, it is held that the fact that "for the purpose of conducting this incidental business the defendant employed Mr. Heller, hired an office for him in Philadelphia, designated him as 'district freight and passenger agent,' and in many ways advertised to the public these facts," and the further fact that "when a prospective passenger desired a ticket, and applied to the agent for one, the agent took the applicant's money and procured from one of the railroads running west from Philadelphia a ticket to Chicago, and a prepaid order which gave to the applicant, upon his arrival at Chicago, the right to receive from the Chicago, Burlington & Quincy Railroad a ticket over that road," and the further facts that he issued orders for reduced rates to railroad employes over defendant's lines, and gave exchange bills of lading, to be in force when freight was actually received by defendant therein—all these, and more, were not sufficient to show that the defendant therein was doing business in the district; citing with approval *Fairbank & Co. v. Railway Co.*, supra.

The case of *Houston v. Filer Stowell Co.* (C. C.) 85 Fed. 757, is cited by plaintiff in error as holding to the contrary. In that case, however, the general manager of the defendant corporation was in the state with reference to the subject-matter involved in the suit, thereby raising questions not involved here. Whether or not the facts in that case show that the defendant there was doing business in this state is not here a material inquiry, since McClellan could not, by anything he could do beyond his authority, bring defendant in error into this state. Whether or not he was, under the facts of this case, an agent, within the meaning of the statute, for purposes of service, must clearly be answered in the negative, under the rule established by a long line of authorities. *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Green v. Railway Co.*, supra.

We deem it unnecessary to consider the phase of the case raised by defendant in error with reference to interstate commerce.

Affirmed.

McCALL CO. v. DEUCHLER.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1909.)

No. 2,984.

DAMAGES (§ 80*)—LIQUIDATED DAMAGES—CONSTRUCTION OF STIPULATIONS—"PENALTY."

In a contract for the purchase and sale of an article of merchandise, to be delivered in stated quantities periodically during a term of over five years, a provision that in case of breach by either party the other may be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

released and recover as liquidated damages a sum equal to the entire purchase price to be paid during the term, is one for a "penalty," having no reference to the actual damages, which in such case are readily ascertainable, and the amount being grossly excessive in case the contract had been performed for any considerable time before the breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 170-175; Dec. Dig. § 80.*

For other definitions, see Words and Phrases, vol. 6, pp. 5272-5276; vol. 8, p. 7750.]

Appeal from the District Court of the United States for the Eastern District of Missouri.

In the matter of E. H. William Normann, bankrupt. From an order disallowing a claim of the McCall Company, said claimant appeals. Affirmed.

Augustus L. Abbott, John Blair Edwards, and Alfred C. Wilson, for appellant.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. This is an appeal from an order disallowing a claim of the McCall Company against the estate of E. H. William Normann, bankrupt, under a clause of a contract in the following words:

"If either of us shall intentionally break this contract, or shall refuse or fail promptly to perform the same after two weeks' notice in writing given by the other, then the other of us shall have the right to exercise the option of being released from all future obligations under it, and to recover and receive as liquidated damages, and not as a penalty, a sum equal to the agreed charge for fashion sheets during the entire term of this contract. Failure to require compliance with the strict letter of this contract order shall not forfeit nor prejudice any right thereunder, nor constitute a waiver thereof."

The contract was made January 28, 1905, and ran for 5 years and 3 months. It required Normann to take and pay for so many fashion sheets, etc., periodically during the term at a fixed price. After three years of the term had run, Normann defaulted, and was adjudged a bankrupt upon his own petition. The company presented a claim for \$358.79, balance due for goods actually delivered and remaining unpaid for, and for the further sum of \$807 as liquidated damages for breach of the contract. The trial court allowed the claim for \$358.79, and disallowed that for \$807 on the ground that it was a penalty, and not liquidated damages.

We think the trial court was right. The company offered no proof of its actual loss, but stood upon its demand for the entire amount stipulated in the contract. This is not a case of an agreed valuation of property, like that of *Sun Printing and Publishing Association v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; nor is it one in which the amount of actual damage is difficult of ascertainment. The contract was the common one of sale and purchase of articles of trade, for the breach of which the law prescribes a clear and definite measure of damages. The provision in the contract ignores this meas-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ure altogether, and fixes an arbitrary amount which is grossly in excess of all loss that could possibly have been sustained. This is manifest from the face of the contract itself. Extrinsic evidence is not necessary to disclose it. The amount claimed as liquidated damages embraces, not only the full price of goods not yet delivered under the contract and of those delivered and not paid for, but for which a separate claim was made and allowed against the bankrupt's estate, but also the price of those which the bankrupt had fully paid for during the first three years of the contract. It is inconceivable that a default of the purchaser, occurring after so much of the contract term had passed, could have inflicted so disproportionate a loss, or that the loss could under any circumstances have exceeded the contract price of the remaining goods, which the bankrupt did not take and pay for according to his agreement. Under such circumstances, calling the specified sum "liquidated damages" does not make it so. *Bignall v. Gould*, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491. There is nothing in *United Shoe Machinery Co. v. Abbott*, 158 Fed. 762, 86 C. C. A. 118, inconsistent with these conclusions.

The order is affirmed.

SAAKE v. LEDERER.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 56.

1. COPYRIGHTS (§ 69*)—ACTION FOR INFRINGEMENT—STATUTORY REQUIREMENTS.
Both the right of action for infringement of a copyright, and the copyright itself, are in this case statutory, and a compliance with such statutes is essential to a right of action.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 69.*]

Rights of authors to control of publication, disposition, or use of their productions independent of statutory copyright, see note to *Bobbs-Merrill Co. v. Straus*, 77 C. C. A. 620.]

2. COPYRIGHTS (§ 69*)—ACTION FOR INFRINGEMENT—BURDEN OF PROOF.
In a suit for infringement of a copyright, the librarian's certificate does not per se establish the copyright; but the burden rests on the plaintiff to show compliance with the statutory requirements as conditions precedent.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 69.*]

3. COPYRIGHTS (§ 23*)—WHO MAY OBTAIN—ASSIGNMENT OF RIGHT.
A contract by which a foreign author of a dramatic composition granted the stage rights in the United States to another, and agreed to copyright the play in this country, did not convey the author's right of copyright, and an attempted copyright by the grantee in his own name was invalid, and will not support an action by him for infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 22; Dec. Dig. § 23.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by Emanuel Lederer against Charles Saake. From a judgment for plaintiff (166 Fed. 810), defendant brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer

Joseph H. Taulane and Hector T. Fenton, for plaintiff in error.
G. W. Pepper and Louis Steckler, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Emanuel Lederer brought suit against Charles Saake for damages for infringement of a copyright taken out by him for a dramatic composition in the German language, entitled "Alt Heidleberg." The play was the work of one William Meyer Foster, of Berlin, and it was staged and performed by the defendant in the German theater of Philadelphia. The copyright was sought to be taken out under the provisions of Rev. St. § 4952, as amended by Act March 3, 1891, c. 565, § 1, 26 Stat. 1106 (U. S. Comp. St. 1901, p. 3406), which reads:

"The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, * * * publishing * * * and vending the same, and in case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others,"

—and section 4956 (amended as above), which is:

"No person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver * * * to the Librarian of Congress * * * a printed copy of the title of the book, map, chart, dramatic or musical composition, * * * nor unless he shall also, not later than the day of publication thereof in this or any foreign country, deliver * * * to the Librarian of Congress * * * two copies of such copyright book, map, chart, dramatic or musical composition."

A verdict having been rendered for the plaintiff, and judgment entered thereon, Saake, the defendant, sued out this writ of error.

Both the right of action in this case and the copyright itself are statutory, and the means whereby Lederer sought to secure both such rights are only those recited in the foregoing sections. It follows, therefore, that failure to comply with those statutes would prevent a right of action in him against Saake from arising. *Thompson v. Hubbard*, 131 U. S. 151, 9 Sup. Ct. 710, 33 L. Ed. 76; *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055; *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425. When suit for infringement is brought, the Librarian's certificate does not per se establish the copyright; but the burden rests on the plaintiff to show compliance with statutory requirements as conditions precedent. *Merrell v. Tice*, 104 U. S. 557, 26 L. Ed. 854; *Osgood v. Aloe Co. (C. C.)* 83 Fed. 470.

The Constitution (article 1, § 8, cl. 8) securing to "authors and inventors" alone "the exclusive right to their respective writings and discoveries," the right of any other person to a copyright is derivative and secondary, and such latter must therefore show that he is the grantee of the author's rights. *Green v. Bishop*, 1 Cliff. 186, Fed. Cas. No. 5,763; *Little v. Gould*, 2 Blatchf. 181, Fed. Cas. No. 8,394; *Yuengling v. Schile (C. C.)* 12 Fed. 100. This Lederer sought to do by his contract of January 10, 1902, with Foster, the author. That contract not only does not in express terms purport to assign Foster's rights as an author to Lederer, but, on the contrary, by the provision of the

translation in evidence, that "the said William Meyer Foster agrees to have the within-named play in order to have the protection of the American law copyrighted prior to its appearance in the book trade," Foster retains to himself the privilege of copyright. On the trial Lederer testified that this was the meaning of the contract when, in answer to the question, "Do you understand you have the exclusive right to publish that book in this country, from that contract?" he said:

"I do not say that—that I have the only right to. It says here that the author will have the book copyrighted here. That means have it set up and printed, in order that he is enabled to go into the trade and have still the protection of the American law."

It is therefore obvious that this contract, on which Lederer's sole right to procure a copyright rests, neither conveyed nor purported to convey the author's title or right to a copyright in the United States.

It is contended, however, that under the case of *Belford v. Scribner*, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514, that is a matter that only concerns Foster and Lederer. We cannot give any such effect to that case. Mrs. Terhune was the authoress of the book there in question, and such authorship by the statute entitled her to a grant of copyright; her marital obligations with reference to her earnings in no way affecting her right to obtain a copyright certificate. The instrument by which Mrs. Terhune assigned to the Scribners her right as authoress to take out a copyright certificate is not printed in the case; but, whatever its form, it evidently purported to assign all the right she had. It is therefore manifest the case was fundamentally different from that before us, where the agreement between the parties stipulated that the power to copyright remained in the author, and the plaintiff testified such was the meaning of the contract.

We are therefore of opinion that Lederer failed to show any right as proprietor to a grant of the copyright sued on, and the judgment must be reversed, with instructions to enter judgment for the defendant.

THORNDYKE et ux. v. GUNNISON, District Judge.

(Circuit Court of Appeals, Ninth Circuit. November 22, 1909.)

No. 1,697.

NEW TRIAL (§ 131*)—GROUNDS—INABILITY OF JUDGE TO SETTLE BILL OF EXCEPTIONS.

Under Rev. St. § 953, as amended by Act June 5, 1900, c. 717, § 1, 31 Stat. 270 (U. S. Comp. St. 1901, p. 696), which provides that, in case the judge before whom a cause has been tried is unable to hear and pass on a motion for a new trial and allow and sign a bill of exceptions, his successor may pass on such motion and allow a bill of exceptions, if the evidence has been taken down, or if satisfied in any other manner that he can fairly do so, but, if not, may in his discretion grant a new trial, a party who has not presented to a succeeding judge a bill of exceptions containing a transcript of the evidence, as required by a rule of court, be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cause of his failure to pay the reporter's fees, is not entitled to a new trial as of course.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 131.*]

Petition for Writ of Mandate, directed to the judge of the District Court of Alaska, Division No. 1, requiring said judge to enter an order in the cause entitled "C. M. Thorndyke et al. v. Alaska Perseverance Mining Company," No. 626A, setting aside the judgment, findings, and conclusions of law therein, and granting to the petitioners, as plaintiffs in said cause, a new trial. Writ denied.

E. M. Barnes and L. S. B. Sawyer, for relators.

R. F. Laffoon and W. C. Sharpstein, for respondent.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

PER CURIAM. The petition in this case sets forth the changes that have taken place in the office of judge of the District Court of Alaska, Division No. 1, since June 28, 1907, when Judge James Wickersham, then judge of the District Court of Alaska and holding the court of the First division thereof, tried the cause of C. M. Thorndyke et al. v. Alaska Perseverance Mining Company, No. 626A, and made findings of facts and conclusions of law upon which the court entered a judgment in favor of the plaintiffs. The petition also recites orders extending time for the preparation of a bill of exceptions and the proceedings relating to the delay on the part of the plaintiffs in procuring from the stenographer of the court a transcript of the evidence.

It appears, from the return to the order to show cause, that the judgment was entered on June 28, 1907, and the time for settling the bill of exceptions was extended from time to time until March 1, 1908. On February 28, 1908, a motion for a new trial was filed and submitted to Hon. Royal A. Gunnison, holding the District Court for the said division. This motion was denied by Judge Gunnison on January 11, 1909. In the meantime the plaintiffs appear to have abandoned all effort to obtain a bill of exceptions. It appears, from the affidavit of the official reporter, that the reason why the stenographic notes were not extended was that no provision was made for the payment of his fees as demanded by him. The rule of the court required that, in a case where the testimony is taken by the reporter, it should be extended for the purpose of settling the bill of exceptions. The bill which was finally tendered was not prepared in accordance with the rule.

We find nothing in section 953 of the Revised Statutes of the United States, as amended by Act June 5, 1900, c. 717, § 1, 31 Stat. 270 (U. S. Comp. St. 1901, p. 696), entitling the plaintiffs to a new trial as of course, or any relief, at our hands.

The petition for a mandate is therefore denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HALL et ux. v. HANKEY.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,493

DEEDS (§ 128*)—CONSTRUCTION—ESTATES CREATED—APPLICATION OF RULE IN SHELLEY'S CASE.

A deed "by and between [the grantors], the party of the first part, and James A. Hall and Mary Hall, his wife, during their or either of their natural lives, and in fee to the heirs of the said Hall and his wife, the party of the second part," conveying real estate "unto the said party of the second part, their heirs and assigns, forever," by unmistakable implication limits the heirs taking to the particular heirs of the grantees named as husband and wife, that is, to the issue of the marriage, and the rule in Shelley's Case does not apply, under the law of Illinois, where such rule is in force as a rule of property; but as, under the statute, the grantee of a fee tail takes a fee simple, Hall and wife took life estates, and the fee simple vested in their children as tenants in common.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415; Dec. Dig. § 128.*]

Appeal from the Circuit Court of the United States for the Eastern District of Illinois.

Suit in equity by Jennie H. Hankey against George L. Hall and Mary A. Hall. Decree for complainant, and defendants appeal. Affirmed.

J. B. Mann, for appellants.

W. M. Acton and J. H. Dyer, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. The suit involved the construction of a deed made and entered into "by and between John C. Culver and Harriet M. Culver, his wife, the party of the first part, and James A. Hall and Mary Hall, his wife, during their or either of their natural lives, and in fee to the heirs of the said Hall and his wife, the party of the second part." "The said party of the first part" conveyed "unto the said party of the second part, their heirs and assigns," certain lands in Illinois, "to have and to hold said lands * * * unto the said party of the second part, their heirs and assigns, forever." At the time of the execution of the deed James A. Hall and Mary Hall were husband and wife, and had two children as the fruit of their marriage. Subsequently another child was born to them.

The Circuit Court held that under the law of Illinois (which, of course, was controlling) James A. Hall and Mary Hall took life estates only, and that the fee simple vested in their three children as tenants in common. Appellants contend that the deed conveyed the fee simple to James A. Hall and Mary Hall as tenants in common.

In Illinois the rule in Shelley's Case is in force as a part of the common law. It is not a canon of construction. It is a rule of property. If the wording of an instrument brings it within the rule, the rule applies, even though the grantor explicitly directs that it shall not apply.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Illinois estates tail have been abolished by statute. The grantee of a fee tail takes a fee simple.

Appellants insist that James A. and Mary Hall are the only persons named as grantees. The granting clause, and likewise the habendum, runs "unto the said party of the second part." Referring to the description of "the party of the second part," we think the deed clearly means the same as if the granting clause had been worded, "unto James A. Hall and Mary Hall, his wife, during their or either of their natural lives, and in fee to the heirs of the said Hall and his wife." *Beacroft v. Strawn*, 67 Ill. 28; *Griswold v. Hicks*, 132 Ill. 494, 24 N. E. 63, 22 Am. St. Rep. 549.

Even so, appellants say, the word "heirs" requires that the rule in *Shelley's Case* be applied. On examining the above-stated granting clause in its entirety, it seems quite apparent to us that there is no naming of the general heirs of James A. Hall and the general heirs of Mary Hall. If a conveyance is made "to John Doe and Richard Roe for life, and then to their heirs," the wording unquestionably refers to the general heirs of Doe and the general heirs of Roe, and consequently the rule in *Shelley's Case* applies, no matter what was the grantor's actual intention. But here the existing marriage relationship between James A. and Mary Hall is conspicuously stated in connection with the word "heirs." The fee is not to go to the heirs of James A. Hall and Mary Hall as James and Mary, but to the heirs of husband and wife; that is, to the issue of their marriage, to the heirs by them begotten. Words of procreation are not indispensable in establishing an estate tail. If the unmistakable implication limits the heirs to particular bodies, that is sufficient. *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505; *Atherton v. Roche*, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591. As we find that there was a limitation to particular heirs, there is no basis for the application of the rule in *Shelley's Case*.

The decree is affirmed.

SAVANNAH, A. & N. RY. CO. v. OLIVER.

(Circuit Court of Appeals, Fifth Circuit. December 14, 1909.)

No. 2,012.

CONTRACTS (§ 229*)—CONSTRUCTION—CONTRACT FOR CONSTRUCTION OF RAILROAD.

Under a contract for the construction of a railroad, by which the contractor was to receive as compensation "the actual cost to himself of the work and labor performed and the materials and supplies furnished, either by himself or under subcontracts, and an amount in addition thereto equal to 7½ per cent. thereof as general contractor's profits," the cost or price of labor, materials, and supplies to be agreed upon between him and the engineer of the railroad company, the contractor is not entitled to charge as a part of the cost a sum for the depreciation of the equipment used by himself and the subcontractors in doing the work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1048-1050; Dec. Dig. § 229.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Suit in equity by W. J. Oliver against the Savannah, Augusta & Northern Railway Company. Decree for complainant, and defendant appeals. Modified and affirmed.

J. A. Brannen, Hinton Booth, and James K. Hines, for appellant.

C. Henry Cohen, Joseph R. Lamar, and E. H. Callaway, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. In this case the master included in the amount found due complainant an item of \$17,287.50 for depreciation of equipment, which should have been disallowed. Deducting this item, and correcting the calculations incident thereto, we find the amount due complainant to be \$269,874.04, and the judgment of the Circuit Court will be amended in conformity therewith; but in all other respects it is affirmed.

GENERAL ELECTRIC CO. v. SANGAMO ELECTRIC CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,532.

1. PATENTS (§ 328*)—INVENTION—ELECTRIC METERS.

The Halsey patent, No. 626,832, for an electric meter, is void for lack of invention, in view of the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC METERS.

The Halsey patent, No. 664,265, for an electric meter of the mercury class, the improvement consisting in completely amalgamating the copper disc, discloses invention, and is valid; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Suit in equity by the General Electric Company against the Sangamo Electric Company. Decree for defendant, and complainant appeals. Reversed in part.

The appeal is from a decree dismissing the bill in the Court below for want of equity. The bill was to restrain infringement of letters patent No. 626,832, issued June 13, 1899, and letters patent No. 664,265, issued December 18, 1900, to Edward S. Halsey, assignor to appellant, for electric meters.

Claim 2 of letters patent No. 626,832 (the claim relied upon) is as follows:

"2. The combination in a mercurial electric-current meter; a mercury chamber being a narrow slot in a body made of non-magnetic material in greater part; magnetic poles N and S entering to said chamber by its walls being fixed therein and defining thereby a magnetic field in said slot of small area compared with the area of the chamber of which it is a part; electrodes 22 and 22 entering said chamber through its walls by which they are held in position, being one at each end of said field centrally located thereto and of small area so as to direct the current between said poles and through the center of said field; an armature of sheet metal adapted to fit said chamber in which it rotates submerged in mercury, and is propelled by the current led to it by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said electrodes and is retarded by the magnetic field in which it rotates, substantially as shown and specified."

The invention claimed in Letters Patent No. 664,265 consists in the amalgamation of the disk and is set forth in Claim 2 (the claim sued upon) as follows:

"2. In an integrating electric meter, a revolving armature consisting of a circular piece of sheet-copper submerged in mercury and having its two main parallel faces completely amalgamated for the purposes set forth."

Other patents cited are the following:

No. 240,678, Apr. 26, 1881, T. A. Edison.

No. 251,545, Dec. 27, 1881, T. A. Edison.

No. 281,352, July 17, 1883, T. A. Edison.

No. 381,443, Apr. 17, 1888, E. Thomson.

No. 509,095, Nov. 21, 1893, J. Perry.

No. 579,582, Mar. 30, 1897, G. Hookham.

No. 816,922, Apr. 3, 1906, R. C. Lanphier.

English Patents.

No. 1364, Mar. 14, 1883, Charles W. Siemens.

No. 7219, 1890, John Perry.

No. 40, 1891, Geo. Hookham.

No. 4064, 1891, George Hookham.

No. 7484, 1896, Evershed & Vignoles.

No. 17764, 1898, Henry Reason.

The further facts are stated in the opinion.

Thomas B. Kerr and Parker W. Page, for appellant.

Charles W. Pickard, for appellee.

Before GROSSCUP and BAKER, Circuit Judges, and ANDERSON, District Judge.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion.

Both of the patents relate to certain improvements in meters for measuring and recording the amount of electric current flowing in or drawn from a circuit with which they may be connected, the meters being of that special class known as mercury meters, for the reason that they have armatures of conducting material immersed in a chamber containing mercury. In meters of this kind (they existed in the prior art previous to the Halsey patents under consideration) the motive device is a disk or cylinder of copper or other good conducting material, immersed in a body of mercury, and mounted between the poles of a magnet in such a manner that when a current of electricity is passed through that portion of the disk which lies immediately under the magnetic poles, the disk will be set in rotation in accordance with a well-known law of operation resulting from the reaction between the current in the disk and the magnetic field through which its path lies. From this class of mercury meters, the Halsey invention, letters patent No. 626,832 is sought to be differentiated by the designation of the mercury chamber as a "narrow" slot, and the magnetic field as being one of "small area." But for these features, letters patent No. 626,832 would be fully anticipated in the prior art.

Though these features doubtless carry with them many practical advantages, they are, in our opinion, anticipated both in purpose and

in effect by prior patents, among them the Perry and Hookham patents; the sole difference being that when a patent in the prior art with a narrow slot is shown, it is said that the area of the magnetic field is larger, and when a prior patent with a smaller area of magnetic field is shown, it is said that the slot is not so narrow; but nowhere does patent No. 626,832 give any criterion by which it may be judged how narrow the slot must be, how large the body of the insulating material, or how large the magnetic field. Indeed, whatever changes Halsey has made over the prior art, are changes, not of new conception, but of adaptation—a change that constitutes its author in the given case, not an electrical inventor, but rather an electrical engineer. For these reasons, we believe that this patent is invalid.

Patent No. 664,265 is meant as an improvement in the same class of meters, and so far as the present suit is concerned, differs from the prior art in completely amalgamating the entire disk instead of seeking to insulate it so as to overcome the tendency to amalgamation. His thought in this respect is set forth in the following paragraph from his testimony (Rec. p. 73):

"I have found, through experiments running through one or two years, that a copper disk armature running in the narrow slot and field gap, which is essential or desirable, that unless the disk armature be thoroughly amalgamated, small air pockets are liable to exist at points which are unamalgamated or poorly amalgamated, thereby causing friction (by the accumulation in such pockets of copper oxide or mercury scum) which may vary from a small amount, affecting the meter only in small loads, to any amount up to an amount that will in some cases stop the meter at full load, or absolutely prevent it from starting. I have found repeatedly in my early experiments that a meter which at one time would run apparently all right, at another time would, with no visible cause, stop running entirely, or would indicate internal friction of some kind which I at first had difficulty in locating. I also found that some of these armatures which had been in use and constantly submerged in mercury for more than a year had not become thoroughly amalgamated, and I am of the opinion that they would never become perfectly amalgamated of themselves. The effect of non-amalgamation or imperfect amalgamation is to interfere with the perfect and complete filling of the mercury space with mercury, and after once filled, or apparently so, on account of the meter being slightly out of level or the armature running closer to one wall than another on account of being slightly out of true, the close approach to one of the walls of one of the imperfectly amalgamated spots or portions of the armature, will sometimes cause the receding of the mercury at this point, forming an air pocket and space for mercury film or scums, which very materially increases friction. This also decreases the hydrostatic pressure at this point, whereby this portion of the armature is drawn still closer to the wall, and on account of the elasticity of the shaft or play in the bearings often causes actual contact or rubbing friction, thereby preventing rotation altogether."

This, we think, is shown to have been a departure from the thought of the prior art.

True, our attention is called to the Perry British Patent No. 7219 (1890), to the Evershed & Vignoles British Patent No. 7484 (1896), and to Reason's British Patent No. 17764 (1898), the latter two of which show copper armatures completely submerged in mercury; and in the former of which it is stated that it is only "sometimes" that the copper cylinder, except where the current is received and given off, is covered with an insulating varnish—the implication argued for being that in other instances the cylinder is not insulated by varnish

and is, therefore, subjected to the amalgamating influence of the mercury—from which it is argued (copper immersed in mercury automatically amalgamating) that there is no novelty in the Halsey patent.

These exhibits from the prior art do not disclose complete amalgamation, for in order to make copper amalgamate when immersed in mercury, all traces of foreign substances must first be chemically removed (something not pointed out or hinted in the British patents); nor do they disclose initial complete amalgamation as an element of the combination—something that must be attended to, irrespective of what may occur incidentally as the result of the immersion of the armature. Indeed, though in constructing meters in accordance with the teachings of the prior art more or less amalgamation is a direct and necessary result, the amalgamation is partial only and not complete, and has been looked upon as an incident to be avoided, not an end to be purposely attained.

We think that, under the circumstances, the departure practiced by Halsey and pointed out in his patent is patentable invention. Undeniably, his initial amalgamation of the disk is the result of his experiments, not of what he read in prior inventions. Undeniably, no one in the prior art purposely set about to amalgamate; whatever amalgamation took place, was incidental only. And undeniably the disks of the appellee are subjected now to this specific process of amalgamation before they are inserted in the instrument—convincing evidence that the defendant has learned from Halsey's patent and not from the prior art.

The decree of the Circuit Court will be affirmed as to patent No. 626,832, and reversed as to patent No. 664,265 and the case remanded, with instructions to enter a decree finding Claim 2 of that patent valid, and finding it to be infringed by appellee (the infringement is not seriously denied) and entering an injunction accordingly.

WESTRUMITE CO. OF AMERICA v. COMMISSIONERS OF LINCOLN PARK.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909. Petition for Rehearing Overruled November 20, 1909.)

No. 1,569.

PATENTS (§ 328*)—INVENTION—METHOD OF SPRINKLING STREETS.

The Van Westrum patent, No. 752,487, for a method of sprinkling streets by the use of a mixture or solution of oil and water, is not void on its face because it uses the term "solution" where "emulsion" may be the correct chemical term; but its validity is a question to be determined by proof.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the Westrumite Company of America against the Commissioners of Lincoln Park. From a decree (164 Fed. 989) on demurrer, dismissing the bill, complainant appeals. Reversed.

Appellant, as owner of patent No. 752,487, February 16, 1904, to Van Westrum, sought to have appellee enjoined from continuing an alleged infringement.

The description and claims are as follows:

"The ordinary system of sprinkling streets with water for the purpose of laying the dust has the disadvantage that in hot weather the water very rapidly evaporates, so that the sprinkling operation must be frequently repeated, whereby a very large quantity of water is used.

"Attempts have been made to employ crude petroleum instead of water, as the former evaporates much slower than water, and therefore renders such frequent sprinkling unnecessary. One of the great disadvantages of petroleum, however, is that it possesses a disagreeable odor, and, further, should it get upon the clothing of passers-by, greasy spots are formed which are extremely difficult to remove.

"According to my invention I make use of the fact that oily substances evaporate very slowly, but at the same time I avoid the inconvenience above referred to.

"My invention consists of a new and improved method of utilizing the granulated dust or particles evolved from the surface of the streets and roadbeds by the constant wear and tear caused by travel of animals, vehicles, and the action of the elements, first, by saturating the said granulated particles with a mixture of oily substance, permeating them through and through, causing the same to become intimately mixed with said oily substance, which is preferably composed of oil and water in such proportions as will be herein-after described; secondly, in sprinkling roadbeds, streets, and the like with an oily substance in such manner that the dust particles become united with a homogeneous mass, binding the particles together to form a coating or top dressing for the roadbed or street, causing said dust to adhere to the solid surface of said bed or street, and thus preventing the diffusion of the said dust by the wind, to the discomfiture, and annoyance of pedestrians and to the injury to houses and articles generally.

"For the purpose of my invention, in using a soluble sprinkling liquid I employ oily substances, such as petroleum, petroleum residue, or other suitable mineral or tar oils rendered soluble in water by any known process; these compounds being previously prepared so as to readily mix in solution with a larger volume of water. The proportion I prefer is about from ten to twenty parts of prepared oil to eighty or ninety parts of water, according to the depth of dust or sand to be laid, saturated, and unified, so that a substantial coating will be formed on the surface of the roadbed or street, whereby the surfaces of said streets or roadbeds are greatly benefited and preserved and the diffusion and scattering of dust largely prevented. This sprinkling medium has the advantage that by reason of the addition of oily substances it evaporates considerably less rapidly than pure water, while, owing to the oily substances being dissolved in the water, it does not leave spots on the clothing of persons which are difficult to remove. Spots made on wearing apparel by this new sprinkling liquid can be readily removed by the application of plain water. Furthermore, I can apply my sprinkling medium at an ordinary temperature and without pressure, by using the common watering car or the like, which is not possible by using for the same purpose crude petroleum or tar, as the latter must be applied on roadbeds in a hot condition and by using pressure, because cold mineral oils or tar do not get mixed with sand, dust, and the like, but form with it globules, which are mutually repulsed, and do not form at all a binding medium for dry or moist sand, dust, and the like. Rain does not impair the roadbeds at all after having been treated by my method, as the rain water is absorbed at once by the oil on the roadbed, out of which the former water has been more or less evaporated, so that rain, in fact, revives the binding effect on the dust particles and largely serves the purpose of a fresh sprinkling of the solution. Besides, the said soluble oily substance can be dissolved in water to any desired extent, and, as but a small quantity of same is

needed, my improved method is very cheap and economical. Finally, my improved sprinkling medium diffuses much easier than petroleum in the road surfaces covered with dust particles, and binds permanently the stones, sand, dust, and earthy material or the like forming the roadbed.

"It will be evident that piles of dust, sand, coal, and other comminuted particles capable of being blown off may be treated with the sprinkling solution, which forms a crust on the surface of the heap or pile, and thus prevents their scattering.

"Having thus described my invention, what I claim is:

"1. The method of utilizing the granulated portions of roadbeds or streets by forming them into a top dressing or coating, by first mechanically or chemically mixing in predetermined proportions oil and water, then sprinkling or spreading the said mixture over the said loose granulated substance or dust and permeating the same, thereby unifying them and forming a concrete mass, which adheres to the solid surface of the street or roadbed, thus preventing the diffusion of dust and forming the said top dressing.

"2. The method herein described of first taking say ten parts of oil, then ninety parts of water, then mixing the same in a solution, then distributing the mixture over a surface of granulated substance, by which the granules are united in a thin stratum, whereby their diffusion or scattering is prevented.

"3. The method herein described of improving the surface of roadbeds and utilizing the loose granulated particles thereon, by sprinkling or coating them with a mixture of oily substances composed of predetermined proportions of oil and water, whereby the said substances are caked or mixed to form a coating for the purpose specified.

"4. The method of utilizing the granulated portions of roadbeds or streets known as dust and forming it into a top dressing, by permeating it with an oily substance consisting of oil and water previously and intimately mixed, whereby the said granulated particles are unified with oil and water and form a concrete mass, in the manner and for the purposes specified.

"5. The method herein described of saturating scattered dust and mixing the same with a mixture of oil and water in the proportions specified in such a manner that said dust is made to adhere to its bed, substantially as described."

Among other averments the bill contained the following: "Your orator further avers and shows unto your honors that, prior to the said invention of said Van Westrum, it was known to those skilled in the art to which the said invention pertains that oil and water could be so intimately and permanently mixed as to hold the oil practically in solution in the water, so that said mixture was to all intents and purposes a solution, and that the patent to Weygang, No. 575,189, dated January 12, 1897, discloses such knowledge; a copy of said patent being attached hereto and marked 'Exhibit B.'"

Appellee demurred on the following grounds:

"(1) That it appears from said amended bill, and particularly from the copy of the patent attached thereto, that the said patent is invalid, for the reason that it does not describe or claim any patentable invention, in view of the prior state of the art within common knowledge, and of which the court will take judicial notice.

"(2) That it appears from said amended bill, and particularly from the copy of the patent attached thereto, that the said patent is invalid, for the reason that it does not describe or claim any patentable invention, in view of the admissions and disclosures contained on the face of said patent as to the prior state of the art.

"(3) That it appears from said amended bill, and particularly from the copy of the patent attached thereto, that the said patent is invalid, for the reason that it appears from the face of said patent and said amended bill of complaint that the description contained in said patent of the alleged invention is defective and misleading, in view of the prior and present state of the art within common knowledge, and of which the court will take judicial notice."

The court sustained the demurrer, and, on appellant's declining to amend, dismissed the bill for want of equity.

Walter H. Chamberlin, for appellant.

William R. Rummeler, for appellee.

Before GROSSCUP and BAKER, Circuit Judges, and ANDERSON, District Judge.

BAKER, Circuit Judge (after stating the facts as above). It is argued that the specification is fatally misleading, because it speaks of "a soluble sprinkling liquid," made up of water and "petroleum, petroleum residue, or other suitable mineral or tar oils rendered soluble in water by any known process." Though "emulsion," and not "solution," be the correct word within the terminology of chemistry, that does not prove that persons skilled in the construction and care of roads would fail to understand that a possible, rather than an impossible, mixture was intended. Prior to the alleged invention in suit, so the bill avers, there was a known mixture of oil and water which "was to all intents and purposes a solution." Until evidence to the contrary is adduced, the presumption should be indulged, in support of the patent, that persons skilled in the art would understand that Van Westrum was referring to such a "solution" as that set forth in the bill, rather than that he was perpetrating a chemical hoax.

Another objection is that the specification is so vague and indefinite that no one could learn from it how to practice the alleged invention. The preferred proportions are stated, and if that is not a sufficient direction to those "skilled in the art or science to which the invention appertains, or with which it is most nearly connected," the deficiency will have to be established by evidence.

Want of invention is predicated on the state of the art, first, within common knowledge, and, second, as admitted by the bill and patent. In the briefs and arguments the two grounds become one. It was admittedly old to sprinkle roads with water; likewise, with oil. Therefore, so the contention runs, no invention was required to sprinkle roads with a mixture of oil and water. Possibly not—especially if each element accomplished only what it had before. But if water alone had no permanent effect in roadmaking, if oil alone did not permeate the body of the dust and form a homogeneous mass, and if, in the mixture of the patent, the water carries minute particles of oil down into the body of the dust, thereby binding the dust particles into a top dressing that adheres to the roadbed, a new result may have been obtained, of such high utility, and so long and diligently sought, that no doubt could be entertained of the quality of the productive act. In brief, if the patent in suit is to be overthrown, it is on facts not ascertainable on demurrer to the bill.

The decree is reversed, with the direction to overrule the demurrer.

B. F. AVERY & SONS v. J. I. CASE PLOW WORKS.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,548.

DAMAGES (§ 142*)—SUFFICIENCY OF COMPLAINT—SPECIAL DAMAGES.

A complaint alleging that defendant purposely and maliciously and for its own advantage delayed the issuance of a patent to plaintiff on a pending application, by causing another to file an application for the same

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

invention, procuring the declaration of an interference, taking successive appeals, etc., does not state a cause of action for the recovery of damages, unless specific damage is alleged; the case being maintainable, if at all, only as one in the nature of trespass on the case for injury and damage to plaintiff, and the mere postponement of the term of its monopoly not being necessarily to its detriment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 413; Dec. Dig. § 142.*]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Action by B. F. Avery & Sons, a corporation, against J. I. Case Plow Works. Judgment (163 Fed. 842) for defendant on demurrer to complaint, and plaintiff brings error. Affirmed.

The writ of error is to reverse a judgment sustaining a demurrer to the complaint of plaintiff in error and dismissing the action. The facts are stated in the opinion.

L. L. Morrell, for plaintiff in error.

James H. Peirce and Louis Quarles, for defendant in error.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion.

The action in the Court below was by plaintiff in error, a corporation under the laws of the State of Kentucky, against defendant in error, a corporation under the laws of Wisconsin—the complaint averring that prior to September, 1903, one Holsclaw was the inventor of an improvement in Planters, fully set forth in letters patent issued to plaintiff in error, assignee, February 5, 1907; that on the 9th day of September, 1903, application was made to the Patent Office for said patent; that but for interference by defendant in error, in the name of one Sobey, such patent would have issued July 12, 1904; that such interference was instituted upon an application by Sobey for a patent upon a like subject-matter in June, 1904; that such interference proceeded in the usual course until determined by the Examiner of Interferences in favor of Holsclaw in June, 1905; that the determination of priority by the Patent Office was upon the disclosure in the Sobey application that the invention had not been conceived by him until after the filing of the Holsclaw application; that thereupon, defendant in error, to delay a final issuance of the Holsclaw patent, moved for a vacation of the Examiner's judgment, which being denied, defendant in error appealed to the Examiner in Chief; which being denied, defendant in error appealed to the Commissioner of Patents; which being denied, defendant in error moved for a rehearing before the Commissioner; which being denied, defendant in error appealed to the District Court of the District of Columbia; which being denied, defendant in error petitioned for a rehearing in the Court of Appeals for the District of Columbia; which being denied, defendant in error presented a petition to the Supreme Court of the United States for a writ of certiorari; which being denied, further dilatory steps were taken in the Court of Appeals and before the Commissioner of Pat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ents, the combined effect of which was to postpone the issuance of the patent until the date already named.

Throughout the complaint, it is repeatedly averred that these steps were taken to delay the issuance of the patent; that the appeals were argued upon the theory that the Holsclaw application presented no patentable invention, though under the law the only question reviewable was priority invention—a question settled against defendant in error in its own affidavits; and that the appeals were taken with the wilful and malicious intent to injure and prejudice plaintiff in error, in order that defendant in error might pirate the Holsclaw invention.

The case thus set forth is not, of course, a case of infringement of a patent, for until the patent was issued to plaintiff in error, there could be no infringement of it, either by defendant in error or any other person. Nor is it a case of trespass upon or injury to the monopoly granted to plaintiff in error in the letters patent, so far as that monopoly is embodied in the seventeen year grant contained in the patent; for although the beginning of the monopoly was delayed, its continuance was just as much prolonged.

The case, if any case can be made upon the facts detailed, is one in the nature of trespass on the case for injury and damage to the plaintiff in error, growing out of the postponement of its coming into enjoyment of his grant, due to the alleged malicious conduct of the defendant in error. But to support such an action, if such an action exists at law, it is essential that plaintiff in error should have suffered some specific damage due to the postponement, and that such damage should be specially set forth in the complaint.

No such damage is averred. True, plaintiff in error avers that defendant in error placed upon the market, prior to the issuance of the Holsclaw letters patent, a large number of machines embodying the invention set forth in that application, and that "but for the infringement and pirating of the said invention as aforesaid by the defendant [it] would have been the exclusive manufacturer of implements embodying the said invention and would have derived greater profit from the sale of the said implements embodying the said invention which said sales were prevented by reason of the defendant selling in the same open market implements embodying the same invention." But such averment is not an averment that plaintiff in error has suffered in the enjoyment of its grant as a whole—that is to say, that the grant as an entirety will be less valuable to it than it would have been had it been issued at the time expected—nor are there any averments of damage upon any theory other than because plaintiff in error was entitled to a patent in July, 1904, all sales of implements embodying the invention, between that date and the issuance of the patent, are to be regarded as infringements. This, of course, is not the law, and such a theory cannot be made the basis of any action of which we have knowledge.

The judgment of the Circuit Court is affirmed

DIECKMANN v. MILWAUKEE CORRUGATING CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,503.

PATENTS (§ 328*)—INVENTION AND INFRINGEMENT—SHEET METAL ELBOWS.

The Dieckmann patent, No. 540,584, for a corrugated sheet metal elbow and process of making the same, claims 3 and 4, which cover the elbow as an article of manufacture, are void for lack of invention, in view of the prior art. Claims 1 and 2, relating to the process, *held* not infringed, conceding their validity.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

Suit in equity by Ferdinand Dieckmann against the Milwaukee Corrugating Company. Decree for defendant, and complainant appeals. Affirmed.

The bill in the Circuit Court was to restrain infringement of Letters Patent No. 540,584, issued June 4, 1895, to appellant for improvements in sheet metal elbows and process of making the same. The claims of the patent are as follows:

"1. The process of forming sheet metal elbows of any desired cross-sectional pattern, which consists in taking a previously formed plain elbow, and by means of suitable dies impressing the desired corrugated, octagonal or similar cross-sectional pattern upon the curved portion of the elbow, substantially as specified.

"2. The process of making sheet metal elbows of any desired cross-sectional pattern from a single piece of sheet metal, which consists in first forming a plain elbow from a single sheet of metal by forming the sheet into a tube, taking up the surplus metal in over-lapping crimps on one side to form the curve of the elbow, and then by means of suitable dies impressing the desired corrugated, octagonal, or similar cross-sectional pattern upon the curved portion of the elbow, substantially as specified.

"3. A sheet metal elbow having the surplus metal upon one side taken up in crimps to form the curve, and having a corrugated, octagonal, or any desired similar cross-sectional pattern impressed upon the elbow throughout its length substantially as specified.

"4. A crimped sheet metal elbow, formed of a single piece of sheet metal, having a corrugated, octagonal or any desired similar cross-sectional pattern impressed thereon throughout its length, substantially as specified."

The defendant's sheet metal elbow, as an article of manufacture, is practically the same as the elbow made under appellant's patent. The case comes to this Court on appeal from the decree of the Circuit Court dismissing the bill. The further facts are stated in the opinion.

R. H. Parkinson and C. W. Miles, for appellant.

E. H. Bottum, for appellee.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion.

The elbow, as an article of manufacture, is corrugated longitudinally; the function of the corrugation being to afford expansibility to the pipe under pressure of changing cold and heat in its contents; and is crimped on its inner side, the function of the crimp being merely to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

take up the metal in the formation of the elbow. That the elbow, as well as the pipe itself, should be thus corrugated—that is to say, that the corrugation should extend around the elbow—is, in view of the function of such corrugation, a desirability so obvious that the mere conception of it cannot be said to constitute invention. Indeed it appears in a number of previous elbows, notably in the Austin & Obdyke elbow, patent No. 113,614, and the Ritchie elbow, patent No. 342,465—the only difference between these elbows and the Dieckmann being in the method of taking up the metal for the purpose of forming the elbow. Whatever, therefore, there is of invention, if invention there be in the Dieckmann patent, is not in the conception of an elbow thus corrugated, but in the process employed to bring about corrugation in connection with the crimping; and it was to the difficulty of discovering such process that the delay, if there was any delay, is to be attributed. This disposes of claims 3 and 4, relating to the elbow as a new article of manufacture.

The process in the Dieckmann patent is described as follows:

"By my process a plain elbow is first formed, preferably by rolling a single piece of sheet metal into a tube, then taking up the surplus metal upon one side into overlapping crimps" (the elbow being given the desired form).

The end of the elbow is then placed over a die and other dies are reciprocated to strike the elbow and give it the cross-sectional configuration of the first die; and by a forward movement of the elbow upon the die, this configuration is successively impressed upon every portion of the elbow, the result being a smooth, true elbow, with regular faces or corrugations running through the length of the elbow.

The process, it will be thus observed, is first to put in the crimps, whereby the tube or pipe is conformed to elbow shape, and then to corrugate it.

Whether this be a patentable process or not, we need not now determine. The burden of infringement is upon complainant, and that burden has not been met; for according to the evidence offered in Court, the corrugating was done first; and this is supported by the appearance of appellee's elbows brought to our attention at the hearing, which show that the crimps in the basins of the corrugations had not been subjected to any greater pressure than the crimps on their summits. Indeed, their whole appearance shows that whatever pressure was applied for the purpose of turning over the crimps after they had been formed, was applied almost uniformly on summit side and basin of the corrugations.

The decree appealed from is affirmed.

BROWNING et al. v. FUNKE.

(Circuit Court of Appeals, Second Circuit. November 17, 1909.)

No. 40.

1. PATENTS (§ 323*)—INFRINGEMENT—MAGAZINE FIREARM.

The Browning patent, No. 580,925, for a magazine firearm, claim 14, if conceded invention and validity, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 323.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 328*)—INVENTION.

The Browning patent, No. 730,870, for a magazine firearm, claims 37, 38, and 39, are void for lack of invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Bill by John M. Browning and the Colt's Patent Firearms Manufacturing Company against Albert H. Funke to enjoin infringement of letters patent. Decree for defendants dismissing the bill (164 Fed. 197), and complainants appeal. Affirmed.

Frederick P. Fish, and W. A. Redding, for appellants.

Grafton L. McGill (J. Nota McGill and Frederic D. McKenney, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decree affirmed, with costs, on opinion of Circuit Court.

AMERICAN PNEUMATIC SERVICE CO. et al. v. W. V. SNYDER & CO.

(Circuit Court, D. New Jersey. September 20, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—PNEUMATIC DISPATCH SYSTEM.

The Bavier & Hawkes patent, No. 658,102, for a vacuo-pneumatic dispatch system, construed, and *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit for infringement of letters patent No. 658,102, for a pneumatic dispatch system, granted to Charles S. Bavier and James R. Hawkes on September 18, 1900. On final hearing.

M. B. Philipp, for complainants.

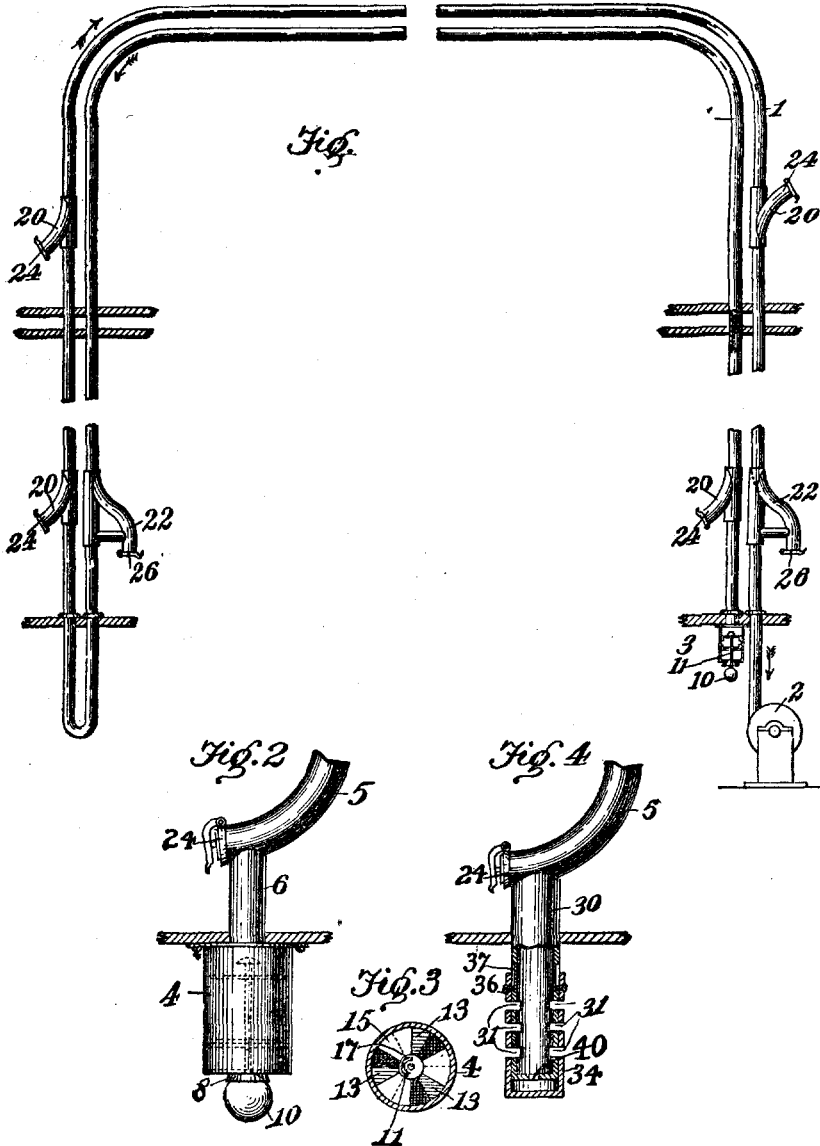
James H. Griffin and Harry P. Simonton, for defendant.

LANNING, Circuit Judge. I do not find it necessary in this case to decide the questions raised by the defendants as to the validity of the complainants' patent. Assuming its validity, the defendants do not, in my judgment, infringe the patent by the manufacture and use of their device.

The complainants' patent, No. 658,102, dated September 18, 1900, is for improvements in vacuo-pneumatic dispatch systems; that is, in that class of pneumatic dispatch systems wherein a partial vacuum is maintained in the line of tubing by an exhaustor or pump. The specification of the patent states that the object of the invention therein described is to attain the highest practicable economy in the operation of vacuo systems by reducing the duty of the exhaustor to the minimum required for the service actually performed when the carriers are moved through the line. This reduction of duty is effected by providing a system wherein the line of transmission tubes is closed at all times when no service in the transmission of carriers is being performed, so that during such times the only duty required of the exhaustor is to maintain a slight vacuum in the closed line. When

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

greater service of the exhauster is required for the transmission of carriers, a terminal air-inlet opens for the admission of air into the line in the rear of the carriers, and the exhauster, regulated by a governor, then speeds up and by increased exhaustion of the air in front of the carriers enables the air admitted in the rear to force the carriers through the line. The following figures illustrate the operation of the complainants' patented device:

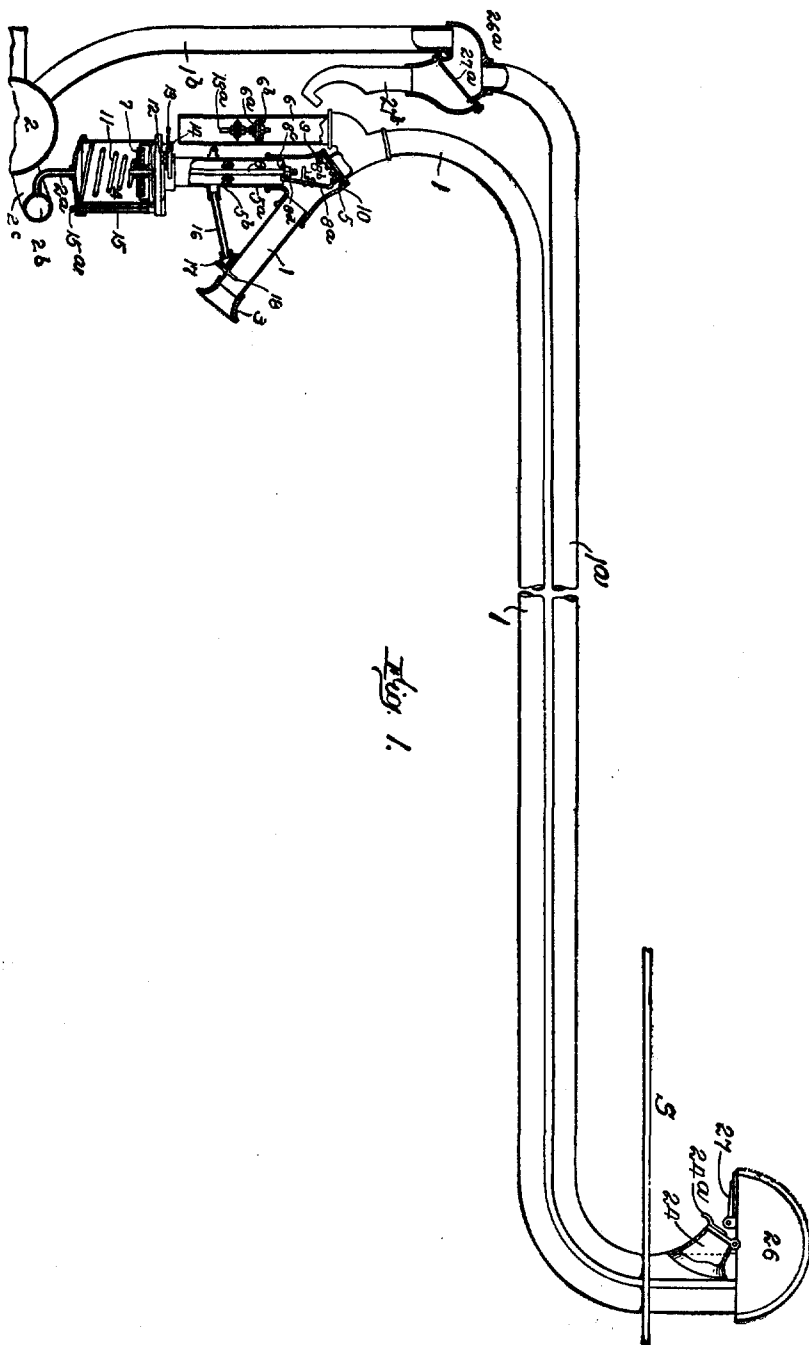


In Fig. 1, the exhauster, 2, is at the end of the looped line of tubing, 1, most remote from the end provided with the terminal air-inlet, 3. Dispatch inlets—that is, inlets where carriers are inserted in the line—are represented at 20, each having a door, 24; and discharge outlets—that is, outlets where the carriers are discharged from the line—are represented at 22, each having a door, 26. Each of the doors to these inlets and outlets is closed by a spring. Door 24 is opened manually or otherwise when a carrier is inserted, and door 26 is opened by the impact of the discharging carrier. Door 24 is closed immediately after the carrier is inserted, and door 26 immediately after it is discharged. It will be observed, then, that during the whole of the time the line is not in service it is closed between the exhauster, 2, at one end, and the air-inlet, 3, at the other end. Assuming the exhauster not to be in operation, and the air in the line of tubing not to have been to any extent drawn from it, the ball-valve, 10 (which is connected by a rod with a perforated piston head as shown in cylinder 4 of Fig. 2 and in Fig. 3), occupies a position below the conical valve-seat, 8. If the exhauster, 2, be now put into operation, it draws the air from the tubing, 1, to such an extent as to produce a partial vacuum therein. The piston head in cylinder 4 is thereupon forced up by the pressure of the air passing into the lower part of the cylinder through the conical valve-seat, 8, and ball-valve 10 is thereby lifted to its seat in 8. In this manner air-inlet 3 is closed, and it remains closed so long as exhauster 2 keeps the air in the tubing sufficiently rarified to enable the external pressure to hold 10 in its seat, 8. Now, if door 24 be opened, air will be admitted to the line through the door, and valve 10 will immediately drop by gravity. If a carrier be then inserted at 24, and the door closed behind the carrier, air will be admitted to the line through the air-inlet at 8, and the perforated piston head in cylinder 4. The perforated piston head is provided with a damper, shown in Fig. 3, by which the admission of air into the line may be regulated. As the exhauster, 2, exhausts the air in front of the carrier, the carrier is forced through the line by the pressure of the air behind it until its discharge at 26. When the carrier is discharged at 26, the door at 26 being immediately closed after the discharge by means of a spring or otherwise, exhauster 2, no longer required to overcome the added resistance of a carrier in the line, exhausts the air from the line to an extent sufficient to cause valve 10 again to take its seat in 8, and thus to close the system until another carrier is inserted. With this brief description the two claims of the patent will, perhaps, be understood. They are:

"1. A vacuo dispatch system, characterized by the combination of a line of tubing, an exhauster operatively connected therewith, and a terminal air-inlet having a closure, which automatically shuts the air-inlet when no carrier is being dispatched and automatically opens same when a carrier is being dispatched, substantially as described.

"2. The combination in a vacuo dispatch system of a line of tubing, an exhauster operatively connected therewith, dispatch inlets and discharge outlets normally closed, and a terminal air-inlet on said line, remote from said exhauster, provided with a closure which is arranged to automatically shut the said terminal air-inlet when no carrier is being dispatched and automatically open it when a carrier is being dispatched, substantially as described."

The following figure illustrates the defendants' device:



When the valves of this line of tubing are all closed, the exhaustor, connected with drum 2, draws a portion of the air from, and thereby creates a partial vacuum in, tubes 1b, 1a, and 1, and in that portion of cylinder 6 above the fixed perforated diaphragm, 6b. A hole in the bottom of cylinder 6 admits air into the lower portion of the cylinder, and the air pressure holds the piston head, 6a, up against the perforated diaphragm, 6b. The exhaustor also draws a portion of the air from that part of cylinder 4 which is below piston head 7 through tube 2a, drum 2b, tube 2c, and drum 2. If, now, a carrier be inserted at 3, it strikes lever 18, opens valve 17, admits air into tube 16 and that part of cylinder 4 above piston head 7, and forces piston head 7 (which is connected with valve 10 by suitable rods) down upon the tension spring 11, thereby drawing open valve 10, and permitting the carrier to be transmitted by the pressure of the air behind it through tube 1 until it is discharged from the tube at valve 27. Immediately after the carrier has passed lever 18, valve 17 closes by means of a spring or other device, and no more air is admitted through tube 16 into the upper part of cylinder 4. The exhaustor draws from the upper part of cylinder 4 the air thus confined in that part by means of by-pass 15, which connects the part of cylinder 4 above piston head 7 with the part below it. The speed with which the air in cylinder 4 is withdrawn is regulated by timing-valve 15a. As the air is exhausted from cylinder 4, piston head 7 is gradually forced up by tension spring 11, and valve 10 is thereby gradually closed. By proper adjustment of the timing-valve 15a, valve 10 will be closed about the time or just after the carrier has been discharged at valve 27. By this arrangement, so long as the carrier is between valves 10 and 27, valve 10 is open, admitting air to drive the carrier on to the exit at valve 27. When a carrier is inserted at 24a, the air admitted into the tubes at the time of the insertion destroys the partial vacuum in tube 6 above the perforated diaphragm, 6b, and allows the piston, 6a, to drop by gravity. Piston rod 13a passes in its descent through an aperture in the bottom of tube 6, strikes lever 13, opens valve 12, and thereby admits air to the upper part of cylinder 4, forcing down piston head 7, and again drawing open valve 10, and again admitting air into the line of tubing sufficient to drive the carrier from 24a to its outlet, 27a. In the meantime valve 10 has been gradually closed, as when the carrier was driven from 3 to 27.

The first two elements of the combination described in claim 1 of the patent in suit, a line of tubing and an exhaustor operatively connected therewith, and the first three elements of the combination described in claim 2, a line of tubing, an exhaustor operatively connected therewith, and dispatch inlets and discharge outlets normally closed, are found in the defendants' device. The remaining element in each of these claims, a terminal air-inlet with a closure which automatically opens and shuts the air-inlet, I do not find in the defendants' device. The terminal air-inlet of the defendants' device is at valve 10. Valve 10 is its closure. If one inserts a carrier into orifice 3 and trips lever 18, valve 10 will be immediately opened; but it will not be opened by admitting air into the line of tubing through which the carriers are

transmitted, and thereby producing an equality of air pressure on each side of valve 10, so that it will fall by gravity, as in the case of the patent in suit. It will be pulled open, without the previous admission of air into the line of tubing through which the carriers are transmitted, by a mechanism wholly external to such line of tubing; that is, by piston head 7, which, being operatively connected with valve 10, is forced down by the admission of free outside air through tube 16 into the upper part of cylinder 4. And if one inserts a carrier at 24a, piston 6a will drop, and valves 12 and 10 will be opened; but, while in that case air will be admitted into the line of tubing through which carriers are transmitted, valve 10 will be opened, not by the mere fact of such admission and the consequent equality of air pressure on each side of valve 10, and the law of gravity, as in the case of the patent in suit. It will again be pulled open by piston head 7, which is forced down by the admission of free outside air through valve 12 into the upper part of cylinder 4.

When a carrier is inserted at 3, and valve 10 is opened, it is very nearly closed again by tension spring 11; and when a carrier is inserted at 24a, while the admission of air into the line of tubing produces the condition which allows piston 6a to fall, and valves 12 and 10 to be opened, valve 10 is again very nearly closed by the tension spring. I am satisfied that it is not completely closed by the spring. The rods connecting piston head 7 with valve 10 are so constructed as to allow a little freedom of movement by valve 10; and in consequence of this freedom, when valve 10 has been almost completely closed by the action of spring 11, I have no doubt that the greater air pressure on the side of valve 10 next to the orifice, 3, will aid in closing it. Nevertheless, it is not closed "substantially as described" in the specification of the patent in suit.

Ball-valve 10 of the patent in suit, which is the closure that automatically shuts the terminal air-inlet when no carrier is being dispatched, and automatically opens it when a carrier is being dispatched, is operated exclusively by regulating the degrees of air pressure in the line of tubing through which carriers are transmitted. Valve 10 of the defendants' device, which is the closure that shuts and opens the terminal air-inlet of that device, is not so operated. Each of the combinations described in claims 1 and 2 of the patent in suit has, as one of its elements, a terminal air-inlet having a closure which automatically shuts the air-inlet when no carrier is being dispatched and automatically opens it when a carrier is being dispatched. The combination in the defendants' device has, as one of its elements, a terminal air-inlet having a closure which shuts the air-inlet, not in any proper sense automatically, but almost wholly because it is forced into the air-inlet by a spring, and which opens the air-inlet, not automatically, but because it is pulled out of the air-inlet by a mechanism specially devised for that purpose. The differences between the combinations of claims 1 and 2 of the patent in suit and the combination of the defendants' device cannot be explained on any theory of the substitution of mechanical equivalents. The combinations are essentially unlike, and there is no infringement.

It follows that the bill of complaint must be dismissed, with costs.

AMERICAN GRAPHOPHONE CO. v. LEEDS & CATLIN CO.

(Circuit Court, S. D. New York. October 6, 1909.)

1. BANKRUPTCY (§ 114*)—DUTIES OF RECEIVER.

Where a corporation, defendant in a suit for infringement of a patent, was adjudged a bankrupt, and a receiver appointed for its property, after an interlocutory decree against it and a reference for an accounting as to damages and profits, the receiver cannot be required to prepare a statement of profits for use before the master from the company's books, or to render any other active assistance to complainant at the expense of the estate, unless he elects to become a party to the suit, but may be required by subpoena to produce the books before the master.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

2. BANKRUPTCY (§ 18½*)—SUIT FOR INFRINGEMENT—BANKRUPTCY OF DEFENDANT.

Where a corporation was adjudged a bankrupt, and a receiver appointed for its property, after the entry of an interlocutory decree against it in a suit for infringement of a patent in a Circuit Court, that court will not assume to determine the status of complainant's claim in the bankruptcy proceedings, nor to control the distribution of funds therein, both of which are questions for the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 18½.*]

In Equity. Suit by the American Graphophone Company against the Leeds & Catlin Company. On order to show cause against receiver for defendant. Petition of complainant denied.

See, also, 155 Fed. 427.

This is a suit for infringement of patent. All questions as to validity and infringement have been passed upon in this court and by the appellate tribunals, and proceedings were pending before a master, under interlocutory decree for accounting of damages and profits, when defendant was adjudicated a bankrupt, in the District Court, Southern District of New York, and a receiver of its property duly appointed.

C. A. L. Massie and Ralph L. Scott, for complainant.

Fredk. N. Frost and Claude N. Gould, for defendant.

LACOMBE, Circuit Judge. The complainant, on order to show cause and due notice, prays this court: (1) That the receiver and defendant be required to prepare and present the sworn statement (of profits, etc.) directed herein by the master. (2) That the receiver (and the trustee in bankruptcy, when appointed) be enjoined from paying out any money or moneys in said bankruptcy proceeding until further order of this court. (3) That the receiver disclose to complainant the names and addresses of all claimants in said bankruptcy proceedings who have supplied to said Leeds & Catlin Company any moneys or other means for the purpose of enabling said defendants to carry on its infringing operations. These requests may be separately considered.

1. Whether the claim of complainant for damages and profits is or is not such a claim as is provable in bankruptcy, and barred by discharge, need not be now decided here. If it is not such a claim, the bankruptcy proceedings will in no way interfere with the proceedings against defendant before the master. The defendant will prepare the statement required, if it can do so; if not, the complainant will prove the amount of such profits and damages in the usual way. The books

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and papers of defendant do not cease to be accessible for that purpose merely because they are in the custody of receiver. Indeed, receiver and his counsel on the argument stated that they were open for complainant's inspection, and would be produced before the master when subpoenaed. The receiver, however, would have no interest in the determination of this claim, and could not be expected to expend any part of the fund in his hands in preparing any statement.

If, on the other hand, the claim be one which is provable in bankruptcy, it is hardly to be supposed that the District Court will assume the burden of liquidating it. Such proceedings usually involve many technical questions of patent law, which may more appropriately and expeditiously be disposed of in the Circuit Court, which is continually passing upon such questions. Presumably, when the claim is liquidated and master's report confirmed, the District Court will accept the judgment of the Circuit Court as sufficient proof of claim, as it would the money judgment of any court of competent jurisdiction.

Whether or not the receiver will appear in such proceedings and endeavor to have the amount of the claim reduced as far as possible is a question for him to decide, or on which he will take the instructions of the District Court. This court certainly has no authority to require him to appear, except as a witness having custody of books and papers. Of course, if he does appear, and is substituted as defendant, it will be his duty to prepare such a statement as he can from the books; but, unless he elects to appear, it would seem that he would be under no such obligation.

No relief of the sort prayed for should now be granted, nor is there any necessity for requiring receiver to make election whether or not he will be substituted. Complainant may proceed with its accounting against defendant, exactly as if no proceedings in bankruptcy were pending; and, if the receiver decides to intervene, he will make whatever application for relief may be necessary.

2. It is not for this court to say what moneys the receiver shall or shall not pay out. All questions as to priority of claims and as to payment of moneys in the custody of the District Court should be submitted to that court for determination. If the claim be one not provable in bankruptcy, presumably that court will make no provision for its payment. If it be a provable claim, it is equally presumable that whatever funds there may be in the hands of receiver, over and above the expenses of administering the estate, will be retained, until all provable claims are liquidated and all questions of priority (if any arise) are determined. The whole matter is exclusively in the jurisdiction of the bankruptcy court.

3. The receiver owes no active duty to complainant to expend the money of the estate in an effort to ascertain the facts asked for. Undoubtedly the receiver will afford all reasonable facilities, as he said he would, for the examination of the records which contain the information sought for. Personally he knows nothing about it. And the officers and employes of defendant may be produced by subpoena before the master at the same time as the books, and interrogated on the subject.

In re PIERSON.

(District Court, S. D. New York. November 13, 1909.)

BANKRUPTCY (§ 372*)—REOPENING OF ESTATE—EXTENSION OF TIME FOR FILING CLAIMS.

Where a bankrupt scheduled no assets, and in consequence no claims were proved and no trustee was appointed, but the estate was formally closed and the bankrupt discharged, on the discovery of previously unknown assets by him and the reopening of the estate, under Bankr. Act July 1, 1898, c. 541, § 2 (8), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), the court may permit the filing of claims for a year from the date of the order, although the year from the adjudication, to which the filing of claims is limited by section 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), has expired.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 574; Dec. Dig. § 372.*]

In the matter of Edgar L. Pierson, bankrupt. On application by bankrupt to reopen proceedings. Application granted.

This was an application by the bankrupt to reopen the administration of the estate under Act July 1, 1898, c. 541, § 2, subd. 8, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), upon the ground that there are newly discovered assets in the form of land, the title to which the bankrupt did not know he held at the time of filing the petition. At the first administration of the estate in 1899, no assets were scheduled, and as a consequence no claims were proved. The referee held no meeting of creditors, appointed no trustee, and closed the estate without further formality. Later the bankrupt got his discharge. Now, upon discovering an interest in real property, he seeks further administration.

Dennis & Buhler, for bankrupt.

HAND, District Judge (after stating the facts as above). There is only one difficulty in the way of the relief asked, which is that under the statute it is long since too late to prove claims. Had any claims been proved, and had there originally been actual administration of any assets, then only those claims which had been proved could now come in. *Re Shaffer* (D. C.) 104 Fed. 982. Here no claims were filed, for the very good reason that there was then no use in proving them. Unless they may now be proved, the bankrupt cannot do what he honestly wishes, which is to remedy the effect of his mistake.

It is not likely that Congress would have intended such a result, had the matter come before it. Under section 2, subd. 8, I have the power to reopen this estate, if it appears that it was closed before being fully administered. Unless I allow the claims to be proved, it is a mere formality to reopen the estate, for no one can elect a trustee. In short, I must make section 2, subd. 8, of no effect, if I do not permit the proof of claims. Of course, one might say that estates could be reopened only in case there had been some assets originally; but there is no reason for limiting the intention of Congress in that way. Literally or verbally considered, there is a conflict between two provisions, which must be resolved by trying to interpret what the reasonable intention of Congress must have been. I cannot hesi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tate to believe that section 2, subd. 8 applies, and that claims may still be proved.

As the creditors had no possible inducement to file claims at first, they may have now one year from the date of the present order. Let an order pass, reopening the estate, so as to include the assets mentioned, referring the administration in due course, directing the referee to advertise for a first meeting, to take proof of claims, and to superintend the appointment of a trustee.

The bankrupt must pay the customary fees for a new administration.

UNITED STATES v. FRANKLIN.

(Circuit Court, S. D. New York. November 8, 1909.)

1. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY.

An indictment under Rev. St. § 5438 (U. S. Comp. St. 1901, p. 3674), which makes it a criminal offense to knowingly make or present for approval to any officer of the United States any false, fictitious, or fraudulent claim against the government of the United States or any department thereof, is not bad for duplicity because it charges that the accused "made and presented" such a claim.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 351; Dec. Dig. § 125.*]

2. UNITED STATES (§ 123*)—MAKING AND PRESENTATION OF FALSE CLAIMS AGAINST—INDICTMENT.

In an indictment, under Rev. St. § 5438 (U. S. Comp. St. 1901, p. 3674), for making and presenting to an officer for approval a false, fictitious, and fraudulent claim against the United States, which sets out the claim, showing it to be an itemized account, averments that certain sums charged therein "should have been" certain smaller sums stated sufficiently shows wherein the claim is false and fraudulent.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 111; Dec. Dig. § 123.*]

3. UNITED STATES (§ 123*)—MAKING AND PRESENTATION OF FALSE CLAIMS AGAINST—INDICTMENT.

An indictment, under Rev. St. § 5438 (U. S. Comp. St. 1901, p. 3674), for making and presenting to an officer for approval a false, fictitious, and fraudulent claim against the War Department of the United States for supplies furnished the cadet mess at West Point, which describes such officer as a brigadier general in the army and superintendent of the Military Academy at West Point, and alleges that he was an officer authorized to approve such claim, *held*, on demurrer, to sufficiently show such authority.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 111; Dec. Dig. § 123.*]

Thomas Franklin was indicted for making and presenting a false claim against the United States, and demurs to the indictment. Demurrer overruled.

The defendant was indicted under section 5438, Rev. St. (U. S. Comp. St. 1901, p. 3674), and charged with having unlawfully made and presented, and caused to be made and presented, to an officer in the military service of the United States, to wit to Albert L. Mills then and there brigadier general in the army of the United States and superintendent of the United States Military Academy at West Point, N. Y., for approval by the said officer as such su-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
174 F.—11

perintendent, he being then and there authorized as such superintendent to approve the same, a certain claim upon and against the Department of War of the United States, which claim was upon an account purporting to be an account of the defendant for provisions and cartage therefor furnished by him to and for the cadet mess of the United States Military Academy aforesaid, the claim being set out at length in the indictment, and which claim, at the time and place when and where it was so made and presented, and caused to be made and presented, was false, fictitious, and fraudulent in the following respects, to wit: In that each item therein, setting out the same at length, i. e., "To 6 bbls. apples, at \$7.00, \$42," should have been, instead thereof, "To 6 bbls. apples, at \$6.50, \$39," and that the defendant then and there well knew the same to be false, fictitious, and fraudulent in the said respects. Under another count in the same indictment the claim was described as being a claim upon and against the government of the United States.

Defendant demurred to the indictment on the following grounds: (1) That each count was bad for duplicity, in that it charged the defendant with two offenses: First, with the offense of having made a false, fraudulent, and fictitious claim for approval; and, second, with having presented a false, fraudulent, and fictitious claim to a certain officer for approval. (2) That the assignments of wherein the claim described in the count was false, fraudulent, and fictitious were pleaded with uncertainty and indefiniteness, and were in the nature of conclusions only, because of which the count failed to show that the claim was false, fraudulent, and fictitious in any material particular. (3) That the superintendent of the United States Military Academy was not such an officer in the service of the United States, with authority to approve the claim, as was contemplated by section 5438, Rev. St., because, first, he had no authority of public law to approve the claim; and, second, because his approval or disapproval could in no wise affect the Treasurer of the United States, for the reason that the cadet mess of the United States Military Academy at West Point is no part of the government of the United States, or of any department thereof, within the meaning of section 5438, Rev. St., or any other law of the United States.

Henry A. Wise, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty.
S. T. Ansell, for defendant.

HAND, District Judge (after stating the facts as above). As to point 1: This point is answered by *U. S. v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664, where the indictment read "as president and agent," though the statute defined two separate offenses; one as president, one as agent. It is perfectly obvious that there was here no intention to charge two offenses.

As to point 2: The discrepancies between the claim and the actual prices paid are sufficiently set out. The pleader has not relied on a word stating only a legal conclusion, like "fraudulent." It is captious to quarrel with the phrase "should have been." Everybody knows that this is intended to cover the prices actually paid by the defendant. It is clear that they charge him with putting in the bills what he said he had paid. To hold otherwise would be to introduce needless perversity into such matters.

As to point 3: As a mere allegation of fact, i. e., that the superintendent had authority to approve the claim, I think it is not demurrable. *Cochran v. U. S.*, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704. True, it is an allegation involving the existence of law; but so is the allegation "made in accordance with the provisions of section 5211" (*U. S. Comp. St.* 1901, p. 3498). Had it been necessary to rely upon such an allegation in sustaining the pleading upon the corpus delicti,

I should think otherwise; but there are many incidental allegations, necessarily stated with some admixture of law. Were it not so, indictments would be often quite interminable. Here the superintendent is identified as being an officer, within section 5438, "authorized by law" to approve the account. That allegation is quite enough to identify him as one of those included under the statute, and to advise the defendant of what officer they intend. So far as concerns the argument that he could not have been so authorized under the statute, it does not convince me. Whatever the legal status of the "cadet mess," it is quite clear to me that the United States had power to give to the commanding officer of the cadets the right to approve or disapprove bills presented to them. They have not the rights of officers in the service. They are yet in tutelage, and the United States has power to protect them in their contracts, by sequestering their pay and protecting its disbursement. Whether the regulations in fact give the superintendent that power is a matter which will come up on the trial

Demurrer overruled.

UNITED STATES v. FRANKLIN.

(Circuit Court, S. D. New York. November 8, 1909.)

CRIMINAL LAW (§ 16*)—CRIMES AGAINST UNITED STATES—OFFENSES COMMITTED IN PLACES CEDED TO UNITED STATES—CONSTRUCTION OF STATUTE.

Rev. St. § 5391, and Act July 7, 1898, c. 576, 30 Stat. 717 (U. S. Comp. St. 1901, pp. 3651, 3652), the former of which provides that in case of any offense committed in any place ceded to and under the jurisdiction of the United States, "which offense is not prohibited or the punishment thereof is not specially provided for by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the state in which such place is situated now in force provide for the like offense," and the latter of which contains similar provisions respecting offenses committed in any place jurisdiction over which has been retained by the United States or ceded to it, etc., "the punishment for which offense is not provided for by any law of the United States," are neither of them limited to the fixing of punishment for offenses expressly created by the federal laws, but they apply to and make punishable any act committed in such places not so provided for, but which is an offense under the laws of the state.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 16.*]

Thomas Franklin was indicted, and demurs to the indictment. Demurrer overruled.

The defendant was indicted under section 5391 Rev. St., and Act July 7, 1898, c. 576, § 2, 30 Stat. 717 (U. S. Comp. St. 1901, pp. 3651, 3652), and charged with having committed upon the fort and military post and reservation known as West Point, in the county of Orange, in the Southern district of New York, the offense of grand larceny in the second degree, and of having feloniously stolen, taken, and carried away, with force and arms, the sum of \$495.78, of the goods, chattels, and personal property of all the cadets then forming the cadet corps of the United States Military Academy at West Point aforesaid.

The defendant demurred to the indictment on the ground that it was insufficient in law, and insufficient to charge him with any offense against the laws of the United States, and insufficient to constitute a crime as against him, upon the theory that section 5391 and the act of July 7, 1898, did not define

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the "offenses" therein referred to, but simply provided a punishment for offenses defined by Congress, but for which Congress had failed to prescribe a specific punishment, and that as the offense of grand larceny was an offense defined by the state law, and not by any act of Congress, to construe the statute as adopting into the Penal Code of the United States the offenses of the several states, as defined by the states themselves, would be to hold that Congress had delegated its sovereign power to define and punish crimes to the Legislatures of the several states, and that therefore the act would be unconstitutional.

Henry A. Wise, U. S. Atty. (Addison S. Pratt, of counsel), for the United States.

S. T. Ansell, for defendant.

HAND, District Judge (after stating the facts as above). I do not in the least mean to reflect upon the wisdom of the counsel who filed these demurrers. To our great discredit, as I think, technicalities of the kind which it raises have been too often successful to permit a conscientious counsel to forego their trial, whenever his ingenuity devises them. Their success does not redound to his disadvantage, but to the court, which has been misled. Any honest reasoning is quite legitimate, and the responsibility for mistakes must rest with the court. Nevertheless, I cannot resist saying that to adopt the construction which is suggested would, in my judgment, be to pervert the obvious meaning of the act quite unpardonably, and that, too, by a metaphysic which is fatuously verbal and naively nonsensical. If the acts meant only to fix punishment, they were to fix punishment for "offenses" which could never exist, since they apply only to offenses not "prohibited" by the laws of the United States. As no punishment could be fixed by Congress for any other offenses, the absurd result ensues that Congress was fixing the penalties upon "offenses" which were not such by any law, and was, therefore, merely engaging in elaborate nonsense. While the act is badly drawn, its intent—an intent not imputed, but drawn from the words—is perfectly obvious.

Demurrer overruled.

In re L. W. DAY & CO.

(District Court, S. D. New York. November 22, 1909.)

BANKRUPTCY (§ 123*)—ELECTION OF TRUSTEE—CREDITORS ENTITLED TO VOTE.

An officer or director of a bankrupt corporation, although a creditor, has no right to vote at the election of a trustee, nor to control the votes of other creditors, and such votes should be excluded.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 123.*]

In the matter of L. W. Day & Company, a corporation, bankrupt. On petition to review action of referee appointing trustee. Order set aside.

Engel Bros., for creditors.

HAND, District Judge. So far as a motion to remove is concerned, I find no ground for it, and dismiss it.

So far as the petition of review is concerned, the record itself, from which the minutes are lacking, gives no ground for a review of the referee's order; but, in view of the argument which took place before me at the hearing and the concessions there made upon the facts, I shall treat the petition as though it had been shown at the election that Wodiska was a director of the company and a brother-in-law of the president, and that his subdivision of the claims, although bona fide, was with the aim of controlling the appointment of a trustee.

With this admitted the case comes within *In re McGill*, 106 Fed. 57, 45 C. C. A. 218, and all those votes should not have been counted; that is to say, neither the votes arising from Wodiska's notes, nor his own claim, nor Mann's should be counted. If the referee had known these facts, he would doubtless have thrown out the votes, and declared elected the rival candidate. This application is really to review for newly discovered evidence. The situation, therefore, is that, not only has there never been an election in fact, but the creditors have never had a fair opportunity for an election, by which I mean an opportunity without the interference of the bankrupt's officers. This they should have.

I believe I might throw out the votes illegally cast, and now declare the other candidate elected; but that course does not seem to be as satisfactory to either faction as a new election, and in any event I prefer to have the creditors declare their choice anew, now that the air has been more cleared. Surely, if there is any doubt as to whether the opposing candidate would be again elected, the whole matter should go to those interested for a declaration of their choice at the present time.

Therefore let an order pass, declaring the failure to elect a trustee to have been caused by the interference of the bankrupt's officers, and the consequent appointment by the referee irregular, ordering a new election in which no claim shall be voted, which is held now, or has been held since, the petition was filed, by any officer of the bankrupt, or by Wodiska.

IN RE MOEHS & RECHNITZER.

(District Court, S. D. New York. February, 1909.)

BANKRUPTCY (§ 113*)—INVOLUNTARY PROCEEDINGS—LIABILITY OF PETITIONING CREDITORS.

There is no liability on the bond of petitioners in involuntary bankruptcy proceedings, except for the usual costs, unless they acted without probable cause and maliciously, and in that case the remedy is a suit in the nature of a suit for malicious prosecution.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 113.*]

In the matter of Moehs & Rechnitzer, alleged bankrupts. On motion for allowance of damages against petitioning creditors. Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Cohen, Creevey & Richter, for the motion.
Leonard M. Wallstein, opposed.

HOLT, District Judge. The liability on the petitioning creditors' bond is for damages caused by the appointment of the receiver. There is no liability for filing a petition in bankruptcy, except for the usual costs, unless the petitioners acted without probable cause and maliciously, and in that case the remedy is a suit in the nature of a suit for malicious prosecution.

Motion denied.

COXE BROS. & CO., Inc., v. CUNARD S. S. CO., Limited, et al. BER-
WIND-WHITE COAL MINING CO. v. SAME. M. P. SMITH
& SONS CO. v. SAME.

(District Court, S. D. New York. November 24, 1909.)

MUNICIPAL CORPORATIONS (§ 849*)—WHARVES—LIABILITIES FOR INJURIES—
SHIPPING.

Damage to vessels lying between the piers above No. 54, North River. The damage occurred by the breaking of mooring posts on pier 54, when used by the steamship *Mauretania* in a strong southeast wind and the swinging of the forward part of the steamer to the northward. The pier belonged to the city of New York and the posts were erected thereon by it, but as they were of the usual size and strength, it was *held* that the accident was not due to their insufficiency and that the city was not liable; also *held* that the accident was not inevitable, but resulted from the use of the pier by the Cunard Company without affording adequate protection to this unusually large steamer by shed or structures on the pier.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 849.*]

(Syllabus by the Judge.)

Actions by Coxé Bros. & Co., Incorporated, by the Berwind-White Coal Mining Company and by the M. P. Smith & Sons Company against the Cunard Steamship Company, Limited, and the City of New York. Decree against the Cunard Company, and petition against the City of New York dismissed.

Robinson, Biddle & Benedict, for Coxé Bros. & Co.

Wilcox & Green, for Berwind-White Co.

MacFarland, Taylor & Costello, for M. P. Smith & Sons Co.

Lord, Day & Lord, for Cunard Co.

Francis K. Pendleton (George P. Nicholson, of counsel), for City of New York.

ADAMS, District Judge. This action was brought by Coxé Brothers & Company, Incorporated, to recover the damages, said to have been \$600, sustained by reason of the Cunard Steamship Company's steamer *Mauretania* breaking adrift from her moorings on the north side of pier 54 North River, on the 23d day of December, 1907, and colliding with their barges, the *Roan* and *Tomhicken*. The action of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Berwind-White Coal Mining Company was for damages, said to have been \$706.70, to their boats Eureka 32 and Eureka 36, on the same occasion. The action of the M. P. Smith & Sons Company was for damages, said to have been \$2,250, to their barge Ellis P. Rogers, and for the loss of the personal effects of the master, \$24, on the same occasion. All of these boats went to the place for the purpose of delivering coal to or receiving ashes from the steamers of the Cunard Line and no charge of fault has been made against them.

The libellants allege that the Cunard Company was in fault: (1) in having the Mauretania lie at said pier, (2) in not having her properly moored, (3) in not having her hawsers and cables properly fastened, (4) in having the steamship, in view of the weather conditions then existing, breasted off from said pier to allow a coal barge to lie between it and the pier, (5) in not reasonably inspecting the steamship's moorings, (6) in not paying proper attention to the weather conditions and further securing the steamship when it was seen that the wind was freshening, (7) in mooring the steamship to inadequate mooring posts, (8) in not giving proper inspection to the pier and mooring posts, (9) in using defective and insufficient mooring posts, and (10) in insufficiently fastening the mooring posts to the pier.

The allegations of fault on the part of the other libellants, though not as full, were practically the same.

The answer of the Cunard Company, after some admissions and denials, alleged:

"Ninth: On the morning of the 23d of December, 1907, the 'Mauretania' was lying moored at said pier 54 bow in and securely and in a proper manner moored to said pier, but by reason of a high wind, the strain on the mooring posts on said pier, was unusually great, and four of said mooring posts on said pier 54 North River, owned and maintained by the City of New York, to which posts the moorings of the bow of said steamship 'Mauretania' were fastened, gave way releasing the bow of said steamship. None of the moorings of said steamship, however, gave way, but remained intact. Said accident was wholly due to the condition of the posts erected and maintained by the City of New York, and was not due in any manner to any fault, negligence or carelessness on the part of the respondent, its agents or employees.

Tenth: Said pier No. 54 North River on said 23d day of December, 1907, was owned and operated by the City of New York and was not in any wise in possession of or subject to the control of this respondent. Said partial breaking adrift by the steamship 'Mauretania' was caused by the weakness of said mooring posts and by reason of the failure of the City of New York to furnish posts strong enough to bear the strain to which they were subjected on said day."

The Cunard Company then filed a petition to bring in the City of New York, alleging its ownership of the pier by the City and that it was not in the possession of or subject to the control of the steamship company, and that the breaking adrift of the steamship was caused by the weakness of the mooring posts and by reason of the City failing to furnish mooring posts strong enough to bear the strain they were subjected to.

The City, after some admissions and denials, alleged:

"That at all the times hereinafter mentioned, the City of New York was the owner of pier 54, North River, and that prior to and on the 23d day of December, 1907, the Cunard Steamship Company, Limited, occupied Pier 54,

North River, on a special permit from the Department of Docks and Ferries, a department of the City of New York having charge of said pier; that The City maintained on said pier a number of mooring posts of the regulation type, the same having been properly tested as to the tensile strength thereof before being placed in position and duly inspected thereafter by competent employees; that prior to the 23d day of December, 1907, the Cunard Steamship Company, Limited, obtained a permit to use the north side of Pier 54 for the purpose of docking their steamships, among which was the steamship 'Mauretania,' and before the said pier was occupied by the steamship 'Mauretania' and prior to the 23d day of December, 1907, the said Cunard Steamship Company, Limited, furnished to the Department of Docks and Ferries, the department of the City of New York having control of said pier, a mooring post and requested said department to place the same on said pier; that in accordance with said request of said steamship company, the said department did place on said pier the said mooring post, as requested, which had been delivered to the Department of Docks and Ferries by the said steamship company; that said mooring post was placed at a distance of about seven feet from the bulkhead on the north side of said Pier 54; that on the 23d day of December, 1907, the steamship 'Mauretania' was moored alongside of the north side of Pier 54, North River, with her bow towards the bulkhead. The day was dark and rainy, with a heavy wind blowing, and at about 10 A. M. on said day, the post near the bulkhead to which the bow mooring lines of said steamship were attached gave way, which subsequently put the strain on the other mooring posts, which in turn gave way, causing the bow of the said steamship to swing around and across the slip and caused her to strike a number of barges moored therein.

Tenth: Claimant, further answering the libel herein, alleges that a proper test was made of all the mooring posts, furnished on said pier by The City of New York as to their tensile strength and they were properly inspected at all times prior to the time of the accident, and if any defects were contained in said mooring posts, they were unknown to The City or could not be discovered, and the condition of said mooring posts owing to the heavy wind was not caused through any negligence or want of care on the part of The City of New York, but was of a nature which The City could not guard against and was consequently inevitable.

Eleventh: Claimant alleges that if there was any damage resulting from the breaking away of the steamship 'Mauretania,' as alleged in the libel herein, the same was not caused through any negligence or want of care on the part of The City of New York."

The testimony showed that the Cunard Company had been expecting that its new ships, the Lusitania and Mauretania, would be in use in the summer or fall of 1907, and in February wrote to the Commissioner of Docks and Ferries to secure accommodations for them. The following correspondence took place:

"New York, January 9, 1907.

Hon. J. A. Bensch,
Commissioner Department of Docks & Ferries,
Pier A North River, N. Y. City.

Dear Sir,

Owing to the delay in completion of plans and giving out contracts for building the sheds on new piers, in the Chelsea District, it seems quite impossible that the work can be completed in time to meet our requirements in anticipation of the arrival of our two new steamers Lusitania and Mauretania, which it is now expected will be due at this port about July 1st proximo.

In consideration of the fact that there is no pier on the whole river front (excepting those in the Chelsea District) with length enough for these ships to lie in safety and without extending for 100 feet or thereabouts into the river beyond the end of the piers, I beg to ask your consideration in favor of building a temporary structure on one of the piers for the protection of passengers and their baggage, pending full completion of the permanent structures.

I would suggest a two-story wooden shed the full width of the pier, say about 250 feet in length, built about the center of the pier, where passengers and baggage could be landed under cover—it could be put up in the simplest and most inexpensive way, the main features being strength and utility for the purposes required.

Yours truly,

Vernon H. Brown."

"New York, February 27, 1907.

Hon. J. A. Bensel,
Commissioner, Department of Docks and Ferries,
Pier A North River, N. Y. City.

Dear Sir,

Owing to the unavoidable delay on the part of Dock Department in constructing sheds on the new piers leased to the Cunard Steamship Company in the Chelsea District, by reason of the impossibility of getting prompt delivery of material, we find it necessary to make some arrangement for the temporary berthing of the two new large steamers 'Lusitania' and 'Mauretania' which we expect will be in service during the coming summer.

Under the circumstances we ask permission to erect on New Pier No. 54 a one-story wooden frame shed about 450 feet long by 80 feet wide and about 16 feet in height, with offices at the street end, all as shown on the drawings and specifications herewith.

The shed to be constructed and removed by the Cunard Steamship Company at its own expense.

Cunard Company to pay rental of Five Hundred Dollars (\$500) in full per month for use of said pier, commencing with and during its temporary occupancy for the steamers 'Lusitania' and 'Mauretania,' and pending completion of the shedding of new piers which have been assigned to this Company.

Respectfully yours,

The Cunard Steamship Co., Ltd.
Per Vernon H. Brown."

"New York, April 2nd, 1907.

Vernon H. Brown,
General Agent, Cunard Steamship Co.,
21 State Street, New York City.

Sir:

Noting your communication of the 27th ulto., I would state that there is no unavoidable delay on the part of this Department in constructing sheds on the new piers leased to your Company in the Chelsea section. The main delay up to the present time is owing to the impossibility of securing an agreement on matters of small detail between the architects and the Companies occupying the Chelsea Section piers. Further, in accordance with my verbal agreement with you, I am willing to give you a permit to construct a shed 450 feet long by 80 feet wide and about 16 feet in height, in accordance with plans to be hereafter approved for which privilege the Cunard Company is to pay at the rate of \$500. per month; the Company also to have the right to berth the steamers 'Lusitania' and 'Mauretania,' on one side of the pier.

Very respectfully, your obedient servant, (Sd) J. A. Bensel,
Commissioner."

This pier, and others in the vicinity, was owned by the City of New York and it had exclusive jurisdiction of the pier in question, subject to the use by the Cunard Company under agreement contained in the foregoing correspondence.

Upon constructing the pier, in the summer of 1906, the City placed mooring posts at intervals of about 60 feet. The outermost post was of special size and strength and did not give way. It was not subjected to the strain, however, which caused those on the shore end of the pier to yield, and whether it would have had strength to withstand such strain was not shown. Between the outermost and innermost

posts was stretched a line of mooring posts, each 26 inches in height and uniform in size and construction. They were made of cast iron and hollow. They were bolted securely to the pier. They were shorter than other posts which had been used by the City but it did not appear that they were of less strength for such reason as they withstood quite as well the horizontal pressure they were intended for and were subjected to. The mere question of height of the posts may therefore be eliminated from discussion.

The thickness of the posts was not shown but it appeared that they were the usual type of posts which had been successfully used for many years. These posts were tested and inspected in the usual way by the city officials who supervised the construction of the pier.

As pier 54 was constructed by the City, there was no mooring post near the bulkhead and the City's attention was called to that fact in August, 1907, in a letter, of which the following is a copy:

"New York, Aug. 13, 1907.

Hon. J. A. BenseL,
Commissioner of Docks & Ferries,
Pier 'A' North River, N. Y. City.

Dear Sir,

There is no heavy mooring post on Pier (new) No. 54 near the bulkhead and a post of this character is necessary for hauling the ship ahead or holding her in position after being berthed—this matter is most important and we have in our possession a spare mooring post such as are in use on Pier 51—this can very readily be placed on the new pier provided you can set it up for us.

Kindly advise if you can arrange this matter for us, and much oblige,
Yours truly, The Cunard Steamship Co., Ltd.,
Per R. L. Walker."

A few days later the following was also sent to the City:

"New York, Aug. 24, 1907.

Hon. J. A. BenseL,
Commissioner of Docks & Ferries,
Pier 'A' North River, N. Y. City.

Dear Sir,

On the 13th inst. we wrote to you about the necessity for putting up a heavy mooring post near the bulkhead on (new) Pier 54. North River, for hauling the 'Lusitania' into place and holding her in position after being berthed.

As we have had no reply, perhaps our letter miscarried. Will you kindly advise if the Department will place the post—we have on hand a spare one such as are now in use on Pier 51.

Yours truly, The Cunard Steamship Co., Ltd.,
Per R. L. Walker."

Then the following action was taken by the City:

"Aug. 20th, 1907.

Report on communication from the Cunard S. S. Co., dated Aug. 13, 1907, requesting that an extra heavy mooring post be located on pier (New) 54 N. R.

Noting the attached from the Cunard S. S. Co., which in brief, is a request that an extra heavy mooring post be located at the inshore end of Pier (New) 54 N. R., and agreeing to furnish same provided the Department will do the necessary work in connection therewith, it is recommended that the above named be advised to furnish the mooring post and the work of fastening same can be done by the force of the Department.

Chas. W. Staniford, Engineer-in-Chief."

Subsequently the City issued the following order:

"Subject or Premises, Pier New 54, North River.

Bureau Order No. 5553 New York, August 26th, 1907.

By order of the Commissioner you are hereby directed to perform the work of fastening mooring post on above pier, said mooring post to be furnished by the Cunard Steamship Company, in accordance with your report on the communication from the Cunard S. S. Company, under date of August 13th, 1907, and report cost for collection from the Cunard S. S. Co.

Please make your report in relation to the above on the back hereof, and return this order to my office on the earliest date possible.

(Sd) Charles J. Farley, Chief Clerk."

To Chief of Bureau No. 1.

Upon this order was endorsed the following:

"New York, 17th October, 1907.

To the Commissioner of Docks—Sir:

In relation to the within order, I have to report as follows:

(Copy) 9 Sept. 07—C. W. Staniford, Esq. Engineer-in-Chief—Sir: In obedience to the within order—have fastened a mooring post on pier No. 54, N. R. for the Cunard S. S. Co.

Work was begun Aug. 28th and finished Sept. 4th 1907.

(Signed) Joel J. Pemoff Asst. Engineer.

Below is the cost of the above work, as reported by Mr. Weir, Apportionment Clerk at Pier 'A', N. R. for collection from the Cunard S. S. Co.:

Labor and supervision.....	\$26.01
Materials	5.88

Total	\$31.89
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(Sd) C. W. Staniford, Engineer-in-Chief."

This additional mooring post was placed at a point designated by the Cunard Company and a bill rendered to it by the City as above indicated.

The Cunard Company desired to build a shed on the pier for its accommodation and accordingly such a structure as it deemed suitable was erected. The shed was 450 feet long, 80 feet wide and 16 feet high. The pier was 825 feet long and 80 feet wide. The shed began about 70 feet from the river end of the pier and extended to within about 200 or 300 feet of the bulkhead.

When the Mauretania went to the pier, she was made fast, lying bow in, on the north side of the pier, by 5 lines aft and 6 forward. Of these lines 9 were 8 inch Manilla and 2 were 3¾ inch wire, of the latter 1 was forward and 1 aft. The after lines were fastened to the 1st, 2d and 4th mooring posts from the outer end, and the forward lines were secured to the 1st, 2d, and 5th mooring posts from the bulkhead. The mooring posts on the north side only were used. No change was made in her position until about 7 a. m. of the 23d instant, when she was breasted out about 40 feet from the pier to allow coal lighters to get between the steamer and the pier. This was accomplished by slackening off the lines but they were not otherwise changed. The boats Tomhicken and Roan were then lying alongside of the next pier on the north, about midway of its length. The Eureka 32 lay outside of 4 other boats at the bulkhead, waiting to deliver coal, and

the Eureka 36 lay alongside of the steamer on her port side about amidships, also waiting to deliver coal. The Rogers lay alongside of the steamer on her port side waiting to take ashes.

The tide was running flood and the water almost high.

The Mauretania was the largest steamship afloat. She was 790 feet long and was of about 45,000 tons dead weight. She was drawing 24 feet 11 inches forward and 34 feet aft. Amidships the highest deck was about 60 feet above the water. The height of the pier above the water was about 6 feet. The height of the shed above the pier being about 16 feet, the steamer was exposed above the top of the shed about 38 feet. Forward, the highest part of the bow of the steamer was about 46 feet above the water, or about 40 feet above the floor of the pier, the shed not extending to that part of the pier.

About 9:45 a. m. the steamer broke adrift at her forward moorings, her bow swinging over toward the pier above, injured the mentioned boats.

No lines on the steamer parted. Her moorings remained intact but 4 out of the 6 posts used broke, leaving only the outside 2 with lines. She was then hauled back by running lines to the piles of the pier and across the pier to the mooring posts on the south side.

The wind at the time of the accident was from the southeast and it had full effect upon the steamer from the fact that she had no protection whatever forward, and aft only that afforded by the shed 16 feet high.

There was a sharp conflict as to the velocity of the wind, some of the Cunard Company's and the City's witnesses estimating it at 60 miles per hour, when a sudden squall prevailed. The Government Weather Records, introduced by the libellants, showed a wind movement of 31 miles, with a maximum of 40 miles for 5 minutes, between 8 and 9 o'clock, and a wind movement of 24 miles, with a maximum of 30 miles for 5 minutes, between 9 and 10 o'clock.

The libellants contend that the steamer was not properly moored, inasmuch as she used only 6 of the mooring posts on the north side of the pier, when 9 were available on that side, and in failing to use the 3 or 4 posts on the street end of the south side of the pier and 2 which could have been used on the river end. Those on the north side which were not used, however, would have added little to the security of the vessel because it was impracticable to so arrange the lines that they would have had a horizontal bearing, which was necessary to make them useful. Anything in the nature of a vertical pull would have been practically of no utility. With respect to the posts on the south side of the pier, they could only be used, on the shore end, by practically stopping traffic on that side of the pier. While it might be proper to resort to them in an emergency, they could not be used regularly without practically destroying the usefulness of the side of the pier, for which the Cunard Company had no authority or permission. They were used in the emergency, but it was testified that even taking such precautions as were practicable, that is, building wooden horses to support the cables, many narrow escapes from serious accidents were made.

There can be no doubt that a very strong wind prevailed at the time and that the steamer was moored to resist only such ordinary winds as prevailed on the two previous occasions of her using the pier. The question is, whether she was moored strongly enough to resist such a wind as could reasonably be expected at the season of the year the accident happened.

The Government Weather Observer in New York, in addition to the testimony mentioned above, said that a velocity of more than 50 miles an hour—

"occurs usually once a month, sometimes two or three or four times a month. * * * Q. If a squall lasted for less than five minutes it would not be recorded by those instruments? A. Perhaps the record would not be here but it would be on the tracing. The record I give here is for five minutes. Q. A sudden puff of wind blowing for a few seconds or part of a minute would not be recorded by those self registering instruments, that is a fact is it not? A. No, it is not a fact. It would be recorded. Q. It would not be noted as part of your record? A. Not unless it was for five minutes. * * * Q. You have no record of sudden squalls outside of the point where you take your records? A. No record. Q. You would not have a record of a squall that took place about 14th Street, a local squall? A. Not unless it prevailed at 100 Broadway, of course not. * * * Q. Is there such a thing as a squall at 14th Street that does not prevail at 100 Broadway, in your experience as a weather man? A. Not at this time of year, not in the month of December. * * * Q. A sudden squall may be limited to the area on which it is prevailing, may it not? A. Not during the winter months. That is true in the summer but not through the winter months. * * * During the winter months they are all general; if there is a gale of wind in one section of the city a gale of wind is blowing all over the whole city."

It is said in the Cunard Company's brief:

"All of the witnesses who testified as to the weather commented on the feature of the sudden squall. It is a matter of general knowledge that a squall may be of destructive violence at one point, while the wind is much lighter two miles distant. Capt. Roberts testified (p. 134): 'I have seen the forward sails of a sailing vessel taken completely off without the wind affecting the after part of the vessel at all.' It is also a matter of common knowledge that a sudden squall may blow with great violence but may not continue for five minutes."

In view, however, of the government weather records and the testimony of the observer, I do not think that much credence should be given to testimony as to a sudden gale of wind as creating an inevitable accident. I doubt if there would have been any accident if the pier had been shedded and the steamer given proper protection. I attribute the breaking adrift of the steamer to that cause. The posts no doubt were too weak to resist such storms as might reasonably have been expected at the season of the year, when the exposure of the vessel is considered, and it seems more reasonable to attribute the accident to such cause than to regard it as something which should not have been anticipated.

The case has not been brought within the authoritative definitions of inevitable accident. In *The Louisiana*, 3 Wall. 164, 173, 174, 18 L. Ed. 85, in rejecting such a claim in a collision case, it was said:

"The collision being caused by the *Louisiana* drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis

major, which human skill and precaution, and a proper display of nautical skill could not have prevented."

* * * * *

"The fact that the steamer was ordered by the government officers to take in coal at the old wharf, which had a narrow front when compared with the great length of the vessel, could not relieve the officers of the boat from the duty of securing her in such a manner as to prevent her drifting when the change of the tide and winds changed the direction of the forces acting upon the vessel. And the fact that under these circumstances she did drift, is conclusive evidence that she was not sufficiently and properly secured."

And in *The Mabey and Cooper*, 14 Wall. 204, 215, 20 L. Ed. 881, it was said:

"Inevitable accident, as applied to a case of this description, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care and precaution could do to keep the vessels from coming together."

There can be no doubt that either the Cunard Company or the City is liable for damages to these libellants and it remains to be determined where, as between them, the responsibility rests.

It is claimed by the City that the cause of the accident may properly be attributed to the Cunard Company because the first post that broke was supplied by that company and placed on the pier by its request, as shown above, and the breakage of the others necessarily followed.

It appears that all the posts gave way at practically the same time. Some of the witnesses say that there was but a single report of the breaking. It seems to be rather unimportant but if otherwise, I think it may properly be concluded that the giving way of the posts were practically simultaneous. The breaking of the post, however, was not the real cause of the trouble, which was due as I have before stated to the insufficient protection given to the steamer by the shed.

This shed was erected by the Cunard Company and was not of ample proportions to give the vessel needed protection. This conclusion, it seems to me, suffices to fix the responsibility upon the Cunard Company. The City did everything that could reasonably be expected to give that company a secure place for its steamers. The posts were inspected by the city officials and found sound. They were of the same class that had been in use for several years on the different city piers. After the accident no flaws were found in them. There is no contention that they were not securely put up, as the manner of breaking shows they were. They were sufficient in number. The Cunard Company asked and obtained permission to use the pier and erected on it a shed which was inadequate for the purposes of protection. The posts were doubtless insufficient in view of the exposure of the vessel but that did not result from any insufficiency of the posts but from the lack of proper protection by sheds or structures on the pier.

The Cunard Company's agents were apprehensive that the posts were too small as it proved they were, when the test of severe weather came. This should have been provided for by that company. It had knowledge that risk to other property, and perhaps lives, would be incurred

by the use of the pier in the condition it was, and should respond for the damages.

There will be a decree against the Cunard Company, with an order of reference. Its petition against the City will be dismissed.

UNITED STATES v. HYDE et al.

(Circuit Court, W. D. Washington, W. D. November 15, 1909.)

No. 1,127.

1. PUBLIC LANDS (§ 138*)—TRANSFER OF RIGHTS—CONVEYANCE OF FOREST RESERVE LANDS TO UNITED STATES—TRANSFER BY GRANTOR OF RIGHT TO LIEU LAND.

Act June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541), which authorizes the owner of patented lands within a forest reservation to convey the same to the United States and select a tract of vacant public land of equal area in lieu thereof, contains nothing which either expressly or inferentially would prevent an owner who has so conveyed his land to the United States from executing an instrument which would operate to pass to another such title as he might thereafter acquire to lieu lands selected by him; and a grantee in such an instrument, who purchases and pays for the same in good faith after his grantor has made his selection, although before its approval, on such approval and the issuance of a patent, acquires the title as a bona fide purchaser and is entitled to protection as such.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 138.*]

2. PUBLIC LANDS (§ 138*)—PATENTS—RIGHT OF UNITED STATES TO CANCELLATION—BONA FIDE PURCHASERS.

The United States is not entitled to the cancellation in equity of a patent issued for lieu lands in exchange for land in a forest reservation conveyed to it by the patentee under the provisions of Act June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541), on the ground that title to such base land was fraudulently acquired from a state, where the patented land has passed into the hands of a bona fide purchaser from the patentee, who had no knowledge of the fraud.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 368; Dec. Dig. § 138.*]

Bona fide purchasers, see note to United States v. Detroit Timber & Lumber Co., 67 C. C. A. 13.]

In Equity. Suit by the United States against Frederick A. Hyde and others. Decree for defendants.

Elmer E. Todd, U. S. Dist. Atty.

H. S. Griggs, for defendants Sawyer and Truxbury.

DONWORTH, District Judge. This suit is brought to set aside a patent issued July 22, 1902, to F. A. Hyde & Co., a California corporation, conveying the N. E. $\frac{1}{4}$ of section 24, in township 11 N., of range 4 E. of the Willamette meridian, situated in Lewis county, Wash. The patent was issued under the following statutory provisions:

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof, may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: Provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." Act June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541).

Under this statute the Secretary of the Interior established certain rules or regulations for its administration. Of these, rules 16 and 18 are as follows:

"16. Where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to execute a quitclaim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for."

"18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for."

The base land, of which a conveyance was made to the United States for the purpose of selecting the land now in question, consisted of a quarter section in the Pine Mountain and Zaca Lake Forest Reserve in California, described as the S. E. $\frac{1}{4}$ of section 36, township 6 N., range 26 W. of the San Bernardino meridian. For convenience I will hereafter refer to that section merely as "section 36." The bill was filed October 17, 1905, and names as defendants, Frederick A. Hyde, John A. Benson, F. A. Hyde & Co., a corporation, Alfred C. Truxbury and wife, and W. H. Sawyer and wife.

The evidence shows the facts to be as follows:

In the year 1898 A. J. Stein was a barber doing business in San Francisco. F. A. Hyde was one of his customers. Some time before March 3d of that year Hyde asked Stein if he had any friends that would like to take up land. Stein answered that he thought he could get them. Hyde asked him if he could get 10, and he said he thought so. Stein thereupon arranged with a number of friends, relations, and acquaintances, about 10 altogether, to sign such papers as Hyde should request. Hyde paid Stein about \$20 for his entire services, and paid the men who did the signing from \$10 to \$12.50 each. One of the men whom Stein procured was William Schlipf, a neighbor. Schlipf went to a notary's office and signed some papers, the nature of which he does not remember. He did not read them and took no interest in the transactions. He signed several papers on different occasions, and perhaps a year or two elapsed between the signings. The record evidence shows that on March 3, 1898, Schlipf signed an application to purchase all of section 36, stating therein, among other things:

"That I desire to purchase the same for my own use and benefit, and for the use or benefit of no other person or persons whomsoever, and that I have made no contract or agreement to sell the same."

This application was sworn to by Schlipf, and was filed in the office of the state surveyor general of California on March 5, 1898, to-

gether with a power of attorney from Schlipf, authorizing Hyde to file the application and to receive the certificate. On August 22, 1898, the surveyor general approved the application and directed that the land be sold in accordance therewith, and on October 17th following a certificate of purchase was duly issued by the register of the state land office, declaring Schlipf to be the purchaser of section 36 and entitled to a patent on completing payment of the balance of the purchase price, which was at the rate of \$1.25 an acre. In the office of the recorder of Santa Barbara county, Cal., there was filed at the request of Hyde on August 4, 1899, an assignment of the certificate of purchase and a deed from Schlipf to Hyde conveying all of section 36; both instruments bearing date October 26, 1898, and appearing to have been acknowledged by Schlipf that day. On February 12, 1900, formal patent in the usual form was issued by the state of California to Hyde as grantee, conveying section 36. Schlipf did not pay any part of the state's price for the land (\$800), and the whole amount must have been paid by Hyde. On February 24, 1900, Hyde and wife by quitclaim deed conveyed section 36 to F. A. Hyde & Co., a California corporation. This deed and the patent were filed for record with the county recorder on March 15, 1900. The articles of incorporation of F. A. Hyde & Co. are in evidence, and thereby it appears that at the time of incorporation Hyde owned 996 of the 1,000 shares constituting the capital stock. On March 2, 1900, there were filed for record with the county recorder a number of quitclaim deeds in due form from F. A. Hyde & Co. to the United States, all dated and acknowledged February 27, 1900, two of which conveyed, respectively, the N. $\frac{1}{2}$ and the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 36, aggregating 160 acres. These conveyances were evidently made for the purpose of serving as a base, under the statute and regulations, for the selection of lieu lands outside of the forest reservation. The genuineness of the signatures purporting to be made by Schlipf on some of the papers is questioned by complainants; but I see no reason to doubt that whatever purports to bear his signature was in fact signed by him.

This was the situation of affairs at the time that defendants Sawyer and Truxbury became connected with the subject-matter of this suit. They reside, respectively, at Worcester, Mass., and North Tonawanda, N. Y., and are lumbermen of mature age and large experience, owning timber lands in different parts of the country. They together visited Puget Sound in 1899, with a view of considering the advisability of investing in timber lands. In Tacoma they made the acquaintance of Angus McDougall, a timber cruiser there residing. They arranged that McDougall should buy timber lands for them in Lewis county and vicinity, and shortly after sent out Chas. Hill as their financial and business representative to act for them in making the purchases. The original idea was to buy from private owners; but while Truxbury and Sawyer were on the ground they were informed in a general way of the law permitting the exchange of lands within forest reservations for vacant land in the public domain, and learned that parties who had surrendered lands in forest reservations were offering their rights for sale. These rights were commonly spoken of as "forest reserve

scrip." Hill came to the state of Washington early in 1900, and, acting with McDougall, acquired altogether for Truxbury and Sawyer about 12,000 acres of timber land in Lewis and Cowlitz counties. Of this about 5,000 acres were acquired from the United States by means of lieu selections. "Forest reserve scrip" was at that time offered for sale by numerous parties, including railroad companies, individuals, and private corporations. Hill obtained price quotations from a number of these. He met Benson at Tacoma in February, and had some negotiations with him. At Benson's suggestion Hill took up the matter with Hyde by correspondence, addressed to the latter at San Francisco. This resulted in the purchase of a quantity of rights by Hill from F. A. Hyde & Co. Hill returned east by way of San Francisco, where he met Hyde and bought more. Between 4,000 and 5,000 acres of rights were bought in this way from F. A. Hyde & Co. The price paid ranged from \$3.85 to \$4.50 an acre. There was no particular certificate or document constituting the "scrip." As evidence of the right to select and acquire the government land in the particular case now in controversy, F. A. Hyde & Co. delivered to Hill, or to McDougall, an abstract of title to the base lands down to and including the deed of relinquishment to the United States, and also an irrevocable power of attorney, executed by F. A. Hyde & Co., constituting McDougall the attorney in fact of that corporation to select public land in any state or territory in lieu of the base lands surrendered (which were therein described), and empowering McDougall to sell and convey by good and sufficient deed—

"all of the right, title, and interest that said corporation now owns, holds, or possesses, and also all of the right, title, and interest that said corporation may hereafter acquire of, in, and to the land that has been or may hereafter be selected as aforesaid, or any part thereof, or to make and execute any contracts, bonds, or agreements relative to such lands for such sum or price, or on such terms, as he may deem proper."

Another clause of the instrument specifically authorizes McDougall to execute and deliver deeds and conveyances. So far as appears, this method of transferring the right of selection was that in common use at the time. Hill employed an attorney residing at Vancouver, who was reputed to be specially qualified in such matters, to examine all papers submitted by Hyde & Co. before payment was made to that company for the rights assigned. The record evidence further shows that McDougall, as attorney in fact of F. A. Hyde & Co., on July 25, 1900, made application through the United States land office at Vancouver, Wash. (the proper land office), to select the quarter section now in controversy in lieu of the base lands in section 36, for which F. A. Hyde & Co. then held the patent of the state of California. The required affidavits appear to have been filed and the required notice given. The abstract of title deposited with the Vancouver land office was made by an abstract company in Santa Barbara, and showed the essential proceedings leading up to and including the patent from the state of California to F. A. Hyde & Co. and the quitclaim deeds from the latter company to the United States, so that on their face these papers showed that F. A. Hyde & Co. had acquired perfect title to the quarter section in section 36, and had made a conveyance thereof

to the United States as provided in the statute and the regulations. On June 4, 1901, F. A. Hyde & Co. by McDougall as its attorney in fact, executed a deed to Truxbury and Sawyer, reciting the exchange of lands and conveying "all of the right, title, and interest that said corporation now owns, holds, possesses, and claims, and also all of the right, title, and interest that said corporation may hereafter acquire of, in, and to" the land now in controversy, and this deed was recorded in the proper records of Lewis county, Wash., on June 21, 1901. On June 24, 1902, the Commissioner of the General Land Office of the United States entered his formal approval of the selection by F. A. Hyde & Co. of the land now in controversy in lieu of the quarter section in section 36, and on July 22, 1902, the United States patent issued in regular form conveying these lieu lands to F. A. Hyde & Co. Something over three years after the issuance of this patent the bill was filed.

I do not find any evidence of a conspiracy or combination between Hyde and Benson, or between them and others, to defraud the United States by any of the means alleged in the bill, except in so far as it was a fraud on the United States to obtain government land by using as a basis of exchange land acquired by defrauding the state of California. The government has offered no evidence to sustain the allegations of the bill charging a corrupt and unlawful combination on the part of officials and employés of the United States. No evidence was offered which can be considered as substantiating the charge that Hyde and Benson influenced officers or employés of the land office or forestry service in respect to the fixing of the boundaries of the forest reservations or in respect to any of the proceedings on the part of the government which resulted in the patenting of the lieu lands. The evidence establishes that, in order to obtain patents from the state of California, Hyde procured Schlipf and others to sign false affidavits and to make applications to purchase state lands in the interest of Hyde; the applicants having no interest whatever in the proceedings. The method adopted constituted a fraud upon the state of California, which rendered the state patent issued to F. A. Hyde & Co. for section 36 voidable at the suit of the state. The United States have not relinquished or offered to relinquish section 36, or any part of it, either to F. A. Hyde & Co., from whom was received the conveyance thereof, or to the successors in interest of that company, Truxbury and Sawyer, or to the state of California. The value of section 36, or any part of it, has not been shown, and, if there is any material difference in value between the base lands and the lieu lands, such difference has not been made to appear.

The contention of the United States apparently is that the government can retain the base lands, of which it still holds the legal title and is a bona fide purchaser for value, and at the same time cancel the patent to the lieu lands, or at least that F. A. Hyde & Co., or its successors in interest, Truxbury and Sawyer, have no concern with the disposition to be made by the United States of the base lands. In support of this position, *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90, and *United States v. Hyde* (D. C.) 132 Fed. 545, are

cited. The question considered in those cases was the right of the United States to remove Hyde from the Northern district of California to the District of Columbia, for trial upon an indictment in which Hyde, Benson, and others were charged with a conspiracy to defraud the United States out of the title to large tracts of public lands. It appears that the facts alleged in the indictment were similar to those set forth in the bill in this suit; but the facts established by the evidence here fall far short of those allegations. I think it is open to question whether, on the facts now appearing, the government could obtain a decree canceling this patent, without rescinding, or offering to rescind, the exchange of lands. A private individual, who has been a party to such a transaction, and who, though occupying the position of bona fide purchaser as to the lands received by him, should desire to cancel his conveyance because of fraud perpetrated by his grantor in obtaining title from a former owner, would be obliged on well-known principles to rescind, or offer to rescind, the transaction, or at least the decree in such a case would compel him to do equity and restore what he has received. He could not retain what he has received and obtain a decree canceling his conveyance. True, he could not be compelled to stand on his position as a bona fide purchaser and waive his right to rescind; but, if he should elect to rescind, he must restore, or offer to restore, what he has received before he is given relief.

It is not clear that the principles announced in *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110, *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747, *United States v. Trinidad Coal Co.*, 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640, and *United States v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384, establish a different rule for suits in which the United States are complainants and the circumstances are those presented here. In all the cases falling under my observation, where the Supreme Court has held that the government may obtain the setting aside of land patents without restoring the consideration received, it appears that the fraud practiced by the patentees consisted in a successful attempt to evade the express provisions of the statute by which Congress had provided for the disposition of such lands, so that, as a result of the fraud, the title to the lands had so vested as to defeat the public policy declared by the statute. Here the result is precisely what Congress intended, namely, the securing of title by the government to the forest reserve lands and the patenting of an equal amount of vacant public land. Congress has expressed no concern in the statute which governs this exchange as to what persons or corporations may secure the vacant land, or as to the extent of area that any one owner may acquire. Here the fraud consisted in the means by which a result, otherwise lawful as far as the United States are concerned, was brought about. Though the fraud was sufficient to warrant the setting aside of the patent to the lieu lands in the absence of a bona fide purchaser, I am not clear as to the conditions under which that relief would be granted.

I find, however, that defendants Truxbury and Sawyer have fully established the defense of bona fide purchase for a valuable considera-

tion without notice. The evidence shows that they purchased for a fair price, in good faith, and had no notice whatever of the fraud. It is substantially conceded that such is the evidence in point of fact; but it is contended that they do not in law occupy the position of bona fide purchasers. The argument for complainants is that, as the deed from F. A. Hyde & Co. to these purchasers was made before the exchange of lands was approved by the Commissioner of the General Land Office, it was made before the equitable title passed from the United States, and, since F. A. Hyde & Co. then had nothing to convey, Truxbury and Sawyer have never received either the equitable or legal title. The answer to this is that there was no statute of the United States or rule of public policy that would prevent a landowner, after relinquishing forest reserve lands to the government, from executing and delivering an instrument which would operate to pass to another such title as he should thereafter acquire in the lieu lands selected. In many of the statutes regulating the disposition of the public lands, the making of such an instrument is prohibited; but nothing of the kind is found here. During the time that the statute governing this transaction was in force, it is very likely that numerous conveyances were made under like circumstances, and no reason appears for declaring them void. The statutes of Washington expressly declare that a quitclaim deed may pass an after-acquired title, where words are added expressing such intention. Ballinger's Ann. Codes & St. § 4521 (Pierce's Code, § 4453); *Ankeny v. Clark*, 1 Wash. St. 549, 20 Pac. 583. It follows that the deed to Truxbury and Sawyer operated to pass to them the full legal title as soon as that title passed from the United States to F. A. Hyde & Co.; and, as they were at that time still acting bona fide and without notice of anything in the nature of fraud, they acquired the equitable title as well. Furthermore, when they purchased the rights of F. A. Hyde & Co. they relied upon the patent from the state of California to that company, and paid the consideration in good faith and without notice of any fraud committed against the state, and they consequently acquired equitable and legal rights which the state could not ignore. Even if that state were now suing, it would not be in accordance with equity to set aside its patent, in view of what these purchasers have done in reliance on its validity.

It appearing, therefore, that defendants Truxbury and Sawyer are bona fide purchasers for a valuable consideration without notice, that they are the holders of the legal title, and that their equity is superior to that of complainants, the bill will be dismissed. The equity of this result is further apparent when it is considered that the United States still hold by an apparently unassailable title the forest reserve lands in exchange for which the Commissioner of the General Land Office approved the selection of the land in controversy, and the state of California, the party primarily interested in protecting its own public policy, has made no effort to set aside its patent.

A decree will be entered as above indicated.

C. B. NASH CO. v. CITY OF COUNCIL BLUFFS et al.

(Circuit Court, S. D. Iowa, W. D. October 22, 1909.)

No. 413.

1. MUNICIPAL CORPORATIONS (§ 88*)—PROCEEDINGS OF COUNCIL—ADJOURNED MEETINGS—LEGALITY.

The legality of an adjournment of a meeting of a city council by less than a quorum to a certain time cannot be questioned by the courts, where at the adjourned meeting all members were present and participated in the transaction of business.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 194; Dec. Dig. § 88.*]

2. MUNICIPAL CORPORATIONS (§ 918*)—ISSUE OF BONDS FOR WATERWORKS—SUBMISSION OF QUESTION TO VOTERS—IOWA STATUTE.

Under Code Iowa, § 720, conferring power on cities, when authorized by a vote of the electors, to purchase, establish or erect, maintain, and operate waterworks, a submission to the voters of a city of a proposition to issue bonds to "purchase or build" a system of waterworks was a valid submission, and an affirmative vote confers authority to issue the bonds for either purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

3. MUNICIPAL CORPORATIONS (§ 865*)—CONSTITUTIONAL LIMITATION OF INDEBTEDNESS—COMPUTATION OF TAXABLE PROPERTY—IOWA STATUTE.

Const. Iowa, art. 11, § 3, provides that no city shall become indebted in any manner for any purpose to an amount in the aggregate exceeding "five percentum on the value of the taxable property within such corporation, to be ascertained by the last state and county tax lists." Code Iowa, § 1305, provides that all property subject to taxation shall be valued at its actual value, to be entered on the list and assessed at 25 per cent. of such actual value, which assessed value shall be entered in a separate column. *Held*, under the construction placed on such constitutional and statutory provisions by the Supreme Court of the state, which is binding on the federal courts, that the constitutional limit of 5 per cent. on the indebtedness of a city is to be computed on the actual, and not the assessed, value of its taxable property, as shown by such tax list.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1836-1838; Dec. Dig. § 865.*]

Constitutional and statutory limitations of municipal indebtedness, see note to *City of Helena v. Mills*, 36 C. C. A. 6.]

In Equity. Suit by the C. B. Nash Company against the City of Council Bluffs, Thomas Maloney, as Mayor, John Olsen and others, as Aldermen, and L. H. Jensen. Bill dismissed.

This bill in equity, filed January 5, 1909, is to enjoin the defendant city and officers from the execution and delivery of its bonds or other obligations in the amount of \$600,000 for the purpose of raising money to buy or construct a system of waterworks. L. H. Jensen is made a defendant, because he is the plaintiff in the district court of Pottawattamie county, Iowa, in a case against the city and its officers, ostensibly for the same purpose that this bill was filed; but the bill herein charges that the state court case is a collusive one.

Lodowick F. Crofoot and Edgar H. Scott, for complainant.

Clem F. Kimball, City Sol., and Charles M. Harl, for respondents.

SMITH McPHERSON, District Judge (after stating the facts as above). The complainant is a Nebraska corporation, and a real estate owner and taxpayer of Council Bluffs. Reasons are relied on for enjoining the creation of the proposed indebtedness of \$600,000 for the purchase or erection of a system of waterworks. About 30 years ago a franchise was granted to a corporation to build and operate a system of waterworks for 25 years. The charter period expired 2 or 3 years since, from which time until the present the system has been operated by mere sufferance. Many negotiations have taken place, resulting in disagreements. In September, 1908, the city council submitted to the voters the proposition as to issuing the amount of bonds in question to purchase or build a system of waterworks, which was ratified by a vote of the electors. Thereupon this action was brought.

1. The city council has a rule, but which is not covered by statute or ordinance, that the regular meetings of the council shall be held on the evening of the first Monday of every month. The last meeting of the council in August, 1908, was August 24th. The record, as made up at the time, recited many doings of the council, none of which were connected with this matter, and then recited an adjournment, not specifying any time. This record was signed by the mayor and the clerk. The next Monday was the first Monday of September. The record, as made up for that day (Monday, September 7th), showed that the mayor and all eight of the councilmen were present, and that on motion the council adjourned until the next evening (Tuesday). It is conceded that that record was untrue. The mayor was not present, nor were six councilmen. Two of the councilmen were in the building, but not in the council room. These two voted to adjourn until Tuesday evening. Proceedings were adopted at the instance of complainant herein to correct the record of Monday evening and show the truth. Thereupon the council changed the record of August 24th, showing that the council then declared that the next regular meeting should be September 8th (Tuesday), as Monday, the 7th, was a holiday; and the record of September 7th was changed, so as to show that but two councilmen were present, and that those two adjourned the meeting until the next evening. The petition to the council was signed by the requisite number of people and was filed with the clerk on Tuesday in advance of the meeting, that evening, at which the council by resolution sent it to the voters. By reason of these facts, it is claimed that the statute, which requires that such petition shall be considered at the next regular meeting of the council, was not observed, and that the meeting of Tuesday, September 8th, was not a regular meeting.

As to the right of less than a quorum of a body to adjourn to a certain time, in the absence of a constitutional or statutory provision allowing it, the authorities are in conflict. Cases holding that less than a quorum can so adjourn are: *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. 434; *Kimball v. Marshall*, 44 N. H. 465. And see *Abbott, Municipal Corporations*, 507. To the contrary, see *Penn. Co. v. Cole* (C. C.) 132 Fed. 668; *Rackliffe v. Duncan*, 130 Mo. App. 695, 108 S. W. 1111; *Raisch v. Railroad*, 7 Cal. App. 667, 95 Pac. 663; *State ex rel. Page*

v. Smith, 48 Vt. 266. And the case of Moore v. Perry, 119 Iowa, 423, 93 N. W. 510 presents the question without a decision. But it seems to me that an adjournment by less than a quorum, ratified by the actual presence of all members at the time to which such adjournment was attempted, and the transaction of business, is not to be questioned by the courts. But, aside from this, it will be kept in mind that the corrected record shows that by a unanimous vote the council on August 24th adjourned until September 8th for the next regular meeting, thereby in effect suspending or abrogating the rule for a Monday, September 7th, meeting.

2. It is contended that the proceedings on which the bonds will be based are invalid, for that the question submitted to the voters was in the alternative—to purchase “or” build a system of waterworks. The evidence shows that there was a sentiment both in the council room and with many people for municipal ownership of the waterworks. There was an outcry against corporations in general, and a waterworks corporation in particular. Members of the council of various vocations and experiences believed that it would be satisfactory if they could expend this large sum of money and operate the system, and they were indorsed by the voters. It was a question of municipal or private ownership. That was in fact, the question, and municipal ownership won out.

The statute provides (Code Iowa, § 720) that cities shall have power to: (1) Purchase. (2) Establish. (3) Erect. (4) Maintain and operate. There is now in operation a system of waterworks. It can be purchased by agreement, or taken under right of eminent domain; that is, by purchase. Brown v. Carl, 111 Iowa, 608, 82 N. W. 1033, is cited as an authority that the proposition voted on must be either for a purchase or construction, and for the one only. But it is not an authority on that proposition. The practical question submitted was as to whether there should or should not be a system owned by the city. And the opinion by Judge Waterman not only shows what the court in fact held, but the reasons therefor, because he said that, if submitted in the language of the statute, it would be valid. And I am inclined to believe, but with doubt, that the contract for purchase, or the contract to erect, as may be adopted by the council, must be ratified by the voters. Code Supp. Iowa, 1907, § 745.

3. The question as to whether the assessment rolls of 1907, or 1908, or a later year, shall be adopted as the basis, in view of my holdings, is an academic question, and not a practical question, and I do not discuss it.

4. One provision of the Iowa Constitution (article 11, § 3) provides that no city shall be allowed to become indebted in any manner, for any purpose, to an amount in the aggregate exceeding 5 per centum on the value of the taxable property within the city, to be ascertained by the last state and county tax list previous to incurring such indebtedness. Any statute or ordinance or other action of a city in conflict with the Constitution, as of course, cannot stand. And it is idle to talk about what majority some scheme has received, because majorities cannot ride down the Constitution. This provision of the

Constitution was adopted for the sole purpose of thwarting majorities, and giving protection to a minority. If every voter in Council Bluffs wants, and votes for, municipal ownership, they can only have it within the Constitution.

The craze to go in debt, with the stock argument for the next generation to help pay the debts, as if they will not have enough of their own creation, is and has been ever present. Seldom is any scheme to be followed by a debt for any purpose voted down. The convention of 1857 knew this. Counties and cities in Eastern Iowa had then gone in debt in extravagantly large amounts for different things, for the supposed public good. Those schemes were supported by the same zeal and enthusiasm as are the schemes of paternalism of the present day. Music, and banners, and processions, and sidewalk oratory, were known and practiced then, as well as at the present day. Debts created by Eastern Iowa counties and cities, before the adoption of the Constitution more than 50 years ago, are still being paid by the future generations—the present taxpayers of many Eastern Iowa counties and cities. These were the evils that the Constitution was to strike down, if the proposed debts, all told, exceed 5 per cent. But, if within the Constitution, the people by a majority can and should rule, and this whether they act wisely or unwisely. So that it must be determined what the Constitution does provide, and to do this a few elementary and fundamental rules must be kept in mind.

All provisions of a Constitution are mandatory. There is no such thing as a directory provision in a Constitution. All paragraphs, all sections, and all words must be given full force and meaning. With these things in mind, the provision must be analyzed. When that is done, we shall see that the debts heretofore created, added to the now proposed debt, shall not exceed 5 per cent. of the property, because the Constitution provides that a city shall not in any manner or for any purpose go in debt beyond that limit. But 5 per cent. of what? And how is the 5 per cent. ascertained? The first question, of 5 per cent. of what, is answered by the wording of the Constitution, which recites: "Five per centum on the value of the taxable property within such corporation [city]." The words "value of the taxable property" of the taxpayers are what are used. It is known that exemptions from taxation are made, such as courthouses, poor farms, church property, hospitals, homesteads of soldiers, etc. Such property is not to be considered, because taxable property only is to be taken into account. Of such taxable property, 5 per centum is to be ascertained. But what amount? The Constitution says: "Five per centum on the value of the taxable property." So that it seems clear to me that we must take 5 per centum on the value of all the property to be taxed within the city.

But how ascertained is the more difficult; that is, how are we to arrive at the value of the taxable property? Values of property for this purpose cannot be ascertained by the courts hearing evidence. One witness will say that a house and lot are worth \$5,000, and one witness a larger, and another witness a smaller, sum. We find that the Constitution requires that such valuation shall "be ascertained

by the last state and county tax lists." The tax list in the first instance is made by the township or city assessor. His valuation, as noted by him and returned to the county auditor, is binding, final, and conclusive, subject only to what may be called appellate proceedings by the board of review (the city council), subject, further, to the county board, equalizing as between precincts, and the state board, as between counties. But the assessor's notations in the end, modified or not modified, go into the hands of the auditor. His work is clerical only. He takes the figures thus returned, and multiplies them by the tax levies, and his figures are certified to the treasurer for collection. Practically ever since we have been a state, the law has required assessments to be made at the actual value of the property. But selfishness and greed to avoid taxation by individuals, and by assessors and boards of review to assist neighbors and political friends, has resulted in a valuation of from 30 or 40 per cent. of the true value. The result has been the same as if a true valuation had been ascertained, because the levy as a multiplier was increased as the valuation was reduced. But this evil, real or supposed, was sought to be remedied by the Legislature by enacting a statute presently to be noticed.

The value of the property of the taxpayers on which the 5 per centum computation is to be "ascertained by the last state and county tax list." What is the tax list as defined by the Constitution? Section 1305 of the Code is as follows:

"Valuation.—All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent. of such actual value. Such assessed value shall be entered in a separate column opposite each item, and is to be taken and considered as the taxable value at which it shall be listed and upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade."

Herein is the pivotal question in the case. And the statement thereof, first of all, presents the inquiry whether this statute has been construed by the Supreme Court of the state, and whether such construction has been held to be valid or void, under the provision of the Iowa Constitution limiting the indebtedness of a city to 5 per centum.

The construction given state statutes and state Constitutions by the highest court of a state will ordinarily be followed by United States courts. Particularly is this so when the facts and transactions of the case have arisen since the decision of the state Supreme Court was made. Therefore, waiving my own views, and properly putting all arguments to one side, it is only necessary to call attention to what the state Supreme Court has decided, if such construction has been given with an affirmative holding upholding similar municipal action.

With this in mind, and observing this rule, in my opinion the question is put at rest by the case of *Halsey v. City of Belle Plaine*, 128 Iowa, 467, 104 N. W. 494, decided in the year 1905, three years prior to any action taken in the matter under consideration by the city of Council Bluffs. I cannot understand how any one can be in doubt as to what was decided, after reading the opinion as officially reported, as above cited. But in the argument it was stoutly denied that the

opinion was decisive. I have therefore given the opinion and the record in the case the attention which they are entitled to receive.

The confusion in the case arises from the figures found in the different reports of the case. The actual value of all property within the city of Belle Plaine upon which taxes could be laid was \$1,578,576. Five per cent. of that in round numbers is \$75,000. The question in the case was as to a proposed bond issue of \$30,000. How much was the city already in debt, aside from the proposed issue of \$30,000? The report of the case in 104 N. W. 495 recites \$8,000. The report of the case in 128 Iowa, 467, recites \$80,000. I have inspected the original opinion and the files and records of the case in the office of the clerk of the Iowa Supreme Court. I find that the opinion is in typewriting, and as it left the type machine it recited \$8,000. But as it now appears a cipher ("0") has been added with pen and ink, so that it reads \$80,000. The official files show that the case was heard and determined on an agreed statement of facts, without other testimony, and by which it appears that for the year in question the following were the facts:

The value of the property of taxpayers was.....	\$1,578,576 00
The assessed or taxable value was.....	379,629 00
The indebtedness was.....	8,000 00
The proposed indebtedness, the subject of the litigation, was...	30,000 00
Total indebtedness, if this last issue was made.....	38,000 00

From which the following are deduced: Five per cent. of the taxable value is \$18,981.45. This is much less than the proposed bond issue. But 5 per cent. of the actual value is \$78,928.50. I have gone into these details to show what was decided by the Iowa Supreme Court, and beyond all doubt that court decided that the actual value, as shown by the 100 per cent. column, is the test as viewed by that court. This is so for the following reasons: (1) The opinion is on that theory only. (2) The Iowa Supreme Court declines to follow the case of *Chicago v. Fishburn*, 189 Ill. 367, 59 N. E. 791, which holds squarely the reverse. (3) The issue of bonds for \$30,000 was held to be valid. They would have been absolutely void by any computation, other than by taking the prior indebtedness at \$8,000, and not \$80,000, and by taking the actual, instead of the taxable, value of the property subject to taxation.

Such was the judgment of the Iowa Supreme Court in the year 1905, and a judgment of a court always prevails as against the opinion or reasons assigned for the judgment. And there can be no doubt that the change of figures in the opinion was by inadvertence, and quite likely by Judge Bishop, since deceased. I have gone into these details because of the very great importance of the matter. And the Iowa Supreme Court having passed upon the question, and thus construed the Iowa Constitution and the Iowa statutes, prior to the time when the city of Council Bluffs took any step towards creating the proposed indebtedness, the question as to this court is foreclosed.

It is beyond all doubt true, under this Iowa Supreme Court decision in the *Halsey Case*, that cities can now become indebted from three to four times as much as they could five years ago. It may be

that it will open a new era, like the old one, sought by the constitutional convention of 1857 to be relegated to history. It may be, as argued, that we will have the bond issues as we did 60 years ago, followed by unbearable burdens of taxation, or even bankruptcy and repudiation. I do not say we will, and cannot say we will not, have such things. All these are matters of policy, with which this court has no power to interfere. This court can only deal with questions of the power of the city. And the Iowa Supreme Court having so decided prior to the year 1908 (in 1905), and that opinion being the latest expression of that court upon the question, this court, by reason of a long, unbroken line of authorities, must give the same construction to the Iowa statutes and the Iowa Constitution. And as section 1, c. 49, p. 33, Acts of the Thirty-First General Assembly, authorized the 5 per cent. debt to purchase or construct waterworks, the city is within both the statute and the Constitution.

Therefore, as in any view, under the evidence, as to the existing indebtedness of the city, an additional indebtedness of \$600,000 will not exceed the constitutional limit, the bill of complaint herein is dismissed.

CHIRURG v. KNICKERBOCKER STEAM TOWAGE CO.

(District Court, D. Maine. November 23, 1909.)

Nos. 104-106.

1. ADMIRALTY (§ 8*)—JURISDICTION—MATTERS OF DEFENSE.

In a possessory action in a court of admiralty to recover possession of vessels of which libellant alleged that he was owner claimant, a corporation filed an answer alleging that it was the owner and in possession, that it bought and paid for the vessels several years before, and had been in possession ever since, that it had the title conveyed to its then president in trust for it, and that he, although having no personal interest in such vessels, in collusion with libellant, who knew all of the facts, fraudulently executed a bill of sale to libellant. *Held*, that such answer stated a defense cognizable in a court of admiralty, which had jurisdiction to determine whether or not libellant's title, alleged as the basis of his right of possession, was fraudulent.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 8.*]

2. ADMIRALTY (§ 8*)—JURISDICTION—DEFENSES.

In a possessory action, a court of admiralty may take notice of an equitable title when it comes up incidentally, and especially when it is alleged by way of defense by the claimant in possession.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 125; Dec. Dig. § 8.*]

In Admiralty. Suit by Michael Chirurg against the Knickerbocker Steam Towage Company. On exceptions to answer. Exceptions overruled.

Bertram L. Fletcher, for libellant.
Benjamin Thompson, for respondent.

HALE, District Judge. These are possessory actions to recover possession of the steamers Delta, Bismarck, and Ralph Ross, and now

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

come before the court on exceptions by the libelant to the answer of the respondent. The three several actions may be treated as one case.

The libel alleges:

(1) Ownership of the several steamers.

(2) That the Knickerbocker Steam Towage Company has exclusive possession of the steamers, and refuses to permit the libelant to take possession, and intends to send the steamers to sea without libelant's consent.

The answer is substantially as follows:

(1) It denies the ownership of the libelant.

(2) It admits that the respondent has possession of the steamers, that it refuses to permit the libelant to take possession of them, that it intends to send them to sea, and that its employment of the steamers is without the consent of the libelant.

(3) It admits the jurisdiction of the court, but denies that the allegations of the libel are true.

(4) It sets out in substance that prior to November 27, 1901, these steamers had been owned by Ross & Howell, who had been engaged in a general towing business upon the Penobscot river, and that at said time, and ever since, the respondent was, and has been, engaged in the same business upon the Penobscot and Kennebec rivers.

(5) That on November 27, 1901, Ross & Howell made an agreement with the respondent for the sale to the respondent on January 1, 1902, of these steamers, with certain other property, for \$35,000, with the stipulation that Walter Ross, of Ross & Howell, should be employed as manager of the respondent's business on the Penobscot river; that thereafter, on February 5, 1902, the agreement was carried out, and the consideration for the purchase was paid by a promissory note; that one James T. Morse was president of and a director in the respondent corporation; that bills of sale were made to him as trustee, for the sole and exclusive benefit of the respondent corporation, he having no personal or beneficial interest in the purchase of the property.

(6) That, immediately after the purchase by the respondent, it took possession of the steamers, and has been in full, exclusive, and unquestioned use, possession, and management thereof ever since, and has received the earnings without accounting to any one, and with the full knowledge, consent, and approval of James T. Morse, who never claimed to have any personal or beneficial interest in the vessels, but acknowledged that they were the property of the respondent.

(7) That the libelant well knew that James T. Morse had no interest or ownership in the steamers, other than to hold the record title to them in trust for the respondent; yet with that knowledge, and in collusion with Morse, on May 18, 1908, the libelant conspired to defraud the towage company, by corruptly making bills of sale to himself of all the steamers, for the fraudulent purpose of enabling him to take possession of them, and compel the respondent to pay him a large sum of money, in order to obtain their redelivery, and to remove the cloud upon the title; that, although the bills of sale were made May 18, 1908, the libelant did not file them in the custom house at Bangor,

where the steamers were enrolled, until December 9, 1908; and that the respondent was not notified of the execution or record of the bills of sale until March 23, 1909.

(8) That all the bills of sale from James T. Morse to the libelant were fraudulent and void, and never conveyed any title to the libelant, but merely created a cloud on the record title of the steamers, and that the bills of sale were invalid, and were not executed in accordance with the laws of the United States.

By the exceptions, the libelant raises the contention that the allegations of the answer are not pertinent to any material issue, for the reason that they state matters of an equitable nature, not cognizable in an admiralty court.

1. Does the answer state a defense not cognizable in a court of admiralty?

I have stated the substance of the answer. It sets out by defensive allegations, propounded in a clear and orderly manner, and in compliance with the admiralty rules, that since February, 1902, the respondent has been in full and exclusive possession and management of the steamers in question; that its title came by purchase from Ross & Howell, who, as well as the respondent, were engaged in the towage business in Maine, and who had, in November, 1901, made an agreement for sale; that this agreement was consummated a little more than two months later by an actual sale and delivery of the boats to the respondent and payment for them; that the bills of sale from Ross & Howell were made to run to one James T. Morse, then president of and director in the respondent corporation; that, in taking such bills of sale, Morse acted for the sole and exclusive benefit of the respondent, and had no personal interest in the purchase; that in May, 1908, Morse made a colorable and fraudulent bill of sale of the steamers to the libelant, for the corrupt purpose of enabling the libelant to take possession of them, and compel the respondent to pay him a large sum of money, in order to obtain a redelivery of the steamers and remove the cloud upon the title; that this transfer was made with the full knowledge on the part of both that Morse had no interest or ownership in the steamers, and no title to convey; and that the bills of sale were not executed in accordance with the laws of the United States, and were invalid.

This, then, in a word, is the respondent's story: That it is the owner, and had the lawful possession, of the steamers; that the libelant, by fraudulent bills of sale, is seeking to defeat its ownership, and to deprive it of possession; that Morse, through whom the libelant claims, had neither title nor possession of the steamers, and did not, and could not, convey any title.

It seems clear to me that the allegations of the answer present issues of fact cognizable in the admiralty. Whether or not the bills of sale are fraudulent does not, of itself, present a question solely for the determination of a court of equity, although the removal of the cloud so created upon the record title would properly belong to such court. These are possessory actions; and the defensive allegations relate to the question of ownership, and hence the right of possession, of

these steamers. While at this stage of the case it is not necessary to determine how far bills of sale of vessel property are evidence of ownership, it may be observed that the jurisdiction of this court to determine the question of ownership in actions of this nature is not confined to property subject to the laws of the United States relating to registration or enrollment. The General Cass, Fed. Cas. No. 5,307. In petitory as well as in possessory proceedings, this court must necessarily determine issues of fact involved in the question of the ownership of vessels and other classes of property over which it has jurisdiction; and it cannot be that a fraudulent holder of a bill of sale, or of a bill of lading, or of any other evidence of ownership, can apply to this court for possession, and yet prevent the court from considering the validity of the title so set up. For a fraudulent title, whether acquired by bill of sale or in any other way, is not a title. It follows, then, that under the admiralty rules the facts upon which the respondent rests its defense must be set out in such defensive allegations as appear in the answer.

2. It is true that, in the answer, the respondent alleges that the bills of sale from Ross & Howell were made and received by James T. Morse as trustee, for the sole and exclusive benefit of the respondent; and it is urged by the learned proctor for the libellant that, when a trust is set up, some equitable question must be involved.

It has been held in maritime courts that, if the libellant states a trust as the foundation of his suit, he states himself out of court. In *Andrews et al. v. Essex Fire & Marine Ins. Co.*, 3 Mason, 6, 16, Fed. Cas. No. 374, Judge Story said:

"Courts of admiralty have no general jurisdiction to administer relief as courts of equity. They cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud." *Kellum et al. v. Emerson*, Fed. Cas. No. 7,669; *Ward v. Thompson*, 22 How. 330, 16 L. Ed. 249; *The Ernest and Alice*, Fed. Cas. No. 3,735; *The C. C. Trowbridge* (D. C.) 14 Fed. 874.

It is well settled, as a general rule, that in possessory actions a court of admiralty will not take cognizance of a merely equitable right as against a claimant in possession under a legal title. *The G. Reusens* (D. C.) 23 Fed. 403. It may decline to enforce a legal title against a meritorious equitable title, accompanied by possession. As a rule, it will not take jurisdiction to try out titles to vessels, where only conflicting equitable claims are involved, as between mortgagor and mortgagee. *The William D. Rice*, Fed. Cas. No. 17,691; *The John Jay*, 17 How. 399, 15 L. Ed. 95. But in *Davis v. Child*, Fed. Cas. No. 3,628, it was said by Judge Ware:

"This court may take notice of an equitable title when it comes up incidentally, especially when it is alleged in the way of defense."

In *The Daisy* (D. C.) 29 Fed. 300, Judge Nelson held:

"An agent, who by fraud or mistake obtains the insertion of his own name as part owner of a vessel in the bill of sale, will be estopped from setting up this title as against his principal in a suit for possession, if the latter is in point of fact the real owner."

In *Wenberg v. A Cargo of Mineral Phosphate* (D. C.) 15 Fed. 285, 287, Judge Addison Brown said:

"Where the libellant is in fact the legal owner, he may enforce his legal right in this court in a petitory suit against those who have by wrong dispossessed him of his property and undertaken to transfer it to others." *The Taranto*, Fed. Cas. No. 13,751; *Thurber v. The Fannie*, Fed. Cas. No. 14,014; *The Friendship*, Fed. Cas. No. 5,123; *The Tilton*, Fed. Cas. No. 14,054.

To recur again to the allegations of the answer, it may be said that, if we eliminate the question of the bills of sale being fraudulent, still the answer sets up that the towage company is in possession under an equitable ownership of a meritorious character; and such equitable ownership clearly arises, as Judge Ware says, "incidentally" and "in the way of defense." It arises, also, in a judicial inquiry into matters where the admiralty has unquestioned jurisdiction. If the court should hold that the respondent has no standing in this court, for the reason that its answer sets up matters determinable only by a court of equity, the result might be that the libellant, having only a fraudulent or colorable title to a vessel or other property over which this court has jurisdiction, could be heard in "courts, proceeding *ex æquo et bono*," while the respondent, having at least a meritorious equitable title, could not be heard in defense; and this is repugnant to the whole idea of admiralty proceedings, and cannot be tolerated. It must be remembered, too, that these matters are now before me on the pleadings; and, in advance of the hearing, the court cannot determine precisely what questions will be presented by the evidence. It is not now necessary to decide whether the ownership of vessel property can pass from the vendor to the vendee by parol, accompanied by delivery, or to conclude in any way as to the nature or validity of the title of either party.

My decision is merely that, under the pleadings, a case is stated of which this court, as a court of admiralty, must take cognizance.

The exceptions to the answer are overruled.

ADAMS et al. v. CITY OF WOBURN.

(Circuit Court, D. Massachusetts. November 30, 1909.)

No. 587.

1. COURTS (§ 310*)—JURISDICTION OF FEDERAL COURT—DIVERSITY OF CITIZENSHIP—CHANGE OF INTEREST PENDING SUIT.

Where a citizen of the same state as the defendant is a necessary party plaintiff to a suit in a federal court when it is commenced, the court does not acquire jurisdiction because at some time during the pendency of the suit he may cease to be a necessary party.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 310.*]

Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 296.]

2. COURTS (§ 310*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—"INDISPENSABLE PARTY."

Under Rev. Laws Mass. c. 111, §§ 112, 113, which provide that, when proceedings are commenced by a landowner for the assessment of dam-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ages where land is taken for public use, a mortgagee may join as a petitioner, and if he does not he must be served with notice and permitted to join, and that the interest of the mortgagee shall be first satisfied before any part of the damages is paid to the mortgagor, a mortgagee is an "indispensable party" petitioner in such a proceeding in a federal court, and where he is a citizen of the same state as defendant the court is without jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 310.*

For other definitions, see Words and Phrases, vol. 4, p. 3559.]

Proceeding by Edward E. B. Adams and others against the City of Woburn. On plea for want of jurisdiction. Plea sustained.

John T. Wheelwright, for plaintiffs.

Albert F. Converse, for defendant.

LOWELL, Circuit Judge. The petition was originally filed in this case by Adams and Mrs. Williams. It alleged that Adams was a citizen of New York, the former owner of land in the city of Woburn, which had been taken by the city for a water supply, and that Mrs. Williams held a mortgage upon this land. The petition went on to pray an assessment of damages. The respondent pleaded to the jurisdiction of this court that Mrs. Williams was shown by the petition to be a citizen of Massachusetts, and that this court was therefore without jurisdiction of the matter. Thereafter Adams, alleging that the mortgage had been paid since the petition was filed, moved to amend it by striking out Mrs. Williams as party thereto. The amendment was allowed, and the respondent insisted upon its plea as directed to the amended petition.

On the ground of diversity of citizenship this court is without jurisdiction of a petition filed by A., a citizen of New York, against B., a citizen of Massachusetts, if C., another citizen of Massachusetts, is a necessary party petitioner thereto. That C. has ceased to be a necessary party since the petition was filed does not give to this court the jurisdiction which it did not have before the change of circumstances. A party cannot bring his cause within the jurisdiction of this court, and prosecute it here, merely because at some time in the proceedings the interests and circumstances of the parties may so adjust themselves that this court would have jurisdiction of the controversy if the suit were brought anew. This is established concerning a change in the citizenship of the parties. *Koenigsberger v. Richmond Mining Co.*, 157 U. S. 41, 49, 15 Sup. Ct. 751, 39 L. Ed. 880. The change here made in the pleadings and that which has arisen in the circumstances of this case will not, it is admitted, suffice to give this court jurisdiction, if that jurisdiction did not inhere at the time and under the circumstances in which the petition was filed. The issue presented by the plea comes to this: Was Mrs. Williams, as the holder of an undischarged mortgage, so necessary a party to the petition that her common citizenship with the respondent in Massachusetts deprives this court of the jurisdiction which it would have had to deal with the petition if the mortgage had been paid before the petition was filed?

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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If yes, the court is without jurisdiction; if no, the court had jurisdiction of the case before Mrs. Williams' dismissal, and that jurisdiction is made to appear even more clearly by her dismissal from the case.

The joinder of parties in suits in equity, as governed by the practice of the English Court of Chancery, has been considerably modified in the federal courts, and especially where a strict following of the English practice would serve to oust a federal court from jurisdiction otherwise arising out of the diverse citizenship of the parties. This modification of chancery practice to meet the exigencies of federal jurisdiction is explicitly recognized by equity rule 47:

"In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties * * * because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of absent parties."

In *Williams v. Bankhead*, 19 Wall. 563, 571, 22 L. Ed. 184, the Supreme Court said:

"The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule, arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party; but he should be made a party, if possible, and the court will not proceed to a decree without him, if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

The classification thus made was followed in *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061, and in many later cases. In *Hotel Co. v. Wade*, 97 U. S. 13, 21, 24 L. Ed. 917, it was said:

"The general rule will yield, if the court is able to proceed to a decree, and do justice to the parties before the court, without injury to others not made parties, who are equally interested in the litigation."

From equity rule 47, and from these cases, it follows that one who would not be an indispensable party, if his joinder ousted the federal jurisdiction, would, on the other hand, be an indispensable party if his joinder did not affect that jurisdiction. See *Sioux City v. Trust Co.*, 82 Fed. 124, 27 C. C. A. 73; *Donovan v. Campion*, 85 Fed. 71, 29 C. C. A. 30. Those interested in the controversy, therefore, are in some cases deemed to be parties necessary or unnecessary, according as their joinder does not or does affect the jurisdiction of a federal court.

All the cases, however, including those above cited, recognize that there are persons whose joinder is so indispensable to the proper disposition of the case that by reason of their indispensability a federal court cannot proceed without them, while yet it has no jurisdiction to

proceed with them by reason of their citizenship. *Woodward v. McConnaughey*, 106 Fed. 758, 45 C. C. A. 602. At the time the petition was filed, was Mrs. Williams an indispensable party of this sort? The answer to the question depends on the statutes of Massachusetts, under which the petition was brought, and by which the rights of the parties are regulated. Rev. Laws Mass. c. 111, reads as follows:

"Sec. 112. If the land is mortgaged, both the mortgagor and the mortgagee, in addition to their rights under the mortgage, shall have the same powers, rights and privileges, and be subject to the same liabilities and duties, as are provided in this chapter for landowners in cases of damages arising under the provisions of section 99; and all petitions for the estimation of such damages shall state all mortgages which are known by the petitioner to exist upon the premises. Mortgagors and mortgagees may join in any such petition, and the tribunal to which it is presented shall order the petitioner to give notice thereof to all parties who are interested as mortgagors or mortgagees, by serving on each of them, fourteen days at least before the time of hearing, an attested copy thereof and of the order thereon, that they may become parties to the proceedings."

"Sec. 113. If mortgagors or mortgagees commence or become parties to such proceedings, entire damages shall, upon final judgment, be assessed for the property taken, and such portion thereof shall be ordered to be paid to every mortgagee who is a party in the order of his mortgage, as is equal to the amount then unpaid thereon, and the balance to the mortgagor; and separate judgment shall be entered accordingly for each mortgagee, who shall hold his judgment in trust, first, with any proceedings realized thereon, to satisfy his mortgage debt, and, after such debt is in any way satisfied, to assign the judgment or to pay over any balance of proceeds to the mortgagor or other person entitled thereto."

It thus appears that, if the petition be filed by the mortgagor alone, he must set out the existence of the mortgage and the name of the mortgagee, and, upon an order of court, which issues of course, must give the mortgagee notice of the proceedings, that the latter may become party thereto. The case thereafter proceeds as if between the owner of the entire estate and the municipality; but by the final judgment the lien of the mortgage is satisfied before the mortgagor is paid anything. Applying these provisions to the case at bar, we find that Adams and Mrs. Williams, the mortgagor and mortgagee, were expressly given the right to join in one petition. This right, without more, might make Mrs. Williams only a proper party to the petition, and not a party strictly indispensable. But the same statute required Adams, if he filed a petition in which Mrs. Williams did not join, to set out therein Mrs. Williams' mortgage, and, further, to give her notice by serving upon her an attested copy of the petition, in order that she might become a party to the proceedings. Under the circumstances which existed at the time the petition was filed, she would necessarily have become a party to this petition, whether originally joined or not, and this court was not allowed by the statute to proceed without reference to her rights. For these reasons, it appears to me that, at the time the petition was filed, Mrs. Williams was an absolutely indispensable party to these proceedings, and that she would have been an indispensable party, even if she had not been joined with Adams as party petitioner, and if Adams' sole petition had contained only a reference to her mortgage. To sum up: Without Mrs. Williams as a party, the court could not have proceeded, because she

would be directly affected by the decree. Therefore she was necessarily made a party, and, as she was a fellow citizen with the respondent in this commonwealth, the Circuit Court is without jurisdiction of this controversy.

The decision thus reached by the court seems to be narrow and technical, and to interpose an empty formality in the way of obtaining an assessment of Adams' damages. He can now file another petition without reference to Mrs. Williams. But to strain the law in order to save Adams from this formality would expose him to the risk of more serious expense and delay. If I am right in holding that this court is without jurisdiction, even after the allowance of the amendment, then this want of jurisdiction will always remain apparent upon the face of the record, where the allowance of the amendment must be properly shown. The want of jurisdiction, thus appearing, cannot be cured by further proceedings, or even by consent. It must be noticed even at the last by the highest court to which this case is taken. If Adams is required to begin suit anew, after trial here and after proceedings in an appellate court, his case will be harder than if he now makes a new beginning, with but short delay and small additional expense.

FISHBLATT v. ATLANTIC CITY.

(Circuit Court, D. New Jersey. December 2, 1909.)

1. REMOVAL OF CAUSES (§ 4*)—SUITS REMOVABLE—CONDEMNATION PROCEEDINGS—"SUIT OF A CIVIL NATURE."

Proceedings to condemn land for public use, instituted in a state court, constitute a "suit of a civil nature," which is removable, if the requisite jurisdictional facts appear.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6779, 6780; vol. 8, pp. 7809, 7810.

Proceedings under power of eminent domain as civil suits under laws relating to removal of causes to federal courts, see note to South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co., 73 O. C. A. 183.]

2. REMOVAL OF CAUSES (§ 107*)—JURISDICTIONAL FACTS—BURDEN OF PROOF.

The burden rests on a removing defendant to show diversity of citizenship, where jurisdiction of the federal court is dependent on such fact.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 230; Dec. Dig. § 107.*]

3. REMOVAL OF CAUSES (§ 52*)—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

Under the statutes of New Jersey, which provide for making a mortgagee a party to a proceeding for the condemnation of land for public use, both owner and mortgagee are indispensable parties and interested in the same questions, and the cause is not removable by the owner, on the ground of diversity of citizenship, where the mortgagee is a citizen of the same state as the petitioner, and it is immaterial that the owner alone appealed from the award.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 52.*]

Separable controversy, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Proceeding by Atlantic City against Isabella S. Fishblatt. On motion to remand to state court. Motion granted.

Harry Wooten (Gilbert Collins, of counsel), for the motion.

Clarence L. Cole (John C. Bell, of counsel, and Emil Rosenberger, on the brief), opposed.

RELLSTAB, District Judge. The proceedings removed into this court were instituted by Atlantic City before a justice of the Supreme Court of the state of New Jersey, under the statutes of said state, for the purpose of condemning and taking a strip of land owned by Isabella S. Fishblatt. Commissioners to estimate the damages for the taking of such property were appointed, and on the coming in of their report an appeal was taken by the owner to the Atlantic circuit court, of said state, and thereupon she removed the entire proceedings into this court.

Such proceedings constitute a suit of a civil nature, as contemplated by Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508; 4 Fed. St. Ann. p. 265), and are removable to the United States Circuit Court by the landowner, if the necessary jurisdictional facts exist. *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; *Mason City R. R. Co. v. Boynton*, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629.

The matter in dispute exceeds in value the statutory minimum of \$2,000, and the only question on this motion to remand is whether the record discloses the requisite diversity of citizenship. The burden of proof to show this jurisdictional fact is upon the party seeking the aid of this court. 18 Enc. Pl. & Pr. p. 297.

The petition for removal alleges that "the controversy in said action, and every issue of fact and law therein, is wholly between herself, a citizen of the state of Pennsylvania, and Atlantic City, New Jersey, a municipal corporation of New Jersey." This is not conclusive. *Union Terminal Ry. Co. v. Ch. B. & Q. R. Co.* (C. C.) 119 Fed. 209.

The record brought up with the petition shows the contrary. It evidences that the Camden Safe Deposit & Trust Company, a corporation of New Jersey, holds a mortgage upon the premises sought to be taken in these proceedings, and that Isabella S. Fishblatt is the owner thereof. See pages 8 and 65 of the typewritten record. In order to remove a cause from a state court into a federal court, upon the ground of diversity of citizenship, the defendant, or, if there be more than one defendant, all the defendants, must be nonresidents of the state wherein the suit is brought, or in case there is more than one defendant, and one of them is a citizen of the state in which suit is brought, then the party removing the cause must show, not only that he is a citizen of another state, but also that there is "a controversy which is wholly between citizens of different states, and which can be fully determined as between them," and that he is "actually interested in such controversy." See Act March 3, 1875, c. 137, § 2, 18 Stat. 470 (U. S. Comp. St. 1901, p. 509; 4 Fed. St. Ann. p. 312).

This separable controversy must be such that complete relief may be afforded the parties (of diverse citizenship) interested therein without the presence of any of the resident defendants. 18 Enc. Pl. & Pr. 209-211. In this cause, if the Camden Safe Deposit & Trust Company is a citizen of New Jersey, the cause is not removable, because the controversy is not the separable one contemplated by the statute. In condemnation proceedings such as these, the land and all rights therein are taken (P. L. N. J. 1894, p. 146), and if the mortgage covers all or any part of such property, both the mortgagee and the owner of the equity of redemption are indispensable parties to the suit. Each has an interest in the whole covered by such mortgage. No part of such mortgaged premises can be taken from one party without affecting the others' estate. A lienholder, in a controversy over the taking of the fee, cannot be separated from the owner of the equity of redemption. Id. pp. 221-222; Foster's Fed. Pr. (4th Ed.) pp. 1494-1497; Bissell v. Canada & St. L. Ry. Co. (C. C.) 39 Fed. 225.

The contention that the mortgagee was not a party to the proceedings on appeal to the state court, and therefore is not an indispensable party to the proceedings removed into this court, is not tenable. Under the statutes of New Jersey the name and interest of the mortgagee, as well as of the owner or occupant, must be set out in the petition invoking the powers of eminent domain. The mortgagee was entitled to notice of the hearing on such petition and before the commissioners after their appointment. It had the right to appeal from the report of such commissioners, and is entitled to at least a part of the award. P. L. N. J. 1900, p. 79, §§ 2, 3, 5, 8, 14; P. L. 1902, pp. 284, 319, 320, 322, §§ 70, 71, 74, 79; P. L. 1909, p. 225.

That the mortgagee did not appear before the commissioners, and did not become a party to the appeal in the state court, does not make it any less an indispensable party on removal to this court. It could be made a party to such appeal on its own application. P. L. N. J. 1902, p. 323, § 80; P. L. 1900, p. 83, § 10. If the mortgagee's interest continued after the appeal, it was in the same position as the owner to remove the cause into this court, if the necessary jurisdictional facts were made to appear. If the mortgagee removed the cause, the owner would be an indispensable party. Bissell v. Canada, etc., Ry. Co., *supra*.

For the same reason (indivisibility of interest), the mortgagee is an indispensable party, if the owner of the equity of redemption is the removing party. The record showing that the Camden Safe Deposit & Trust Company has an indispensable interest in the controversy removed into this court, the only question remaining is: Where is its citizenship? The original petition, filed in this cause by Atlantic City, refers to said company as "a corporation of the state of New Jersey." On behalf of Isabella S. Fishblatt it is said that this is not a sufficient averment of citizenship, and that, in the absence of a proper averment showing citizenship outside of the state, the court cannot determine that it is a citizen of the state of New Jersey. But this is not the test. The party invoking the jurisdiction of a federal court must show the necessary jurisdictional facts. Perhaps such an averment by

a petitioning corporation, seeking to remove a cause from the state court, would not be sufficient to show citizenship in another state. *N. Y. & N. E. R. Co. v. Hyde*, 56 Fed. 188, 5 C. C. A. 461; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553, 19 L. Ed. 998; *Frisbie v. C. & O. Ry. Co. (C. C.)* 57 Fed. 1; *Continental Wall Paper Co. v. Voight & Sons Co. (C. C.)* 106 Fed. 550; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Knight v. L. & M. Lumber Co.*, 136 Fed. 404, 69 C. C. A. 248.

In these cases the courts applied only the rule that the burden is upon the petitioner, who removes the cause, to show all the essential facts necessary to give the federal court jurisdiction. They held that, inasmuch as it was within the power of the petitioner to aver with certainty where the alleged company was incorporated, no intendment would be made to cure its omission. Jurisdiction cannot be invoked because it does not certainly appear that a given defendant is a natural or artificial person, or where he or it has citizenship. In the absence of a sufficient averment of citizenship to show diversity, jurisdiction is not established. 18 Enc. Pl. & Pr. 297, 304; *Thayer v. Life Ass'n*, 112 U. S. 717-719, 5 Sup. Ct. 355, 28 L. Ed. 864; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287, 30 L. Ed. 435. In case of doubtful jurisdiction, the cause should be remanded. 18 Enc. Pl. & Pr. 378.

The record showing that in the initial proceedings to condemn the land the mortgagee was made a party, and it not appearing that its interest had ceased at the time of the removal of such proceedings into this court, or that its citizenship was not in the state of which the actor in such condemnation proceedings is a municipality, the cause is remanded.

SULLIVAN v. AYER.

(Circuit Court, E. D. Pennsylvania. November 26, 1909.)

No. 23.

1. COURTS (§ 312*)—JURISDICTION OF FEDERAL COURTS—SUITS BY ASSIGNEE.

Under the federal judiciary act (Act March 3, 1887, c. 373, § 4, 24 Stat. 554 [U. S. Comp. St. 1901, p. 514]), which makes national banks citizens of the state in which they are located for the purposes of the jurisdiction of a federal court, and section 1 of the same act, providing that such courts shall not have cognizance of any suit on a chose in action brought by an assignee, unless such suit might have been maintained in that court if no assignment had been made, the assignment of a chose in action by such a bank does not vest the assignee with the right to maintain an action thereon in a federal court against a citizen of the state in which the bank is located.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 312.*]

2. COURTS (§ 312*)—JURISDICTION OF FEDERAL COURTS—SUIT BY ASSIGNEE ON CHOSE IN ACTION.

A national bank located in Pennsylvania recovered a judgment in the Supreme Court of New York against a New York corporation and issued an execution thereon, which was returned unsatisfied. The bank then assigned the judgment, with all its rights, to plaintiff, a citizen of New York, who brought suit thereon in a federal court in Pennsylvania

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against a citizen of that state to enforce his statutory liability under the laws of New York as a stockholder of the judgment defendant. *Held*, that such suit was one to recover the contents of the judgment, which was a chose in action, within the meaning of section 1 of the federal judiciary act of 1887 (Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508]), and, since it could not have been maintained by the bank in such court, could not be by plaintiff as its assignee.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 312.*]

In Equity. Suit by James M. Sullivan against F. Wayland Ayer. On motion by defendant to dismiss for want of jurisdiction. Motion sustained.

Smith & Burns, for plaintiff.

Sheldon Potter and Henry T. Dechert, for defendant.

J. B. McPHERSON, District Judge. This suit is brought by James M. Sullivan, a citizen of New York, against F. Wayland Ayer, a citizen of Pennsylvania and a resident of the Eastern district. Without more, these facts would show that a controversy apparently exists which is within the jurisdiction of the Circuit Court, because of diverse citizenship between the parties. When the statement of claim was filed, however, it appeared that the cause of action arose in the following manner:

In June, 1900, the Elmira Steel Company, a corporation of the state of New York, made a promissory note to the order of C. R. Baird & Co., payable in four months. This note was duly indorsed by Baird & Co., and was afterwards transferred before maturity to the Yough National Bank of Connellsville, Pa. In November, 1900, the bank obtained judgment in the Supreme Court of New York against the Steel Company and Baird & Co., and issued execution thereon. The writ was returned unsatisfied, and afterwards (but before October 12, 1900, the day when the present suit was brought) the bank—

“duly sold, assigned, and transferred to this plaintiff all of its right, title, and interest in and to said judgment, and all of the rights and remedies to which it was or might become entitled under and by virtue of the laws of the state of New York, by reason of being the owner of said debt and of the subsequent proceedings taken by it for the collection of the same and by virtue of the corporation laws of the state of New York.”

The statement of claim then goes on to aver that the defendant was a stockholder in the Steel Company, and that by virtue of such holding he was liable under the laws of New York for the full amount of the judgment. Upon these facts the defendant moves to dismiss the suit, taking the position that the plaintiff is proceeding upon a chose in action, and that the title thereto is derived from an assignor, who could not have maintained the action in this court.

In considering this position, it should first be observed that the original note was merged in the judgment. As was said in *Ober v. Gallagher*, 93 U. S. 206, 23 L. Ed. 829:

“The note was no longer in existence as an outstanding liability. It had been merged in the judgment, and was, as a note, extinguished. Gallagher no longer claims as the assignee of the note, but as the owner of a judgment in his favor against Thompson.”

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the collection of its judgment, therefore, the bank no longer proceeded upon the note, and upon the assignment or indorsement thereof, but upon the judgment itself. If the bank had been thus proceeding against Ayer in this court to enforce the statutory liability (whatever that may be) created by the laws of New York, it would have been met by the objection that the action could not be maintained in this forum, because the following provision of Act March 3, 1887, c. 373, § 4, 24 Stat. 554 (1 U. S. Comp. St. 1901, p. 514), is in the way:

"Sec. 4. All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them real, personal or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the Circuit and District Court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state."

This being so, it follows, I think, that section 1 of the same statute (24 Stat. 552 [1 U. S. Comp. St. 1901, p. 508]) forbids the plaintiff also, as assignee of the bank, to maintain the suit in this court. The relevant language of the section is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit * * * to recover the contents of any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The remaining question, therefore, is whether the present action is brought to recover the contents of a chose in action, and upon this question the decisions seem to leave no room for doubt. A judgment is a chose in action. The contents of a judgment, like the contents of the promissory note of which Chief Justice Marshall was speaking in *Sere v. Pitot*, 6 Cranch, 335, 3 L. Ed. 240, "are the sum it shows to be due"; and this suit is brought to recover the sum due upon the judgment recovered by the bank, because that record forms the indispensable foundation of the action. If this were an action of debt upon the judgment, in which the Steel Company was pursued before some other tribunal than the Supreme Court of New York, there could, of course, be no doubt that the suit was brought to recover the contents of the judgment. And, while it is true that the present proceeding is not directed against the Steel Company, and that the judgment alone would not support a recovery against the defendant Ayer, it is also true that the plaintiff is seeking to recover from him the sum due upon the judgment, and nothing else. The liability of the defendant depends upon the relation he bears to the Steel Company, and this, therefore, is a necessary part of the inquiry; but the object of the suit is to obtain a satisfaction of the judgment, and the enforcement of his statutory liability is merely a means to that end. When the money due upon the judgment is collected, its contents are recovered, and it is only a step in the process of recovery to invoke the defendant's liability as a stockholder. *Corbin v. Black Hawk County*, 105 U. S. 659, 26 L. Ed. 1136; *Shoecraft v. Bloxham*, 124 U. S. 730, 8 Sup. Ct. 686, 31 L. Ed. 574; *Mexican Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672.

The rule to dismiss is made absolute.

In re WILLIS W. RUSSELL CARD CO.

(District Court, D. New Jersey. April 13, 1909.)

1. BANKRUPTCY (§ 228*)—REFEREES—ORDERS—SETTING ASIDE—LACHES.

A motion to vacate an order made by a referee in bankruptcy, on the ground that he was without jurisdiction to make it, should be entertained at any time and disposed of on the merits; the doctrine of laches having no application in such case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

2. BANKRUPTCY (§ 368*)—TRUSTEES—CONTINUANCE OF BUSINESS—COMPENSATION.

Bankr. Act July 1, 1898, c. 541, § 2, subd. 5, 30 Stat. 546, as amended by Act Feb. 5, 1903, c. 487, § 1, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1308), providing that courts of bankruptcy may authorize the business of bankrupts to be carried on by receivers or trustees, and allow such officers additional compensation for their services, does not vest the court with power to fix the compensation of a trustee in advance for such services to be rendered in the future.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. § 368.*]

In the matter of the Willis W. Russell Card Company, bankrupt.
On petitions to review orders of referee. Orders reversed.

Harrison Clark, Jr., for petitioner.

Robert Adrain, for trustee in bankruptcy.

LANNING, District Judge. At the first meeting of the creditors of the bankrupt, in April, 1908, John W. Dickinson was elected trustee, and a resolution was adopted by the creditors authorizing the trustee to operate and continue the business of the bankrupt for the period of three months. On May 5, 1908, the referee, on the application of the trustee, and without notice to the creditors, made an order allowing the trustee a salary of \$100 per week for carrying on the business. He carried on the business, under what authority does not appear, until February 2, 1909, when another meeting of creditors, pursuant to due notice, was held. At this meeting the creditors resolved "that the business be continued by the trustee for another year," and also "that the trustee's conduct of said business to date be in all respects approved." None of these proceedings were objected to by Ward & Gow, the assignors of the present petitioner. The claim of Ward & Gow was assigned to the petitioner, who is William S. Cox, on February 24, 1909. Cox moved, before the referee, on March 8, 1909, that the order of May 5, 1908, allowing the trustee a salary of \$100 per week, be vacated for want of jurisdiction on the part of the referee to make it, and for failure to observe the provisions of General Order No. 23.¹ The referee entered an order, March 8, 1909, "that the said motion be and the same hereby is not entertained." This order is now here on Cox's petition to review it, and the errors assigned are that the salary order is void for want of authority on the part of the referee to make it, and also because, in making it, the provisions of General Order No. 23 were not observed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

¹ 59 Fed. xl, 32 C. C. A. xxvi.

Unquestionably the referee erred in refusing to entertain the motion to vacate. Based, as it was, on the allegation that there is no authority in the bankruptcy act for granting such special allowance to a trustee for carrying on the business of the bankrupt, the motion should have been heard and disposed of on its merits. There seems to be less discretionary power allowed the court in fixing the fees of trustees for services rendered under Act July 1, 1898, c. 541, § 2, subd. 5, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), than in fixing the fees of receivers under section 2, subd. 3. See *In re Kirkpatrick*, 148 Fed. 812, 78 C. C. A. 501; *In re Sully* (D. C.) 133 Fed. 997; *In re Martin Borgeson Co.* (D. C.) 151 Fed. 780. Whatever power the bankruptcy act may confer in fixing the fees of trustees for carrying on business after the work is completed, or from time to time as the work progresses, it is clear that there is no authority to fix his compensation by an order to operate in futuro. The order of May 5, 1908, is wholly void, and it should have been vacated.

The order refusing to entertain the motion to vacate the order of May 5th is reversed, and the order must be returned to the referee, with instructions to entertain the motion to vacate and proceed in accordance with the views above expressed. The doctrine of laches, which is insisted on by counsel for the trustee, is not applicable to a motion to vacate an order made without jurisdiction, especially where no rights have become vested under the order sought to be vacated. 1 Rem. on Bankruptcy, p. 277.

The second petition of review brings up an order of March 8, 1909, by which the referee refused to entertain a motion to vacate an order of April 24, 1908, allowing certain creditors set-offs by way of trade dividends. It may be that the order of April 24th ought not to be vacated; but, as the motion is based on alleged want of jurisdiction to make the order, it should have been entertained and disposed of on its merits.

This order, too, is therefore reversed, and the record must be returned to the referee, with instructions to hear the motion and dispose of it as the referee may think justice and the law require.

THE COLUMBIA.

(District Court, E. D. Virginia. November 4, 1909.)

COLLISION (§ 49*)—STEAM AND SAILING VESSELS MEETING—EVIDENCE OF FAULT—VIOLATION OF RULES BY STEAMER.

A steamship entering the Elizabeth river for Norfolk in the early morning, but after daylight, *held* solely in fault for a collision with a meeting schooner under the evidence, the weight of which showed that the schooner kept her course until the collision became inevitable, and was making but little headway against a strong flood tide and with a light wind, while the steamship, although bound to keep out of the way, and to avoid even risk of collision by slackening speed, and stopping and reversing, if necessary, under rules 20 and 23 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), kept

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

her course and speed directly toward the schooner until within 600 feet, and when it was too late to avoid the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 55; Dec. Dig. § 49.*]

In Admiralty. Suit for collision by E. T. Rookes, master of the schooner Milton S. Lankford, against the steamship Columbia. Decree for libellant.

Edward R. Baird, Jr., for libellant.
Williams & Tunstall, for respondent.

WADDILL, District Judge. On the morning of the 2d of February, 1909, a few minutes before 7 o'clock, the Milton S. Lankford, a small two-masted schooner, 63 feet long, 16 feet beam, and of the burden of 40 tons gross, laden with 981 bushels of oysters, while en route from Norfolk to Cape Charles, Va., in the Elizabeth river, just below and in the immediate vicinity of Crany Island Light, came into collision with the steamship Columbia, one of the line steamers of the Chesapeake Steamship Company, plying between Baltimore and Norfolk, bound into Norfolk. The tide was running strong flood, with a comparatively light wind from the southwest, variously estimated at from two to six miles an hour.

The Lankford's contention is that at the time of the collision she was on the port tack, on a course bearing a little north by east; that she observed the approach of the steamer a mile or more away, coming at a high rate of speed; that she maintained her course until within a short distance of the steamer, and, upon seeing a collision was inevitable, she put her wheel hard aport, with a view of lightening the blow of the collision as far as possible; that the steamer, without changing her course, crashed into her, striking her on her port beam, and causing her to sink and become a total loss.

The respondent, on the other hand, insists that at the time of the collision the Lankford was on the regular course down the channel, heading north by west, and the Columbia coming up the channel, about the middle of the channel, on her regular course of S. E. $\frac{1}{2}$ E., with the Lankford on her starboard; that the Lankford was seen some mile and a quarter away, her movements observed, and the steamer continued on her course, allowing sufficient room to pass the Lankford in safety, when the latter, at a distance of two or three lengths of the Columbia, suddenly changed her course to the eastward, across the bow of the steamer, at a time when it was too late for the collision to be avoided, though everything possible was done by the Columbia to avert the disaster.

There is a sharp conflict between the navigators of the Columbia and the witnesses for the Lankford as to whether or not the latter vessel changed her course, and on what is the correct state of facts in this regard this case largely depends. It is fair to the witnesses to say that on both sides they testified with the utmost frankness and apparent fairness, and were no doubt sincere in the several statements made by them. But necessarily those on the one side or the other must have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been mistaken, certainly as to whether any actual change of course occurred and the time it took place. The conclusion reached by the court, after giving much consideration to the case, is that the evidence preponderates strongly in favor of the Lankford that no change was made in her course other than that conceded by her to have been made when the collision was inevitable. The navigators of the Lankford so testified, and witnesses of the occurrence, entirely disinterested, themselves experienced navigators, in a position to see fully just what did happen, strongly support this statement, and, moreover, testify that at the time in question, by reason of the then condition of the wind and tide, the Lankford could not have changed her course suddenly, as contended by the steamer; the testimony on both sides being that at the time she could have had but little more than steerage way.

The witnesses for the Lankford observed the movements of the steamer, and saw for a short time before the collision that unless she changed her course, or stopped, the vessels coming together was inevitable, as the steamer was bearing down directly upon the Lankford, and it is admitted that she did not change her course, nor did she slacken her speed until within two or three of her lengths away from the schooner, and too late to avoid the collision. There is a slight conflict in the testimony of the respondent as to the distance between the vessels when the change of course of the Lankford was first observed, as contended for, one of respondent's witnesses saying that they were 600 yards apart; but this witness doubtless meant 600 feet, and certain it is that he was at variance with the other witnesses from his ship, who testified as to this fact, and must have been mistaken, as the ship could readily have avoided the accident, had there been a change in the course of the schooner 600 yards away. The undisputed facts of the case are that the two vessels observed the course of each other for at least a mile apart, and, though early in the morning, it was daylight, and they could easily see the movements of each other, as there was nothing to obstruct their view, or obstruct the channel; that the weather and water conditions were favorable; that the vessels were on parallel courses, approaching each other practically head on; and clearly there was no reason for, and there would have been, no collision, had the ordinary rules of navigation been respected and observed.

The steamship was the burdened vessel, and upon her was imposed the obligation of not only avoiding the collision, but the risk of collision. Article 20 of the inland rules of navigation is as follows:

"Art. 20. When a steam vessel and sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

And article 23 is as follows:

"Every steam vessel which is directed by these rules to keep out of the way of another vessel, shall on approaching her, if necessary, slacken her speed or stop or reverse."

Act June 4, 1897, c. 4, 30 Stat. 101 (U. S. Comp. St. 1901, p. 2883). The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; The Richmond (D. C.) 114 Fed. 208, 213; The Elizabeth (D. C.) 114 Fed. 757.

The practically helpless condition of the sailing vessel, by reason of the wind and tide on this occasion, shows the reason for the rule requiring the steamer to keep out of her way. The Columbia could not take chances, or make a close shave, except at her own peril. In doing so, she ran the risk which brought about this accident, and that the rule was intended to avoid. Nor could she, by placing those in charge of the navigation of the sailing vessel in a position of peril and consternation, escape liability for errors of judgment on their part under the circumstances; that is, brought about by the steamer's own negligence and disregard of the rules provided for the mutual safety of both vessels. In the view taken by the court, this largely accounts for the manner in which this collision occurred, and tends in great measure to harmonize the differences between the witnesses as to the movements of the vessels. In other words, the Lankford did change her course, but only after the collision had become inevitable.

The master of the steamship admits that he would not have passed the Lankford more than her length of 63 feet, had she not changed her course, as claimed by him. This is too close for safe navigation, and certainly there were no exigencies, arising from the crowded condition of the channel or otherwise, which made the same necessary. Steamers attempting to pass incumbered craft closely, or in narrow channels, or in a crowded harbor, should only proceed at such speed as to keep the control of their vessels easily in hand. It is conceded that the steamship gave danger signals, put her wheel hard aport, slackened her speed, and reversed her engines, all practically at the same time, and within probably a minute and a half of the collision, one of the steamer's witnesses estimating it at from half to three-quarters of a minute of the vessels coming together, and that the steamer failed to respond to her wheel, and continued on her course and into the schooner. This admission shows the collision was then inevitable, and convinces the court that the change in the schooner's course, on account of which the steamer's danger signals were given, were those admitted by the schooner's navigators to have been made when they believed the vessels' coming together was inevitable, hoping as far as possible to lessen the blow of the collision.

The steamship having failed in its duty, in that it did not seasonably observe the rules of navigation in time to avoid the risk of collision, as well as the collision itself, must bear the burden resulting, if these rules are to be enforced and observed; and it is the duty of the court to see that they are respected.

A decree, therefore, may be entered against the steamship, ascertaining the fault of this collision to be solely that of the steamship.

MANETTA v. UNITED TRACTION CO.

(Circuit Court, E. D. Pennsylvania. December 3, 1909.)

No. 56.

STREET RAILROADS (§ 98*)—ACTION FOR INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Uncontradicted evidence, in an action against a street railroad company to recover for a personal injury, that plaintiff, who was in charge of street work, stood upon defendant's tracks at a corner where the track turned for from 15 to 25 minutes, with his back toward the point from which the car approached which struck him, without looking around, *held* to establish such contributory negligence as to justify taking the case from the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

At Law. Action by Charles Manetta against the United Traction Company. Motion to take off nonsuit. Motion denied.

Thomas James Meagher, for plaintiff.

Paxson Deeter and John C. Bell, for defendant.

J. B. McPHERSON, District Judge. After a review of the testimony, in the light of the brief submitted by the plaintiff, I still think it would be impossible to sustain a verdict in his favor upon the evidence that was offered at the trial. I have no controversy with the decisions that have been cited. There is no doubt that the plaintiff was rightfully upon the street, being a foreman in charge of the work that was being done for the city of Reading at the intersection of the two highways spoken of by the witnesses, and there was no intention to hold otherwise at the trial. But he certainly was not relieved thereby of the duty to take reasonable and proper care of himself. He knew that cars were frequently to be expected, and that they swung around the corner where he was standing; but according to his own testimony he stood there from 15 to 25 minutes with his back toward the point from which the car came that struck him, and did not once look to see whether danger was approaching, although the nature of his occupation was by no means exacting, and, indeed, was such that he could have turned his head whenever he pleased. Upon his testimony alone I think the nonsuit was properly entered, while it is also true that other of his witnesses strengthen the case against him. If a case like this must go to the jury, although the court would feel obliged to set aside a verdict in the plaintiff's favor, it would be hard to conceive of a case that could be withdrawn from that tribunal.

Moreover, it may well be doubted whether there was enough evidence of the defendant's negligence to be submitted to the jury. Upon the question of speed there is the meager statement, contained in a single sentence uttered by an Italian witness who could scarcely be understood—it was necessary to abandon his examination because it was evident that he did not understand enough English to comprehend the questions—that the car was running fast; and this in opposition to the convincing testimony, in accord with common experience,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that speed was most unlikely while the car was approaching and was passing around the curve. The testimony concerning the defendant's failure to give a signal by ringing the bell was not much better, being wholly negative in its character and very unsatisfactory.

The motion to take off the nonsuit is refused.

In re SINGER.

(District Court, E. D. Pennsylvania. November 27, 1909.)

No. 3,449.

BANKRUPTCY (§ 241*)—EXAMINATION OF BANKRUPT—REFUSAL TO ANSWER QUESTIONS—PUNISHMENT FOR CONTEMPT.

Where a bankrupt, on his examination before a referee, persistently makes false or evasive answers, although it is evident that he must be able to reply fully and correctly, the court is justified in punishing him for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 241.*]

In the matter of Louis Singer, bankrupt. On motion to punish for contempt. Motion sustained.

J. Howard Reber, for creditors.

Louis Goodfriend and Emanuel Furth, for bankrupt.

J. B. McPHERSON, District Judge. In Re Gitkin (D. C.) 21 Am. Bankr. Rep. 113, 164 Fed. 71, Judge Holland has made a careful examination of the questions presented when a bankrupt, who is under examination before a referee, persistently makes false or evasive answers, although it is evident that he must be able to reply fully and correctly, and has held that such conduct justifies the court in punishing the bankrupt for contempt. See, also, a similar ruling by Judge Hough in Re Fellerman (D. C.) 149 Fed. 244, and by Judge Holt in Re Schulman (D. C.) 21 Am. Bankr. Rep. 288, 167 Fed. 237.

In the case now before the court the same situation appears. The bankrupt persistently evaded making direct answers to questions concerning a subject—the recent sale of a house—about which he could not have been ignorant, and it was therefore necessary to suspend the examination and appeal to the court for redress. The referee certified the facts, a rule was granted, and a day was fixed for the hearing. Upon that day evidence as to the acts complained of and the arguments of counsel thereon were heard, and I have since considered the whole matter. My conclusion is that the bankrupt should be punished for the contempt in question, and it is therefore ordered that the marshal take him into custody and commit him to the county jail, there to remain for the period of 30 days.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

FIRST STATE BANK OF CORWITH, IOWA, v. HASWELL et al.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1909.)

No. 2,989

1. BANKRUPTCY (§ 161*)—VOIDABLE PREFERENCES—TIME OF GIVING PREFERENCE—DATE OF FILING PETITION—EFFECT OF AMENDMENT.

Amendments to a petition in involuntary bankruptcy filed by a single creditor, by which other creditors join therein, and setting out their claims, relate back to the filing of the petition, and, although such joinder was necessary to the sufficiency of the petition, do not advance the date of its filing, which, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), fixes the four months' period within which transfers by the bankrupt are preferential.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

2. BANKRUPTCY (§ 81*)—INSUFFICIENCY OF PETITION—DEFECTS CURABLE BY EVIDENCE.

In a petition in involuntary bankruptcy, alleging a preferential transfer of land as an act of bankruptcy, an insufficient description of the land, where not objected to by demurrer, may be cured by the evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 113-118; Dec. Dig. § 81.*]

3. BANKRUPTCY (§ 467*)—APPEAL FROM DECREE OF ADJUDICATION—PRESUMPTIONS.

Where an insufficiency of allegation in a petition in bankruptcy was such that it might be cured by the evidence, and the evidence is not in the record, an appellate court will presume, in support of a decree of adjudication, that it established the facts so insufficiently alleged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Northern District of Iowa.

In the matter of John H. Standring, bankrupt. A decree of adjudication was entered in involuntary proceedings, from which the First State Bank of Corwith, Iowa, by W. C. Oelke, its receiver, appeals. Affirmed.

C. R. Wood, for appellant.

D. M. Kelleher, Maurice O'Connor, and Burt J. Thompson, for appellees.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge. This is an appeal from an order of the District Court adjudicating John H. Standring an involuntary bankrupt. It is prosecuted by the receiver of the First State Bank of Corwith, which was charged in the petition filed March 19, 1908, with having received an unlawful preference by the conveyance to it of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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certain tract of land within four months before the filing of the petition. The giving of that preference was the act of bankruptcy counted on in the petition.

The petition was filed by one creditor, who alleged that the debtor had less than twelve creditors known to him. No answer was filed by the debtor; but the bank, whose conveyance was attacked, filed one disclosing, among other things, that there were more than twelve creditors, and stating their names and addresses, as required by section 59d of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]). The requisite number of creditors joined with the original petitioner, as authorized by that section, in an amendment which was filed June 22, 1908. This amendment, after averring that the new parties had provable claims against the debtor, stated that they adopted all the averments of the original petition, which remained unchanged by the amendment, "the same as though they had originally signed and joined in said petition." The bank afterwards filed an answer, alleging that the debtor was a wage-earner, and, therefore, not subject to the provisions of the bankruptcy act. The case was thereafter brought on for trial, the evidence of both parties was heard, and an order of adjudication was entered in the following words:

"It is adjudged and decreed by the court that the said John H. Standring be, and hereby is, adjudged a bankrupt upon the petition filed March 19, 1908, as amended; the amendment relating back to the date of filing the original petition, March 19, 1908."

The evidence heard below is not brought here, and we are, therefore, limited to a consideration of the case made by the pleadings, which alone are found in the record. The contention is that, as the original petition was defective for want of parties, the adjudication on that petition as amended, and the order relating the amendment back to the date of the original petition, was erroneous. The importance of this contention for the bank rests in this: If the "filing of the petition" within the meaning of section 60 of the bankruptcy act, concerning unlawful preferences, has relation to the filing of the original petition only, the preference which the bank received would be defeated, because less than four months had then elapsed since it was given. If, on the contrary, it has relation to the filing of the amendment, as in this case, the preference would be protected, because more than four months had then elapsed.

This contention is clearly untenable. Section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445] as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1909, p. 1314]), provides that:

"A person shall be deemed to have given a preference if being insolvent he has within four months before the filing of the petition * * * made a transfer of any of his property," etc. * * *

The amendment as made in this case did not constitute "the petition," within the meaning of section 60. It did not by its terms purport to be a petition. It alleged no new act of bankruptcy. It consisted merely in striking out such allegations of the original petition

and substituting such other allegations as were requisite to show the joinder of the necessary parties, authorized by section 59d, and their status as creditors. The original petition then remained as if all the averments of the amendment had been bodily incorporated in it.

Congress, by the provisions of section 59, which seems to have been enacted to meet just such condition of things as is disclosed by this record, very manifestly intended, not that the original petition should be supplanted by the amendment there provided for, but that it might be supplemented by the joinder of other necessary creditors. This is made clear, not only by the provisions of subdivision "d," but by the provisions of subdivisions "e" and "f" of the same section. They all contemplate the retention of the original petition as the pleading upon which subsequent proceedings should be had. The general rule as repeatedly recognized by this court is:

"That the amendment to a petition which sets up no new cause of action, but merely amplifies and gives greater precision to the allegations in support of the cause of action originally presented, relates back to the commencement of the action." *Crotty v. Chicago Great Western Ry. Co.* (C. C. A.) 169 Fed. 593, and cases cited.

This rule is also applicable to cases where jurisdictional facts which existed at the time the original petition was filed are subsequently made to appear for the first time by an amendment. *Goodman v. City of Ft. Collins*, 91 C. C. A. 98, 164 Fed. 970, and cases cited. In *Ryan v. Hendricks*, 92 C. C. A. 78, 166 Fed. 94, the Court of Appeals of the Seventh Circuit applied the above-mentioned rule to just such a case as this. It said:

"The amendments related to the number of the petitioning creditors and the amount and nature of their claims and to the occupation of the debtor. There is no doubt that at the time the original petition was filed Longerman was a bankrupt, and all the conditions existed which made it proper for his estate to be administered under the bankruptcy law. If the original petition failed to set forth these conditions fully and clearly, the court did right in allowing the amendments, and the amendments, when made, related back to the time of the filing of the original petition, and had the same effect as if originally incorporated therein."

See, also, *In re Plymouth Cordage Co.*, 135 Fed. 1000, 68 C. C. A. 434; *In re Broadway Savings & Trust Co.*, 152 Fed. 152, 81 C. C. A. 58; *In re Haff*, 136 Fed. 78, 68 C. C. A. 646; *State Bank v. Cox*, 143 Fed. 91, 74 C. C. A. 285.

The learned district judge committed no error in the order of adjudication in decreeing that the amendment related back to the date of the filing of the petition. This decretal order stated only a legal consequence, and might have been omitted; but it was not erroneous merely because it was unnecessary.

The issue of fact presented by the bank's answer, to the effect that the debtor was a wage-earner, and, therefore, not subject to the provisions of the bankruptcy act, cannot be considered by us. The trial court by its decree of adjudication necessarily found that issue against the bank; and, as no evidence is preserved in the record, we are unable to review its finding.

The next error assigned is that the petition was fatally defective, because of an insufficient description of the land charged to have been

transferred to the bank. It was described as fractional quarters of "section 18, in township 94 north, of range 26 west of the 5th P. M." without specifying the county or state in which it was situated. It is unnecessary to decide whether this description was sufficient to identify the land. The rule is that every presumption must be indulged in favor of the correctness of a judgment rendered by a court of competent jurisdiction until the contrary appears. "*Omnia præsumentur rite et solemniter esse acta*" is the maxim to be applied. Let it be conceded, then, that the petition failed to sufficiently describe the land charged to have been unlawfully conveyed, by not specifying the county or state in which it was located. Nevertheless the proof may have supplied the defect. The fact that the bank failed to bring the proof here for our consideration justifies us in the belief that it did so, and we ought, in the interest of justice, to so presume. The common-law rule of pleading was that:

"Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict." *Andrews' Stephen's Pleading*, § 109.

This rule was applied by us in *Keener v. Baker*, 93 Fed. 377, 35 C. C. A. 350, and in *Michigan Home Colony Co. v. Tabor*, 141 Fed. 332, 72 C. C. A. 480, and in other cases cited in them. We held in those cases that after a judgment has been rendered it will be presumed, in the absence of a contrary showing, that the facts necessary to support it were proved, and the complaint will be treated as amended to conform to the proofs. If, therefore, there was a defect in the petition as complained of, we must presume, in the absence of a contrary showing, that it was supplied by the proof; otherwise, the adjudication of bankruptcy would not have followed. We feel specially inclined to indulge this presumption in the present case, because the record does not disclose that the alleged defect was ever called to the attention of the trial court, and because the facts of the case are not brought here for our consideration.

Finding no error in the proceedings below, the decree is affirmed.

REYNOLDS et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1909.)

No. 2,959.

INDIANS (§ 27*)—LANDS—SUIT TO DETERMINE RIGHT TO ALLOTMENT.

Act Aug. 15, 1894, c. 290, 28 Stat. 305, as amended by Act Feb. 6, 1901, c. 217, § 1, 31 Stat. 760, which provides that Circuit Courts shall have "jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

der any law or treaty. * * * and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him," contemplates the selection of specific land for allotment by the claimant before the institution of such a suit, upon which the judgment or decree may operate as a complete allotment.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 19; Dec. Dig. § 27.*]

Appeal from the Circuit Court of the United States for the District of South Dakota.

Suit by Estella Lizzie Reynolds, for herself and her minor children, Lewis P. Reynolds, George M. Reynolds, Naomi E. Reynolds, and Russell O. Reynolds, against the United States. From a decree dismissing the bill, complainants appeal. Modified and affirmed.

James A. George, for appellants.

Edward E. Wagner, U. S. Atty., and William G. Porter, Asst. U. S. Atty.

Before HOOK and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This was a suit under Act Feb. 6, 1901, c. 217, § 1, 31 Stat. 760, amending Act Aug. 15, 1894, c. 290, 28 Stat. 305, to establish the right of complainants, as members of the Sioux Nation of Indians, to an allotment of lands in the Pine Ridge Indian reservation in South Dakota. The trial court sustained a demurrer and dismissed the bill.

The section of the statute as amended is as follows:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian agency: Provided, that the right of appeal shall be allowed to either party as in other cases."

It did not appear from the bill that complainants had selected any specific tract or tracts of land in the reservation which they desired should be allotted to them. There was no claim to any particular land. The case stated was merely an assertion of their qualifications, which they sought to have established by a decree of the court. Though the record is silent upon the subject, it is said by counsel that this was the ground upon which the demurrer was sustained. While it is not alto-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gether clear, we think the statute contemplates that a selection of specific land for allotment should precede the commencement of the suit. There would then be something for the decree of the court to operate upon. It is unusual for a Circuit Court, in litigation *inter partes*, judicially to declare the mere existence of a status or the possession of certain qualifications, which for any concrete effect would have to be followed by voluntary action on the part of individuals and then by official action of administrative officers of the government.

Color for the construction of the statute given by the court is found in the provision that a decree in favor of a claimant, when certified to the Secretary of the Interior, shall have the same effect "as if such allotment had been allowed and approved by him." This evidently contemplates that the decree shall have the effect of a complete allotment, and that, of course, implies the designation of specific land. The clause conferring jurisdiction upon the Circuit Courts points in the same direction, though perhaps not so clearly. It provides that those courts are "given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty." The jurisdiction conferred is to try and determine the right to an allotment, and that presupposes a specific selection by the claimant. The suit provided for is a local one, and the phrase "within their respective jurisdictions" means that regard must be had to the locality of the particular land in question. The cause of action does not arise and is not triable in every district in which the claimant merely asserts his possession of the requisite qualifications.

The act providing for the allotment in severalty of lands within the reservation (Act March 2, 1889, c. 405, 25 Stat. 888) prescribes definitely (section 8) the number of acres each qualified claimant is entitled to, and provides (section 9) that all allotments shall be "selected" by the Indians, heads of families "selecting" for their minor children, and that the agents shall "select" for each orphan child. The making of the allotments is by special agents (section 10), whose duty it is to certify them in duplicate to the Commissioner of Indian Affairs, who in turn transmits one copy to the Secretary of the Interior. When the Secretary approves the allotments, he (section 11) causes patents to be issued in the names of the allottees. It will be perceived that the selection of specific land is a necessary preliminary step to an allotment. To take that step was the duty of complainants, and no action of the officials could prevent them doing so. If the officials then denied the right of complainants to the land selected, and refused to proceed and make the allotment to them, the Circuit Court was open, and its decree in favor of complainants' right to the particular land selected, when certified to the Secretary of the Interior, would have the same effect "as if such allotment had been allowed and approved by him."

We think the proceeding in court was intended as a remedy when the position of the officials is adverse, which does not relieve the claimant of his duty to first localize his claim by a selection of specific land, so that, if final decree is rendered in his favor, all controversy will be

at an end, and the Secretary of the Interior can cause a patent to be issued without further inquiry. In *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039, which was brought under the act of August 15, 1894, before the amendment of February 6, 1901, the claimant had made a selection of specific land.

The government also urges the bill is demurrable because it does not disclose the possession by complainants of any right under the act authorizing allotments. For the reasons already mentioned, we think it would be premature to enter upon that question; but, that complainants be not foreclosed in respect of it, the dismissal of their bill should be without prejudice, and, as so modified, the decree is affirmed.

GOW et al. v. GANS S. S. LINE.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 83.

1. SHIPPING (§ 49*)—CHARTER HIRE—DEDUCTION FOR DEFICIENCY OF MEN.

Under a provision of a time charter for a suspension of charter hire in case of deficiency of men preventing the working of the vessel, the detention of the vessel in quarantine on account of the crew, after the vessel would otherwise have been released, constituted a constructive deficiency of men.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 49.*

Deductions and offsets from charter hire of vessel, see note to *Tweedie Trading Co. v. George D. Emery Co.*, 84 C. C. A. 254.]

2. HEALTH (§ 24*)—QUARANTINE REGULATIONS FOR VESSELS—CONSTRUCTION—"AMERICAN."

In regulation 68(c) of the quarantine regulations, authorizing the placing in quarantine of vessels arriving between May 1st and November 1st from "a tropical American port," the word "American" is to be construed as meaning the continent of America, or the Western Hemisphere, and not the United States.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 24.*

For other definitions, see Words and Phrases, vol. 1, p. 371.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Leonard Gow and others against the Gans Steamship Line. Decree for libelants, and respondent appeals. Modified and affirmed.

Wheeler, Cortis & Haight (Charles S. Haight and Clarence Bishop Smith, of counsel), for appellants.

J. Parker Kirlin and Charles R. Hickox, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a libel to recover \$682.25, deducted by the respondent, the charterer of the steamship *Vittoria*, under a government form of time charter, as hire for 5 days 9½ hours detention in quarantine at Norfolk, viz., from September 11th at 6:30 a. m. to September 16th at 4 p. m. The delay is not disputed, nor that it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was caused by the United States quarantine authorities. The charter contains clauses the relevant parts of which are as follows:

"16. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the vessel for more than 24 consecutive hours, payment of hire shall cease until she be again in an efficient state to resume her service. * * *

"17. * * * The act of God, enemies, fire, restraint of princes, rulers, or people, and all dangers and accidents of the seas, rivers, machinery, boilers, and steam navigation, and errors of navigation throughout this charter party always mutually excepted."

The relevant quarantine laws and regulations under which the United States quarantine authorities detained the vessel were as follows:

"68. Vessels arriving under the following conditions shall be placed in quarantine: * * *

"68 (b). Any vessel which the quarantine officer considers infected.

"68 (c). If arriving at a port south of the southern boundary of Maryland in the season of close quarantine, May 1 to November 1, directly or via a Northern port, from a tropical American port, unless said port is known to be free from yellow fever."

"74. After a vessel has been rendered free from infection, it may be furnished with a fresh crew and released from quarantine, while all or part of the personnel are detained. Under these circumstances the quarantine officer must exercise the greatest care that the vessel shall not become reinfected, especially by contact with persons in quarantine or infected objects."

"102. For the purpose of these regulations, five days shall be considered as the period of incubation of yellow fever."

"104. For the destruction of mosquitoes there shall be a preliminary and simultaneous fumigation of all parts of the vessel by sulphur dioxide gas. In cabins containing articles liable to damage by sulphur dioxide, pyrethrum powder may be burned instead."

"106. The personnel of the vessel shall be detained five days from completion of disinfection, or if they have been removed before disinfection of the vessel, their detention shall begin from last possible exposure to infection.

"If cases of yellow fever have occurred aboard, the time of detention at stations south of the southern boundary of Maryland must be extended to six days."

We have held in the case of *Tweedie Trading Co. v. George V. Emery Co.*, 154 Fed. 472, 84 C. C. A. 253, that a deficiency of men may be constructive, e. g., inability to work because of quarantine regulations; and in *Clyde Commercial Steamship Co. v. West India Steamship Co.* (C. C. A.) 169 Fed. 275, that a distinction between the vessel and her crew may be made for quarantine purposes. Such a distinction appears in the regulations under consideration. Under 68(b), 68(c), 74, and 104, a vessel may be rendered free from infection by fumigation and released, if a new crew be furnished; otherwise, she may be detained for five days longer for the purpose of observation of the personnel. The fumigation of this vessel was completed September 11th at 4 p. m., and the subsequent detention of five days was due entirely to the personnel. There was, therefore, a constructive deficiency of men within article 16 of the charter, which expressly causes hire to cease for that time. The exception in article 17 of the restraint of princes, rulers, and people does not apply to the categories mentioned in article 16, as we have held in the case of the *Clyde Commercial Steamship Co.*, *supra*.

The District Judge held that the quarantine officer had no legal authority to subject the vessel to quarantine, and therefore that the detention was unlawful, within *Northern Pacific Railway Co. v. American Trading Co.*, 195 U. S. 439, 25 Sup. Ct. 84, 49 L. Ed. 269. Under the view we have taken of the case this conclusion is immaterial; but the record shows that the officer had authority to detain the vessel under 68(b) if he considered her infected, and under 68(c) because she came from a tropical American port between May 1st and November 1st. The word "American" in the regulation cannot refer to the United States, which lies entirely above the tropics, but we think must be understood as referring to the continent of America or Western Hemisphere. Havana, the port from which the vessel came, is within the tropics; that is, the space between 23° 27' north and 23° 27' south latitude.

The decree is modified by directing the District Court to enter a decree in favor of the libelants for hire for 9½ hours; costs of District Court to libelants, and costs of this court to respondent.

MCCABE v. PATTON et al.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 10.

BANKRUPTCY (§ 317*)—PROVABLE CLAIMS—STIPULATION IN NOTE FOR ATTORNEY'S FEES—"FIXED LIABILITY."

The holders of notes given by a bankrupt, containing warrants of attorney and stipulations for the payment of attorney's fees for services rendered in the premises and collecting the same, took judgments on the notes, which were not due, a few days before the bankruptcy, after which they proved the notes in bankruptcy, together with claims for attorney's fees. *Held*, that under the law of Pennsylvania, by which such stipulations for attorney's fees are held not to create a "fixed liability" on the part of the debtor, but only a liability for reasonable fees for services rendered, not exceeding the amount stipulated, the creditors were not entitled to the allowance of the fees claimed; there being no proof of any collection service rendered which entitled them to indemnification.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 317.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

In the matter of Joseph G. Beale, bankrupt. Appeal by Sydney J. McCabe, trustee, from an order allowing claims for attorney's fees to W. D. Patton, the Armstrong County Trust Company, the Farmers' National Bank, and the Merchants' National Bank, creditors. Reversed.

Harry B. Wassell, for appellant.

J. Claude Bedford, for appellees.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. This is an appeal by the trustee in bankruptcy from an order of the District Court confirming a report

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the referee, wherein the referee had allowed certain attorney fees on judgments against Beale, the bankrupt. The facts of the case are as follows:

The Farmers' National Bank of Kittanning, Pa., and the other appellees, owned four notes, signed by Beale, containing warrants of attorney and stipulations for payment of attorney's fees for services in the premises and collecting the same. Two of the notes were payable on demand after date, and the other two were not due when, on February 17, 1908, without demand for payment, judgments were entered thereon against Beale in the common pleas court of Armstrong county for the debt, interest, and attorney's fees provided for in said notes. On February 22, 1908, and before the time notes were due, Beale was adjudged bankrupt. Thereafter the appellees presented claims for the amounts of their several debts, aggregating some \$18,000, together with \$900 attorney's commissions. The trustee objected to the allowance of the attorney's commission, which objection was overruled. The referee's action thereon having been approved, and his report confirmed, this appeal was taken.

It will be observed that objection is not taken to the allowance by the referee of the money represented by the notes, but is confined wholly to the appellees proving the attorney's fees on such notes in addition thereto. The claim thus made on the note must meet the requirements of being "a fixed liability as evidenced by * * * an instrument in writing absolutely owing at the time of the filing of the petition against him." Turning, therefore, to the question whether there existed a fixed liability on Beale to pay these commissions when the petition was filed against him, we are of opinion he was not, in view of the Pennsylvania decisions, which hold that such commissions on notes and mortgages are not fixed liabilities to the payee of a note, but are in the nature of penalties for his indemnification for expense of collection. The record in this case shows that the appellees based their claims on the notes they held and copies of which they filed as part of their claims. While the proof of claim refers to the fact that judgments were entered on these notes a few days before bankruptcy, yet no exemplifications of said judgments accompanied the proof or are now before us in the record. Looking, then, at the facts as disclosed by the record, we treat these as claims made on notes, which course is in accord with what was said in *Boynton v. Ball*, 121 U. S. 466, 7 Sup. Ct. 983, 30 L. Ed. 985:

"Notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which action was brought in the state court and the existence of which was provable in bankruptcy."

Without discussing the authorities at length, it suffices to say the Supreme Court in *Daly v. Maitland*, 88 Pa. 384, 32 Am. Rep. 457, in which *Robinson v. Loomis*, 51 Pa. 78, was reversed, held:

"The court, from practical knowledge of professional work, are able to say in every particular case what ought to be the compensation or rate of commissions for collecting a debt by suit. Whatever is stipulated beyond a reasonable

rate should be relieved against upon equitable principles. Certainly no certain commission can be determined upon to be applied to all cases."

This view was followed in *Imler v. Imler*, 94 Pa. 374, where it was said:

"The obvious intention in this and like stipulations in instruments for the payment of money is that the creditor shall be indemnified for his reasonable expense of counsel fees in collecting the money; that is to say, where it becomes necessary to employ counsel to collect the money, the debtor shall be subjected to the expense thereof not exceeding the agreed limit. It was never intended, nor can we permit such a clause to be used, to compel a debtor to pay attorney's commissions where the latter does not dispute the claim and pays at maturity. In such cases there is no necessity for the intervention of an attorney. Where, however, an attorney has been employed in good faith by reason of the neglect or refusal of the defendant to pay, the fact that the money has been paid to the attorney without execution does not relieve the defendant from his agreement to pay reasonable attorney's commissions, for the reason that the creditor's liability to the attorney has attached."

Applying these principles to the case before us, we are of opinion the case must be reversed. The claimants offered no proof of any collection service rendered before the date of the bankruptcy which entitled them to indemnification, and the referee, therefore, had proof of no such fixed liability in reference to these commissions as warranted their participation in the bankrupt's estate.

SAPIR et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 23.

CRIMINAL LAW (§ 370*)—EVIDENCE—EVIDENCE OF SIMILAR OFFENSES.

In a prosecution under Act March 3, 1875, c. 144, § 2, 18 Stat. 479 (U. S. Comp. St. 1901, p. 3676), for knowingly receiving property stolen from a navy yard of the United States, on the question of knowledge, evidence is admissible to show that the defendant had received and purchased articles of the same general character stolen from such navy yard at other times.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 825; Dec. Dig. § 370.*]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Israel Sapir and Rose Sapir were convicted of receiving stolen property, and bring error. Affirmed as to Israel Sapir, and reversed as to Rose Sapir.

This cause comes here upon a writ of error to review a judgment of the Circuit Court, Eastern District of New York, convicting Israel Sapir and Rose Sapir of a violation of the provisions of Act March 3, 1875, c. 144, § 2, 18 Stat. 479 (U. S. Comp. St. 1901, p. 3676), which forbids the receiving of any property stolen from the United States, with knowledge that the same has been so stolen. The indictment contained three counts, but for some reason which is not explained the second and third counts were withdrawn from the consideration of the jury.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

F. S. Chilton, for plaintiffs in error.

Wm. J. Youngs (S. B. Strong, Asst. U. S. Atty., of counsel), for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The first count, which is the only one before us, charged that on August 3, 1908, at the borough of Brooklyn, defendants did knowingly, willfully, and unlawfully receive and conceal certain property, to wit, certain brass composition, which had been theretofore stolen from the United States and from the United States navy yards in Brooklyn, defendants knowing that said property had been so stolen.

Error is assigned to the admission of testimony as to transactions had with the defendants by a person other than the one who sold the stolen piece of brass. It is also contended that, such evidence being eliminated, there was not sufficient to send the case to the jury, and that a verdict of acquittal should have been directed.

The testimony as to the piece of brass was given by the witness Ready. He testified that at all the times referred to he was employed in the navy yard, and that he first saw both defendants in their junk shop, which was about three blocks from the Sand street entrance of the navy yard, about two weeks before the 4th day of August, 1908. He went into the shop, taking a few things with him. He does not say what they were. He sold them to the man, the woman being present, for 24 cents. On August 3d he again went into the shop with some old rubbish or junk, including the particular brass casting, which witness said was government property "found" by him in the ditch in the navy yard. He was working in the navy yard that day, went out for noon, and then went into the junk shop. He did not see the woman at all that day. He did see Israel Sapir, to whom he gave the stuff. Israel weighed it and gave him 18 cents for the lot, not asking him for his name or address. This evidence fails to connect Rose Sapir in any way with this particular brass casting, the subject of the first count; and, since the other counts were eliminated before the cause was sent to the jury, we think they should have been instructed to acquit her.

Having shown by the witness Ready the receipt of property which the witness had stolen from the United States, the government undertook to show facts and circumstances from which the jury might infer that, when Israel Sapir received the brass casting, he knew it had been so stolen. It was shown that one Cunningham was also a navy yard employé; that on several different days in July and August, about the noon hour, he was seen to go from the navy yard to the junk shop, where he remained for about five minutes, and then returned to the navy yard. Sometimes he went in the front entrance, sometimes in what was called the "hall entrance." On each occasion his coming was apparently watched for. Either one or other defendant—usually the woman—was outside the door looking up and down the street, and when Cunningham got within about half a block the watcher went

inside and closed the door. On August 4th Cunningham entered the shop in the usual way and was promptly followed by detectives, who seized him and took from him three brass castings, which were hung on a string from his neck under his shirt. The defendant Rose Sapir, being asked by one of the detectives how many times Cunningham had been there, stated that she had never seen him before, and immediately afterwards addressed him by his first name. Various articles, identified as navy yard property, were found in the shop. In the afternoon of August 3d one Anderson was arrested in the shop, where he had just brought three pieces of lead, which he had taken from one of the battleships in the yard. He took them out of his hat, and gave them to Israel Sapir, who weighed them, and gave him 24 cents for them.

It is contended that all the evidence pertaining to Cunningham and to the exhibits taken from him should have been stricken out on motion, on the theory that a person cannot be convicted of one offense upon proof tending to show that he committed another. But it is well settled that in cases where the charge is of uttering forged notes, or passing counterfeit money, evidence as to other offenses is admissible, and "upon an indictment for receiving stolen goods evidence is admissible that the prisoner had received, at various other times, different parcels of goods, which had been stolen from the same persons, in proof of the guilty knowledge of the prisoner." Per Story, J., in *Bottomley v. U. S.*, 1 Story, 135, Fed. Cas. No. 1,689, cited with approval in *N. Y. Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 599, 6 Sup. Ct. 877, 29 L. Ed. 997.

We think no error was committed in sending the cause to the jury on this proof, and we cannot disturb their finding. Indeed, we see no grounds for doing so.

The judgment is reversed as against Rose Sapir, and affirmed as against Israel Sapir.

J. W. CALNAN CO. v. DOHERTY et al.†

(Circuit Court of Appeals, First Circuit. November 3, 1909.)

No. 831.

BANKRUPTCY (§ 71*)—ADJUDGING BANKRUPT EITHER THE REAL OWNER OR THE NOMINAL OWNER.

Where a corporation, which was the apparent owner of a business of the class which is within the purview of the bankruptcy statutes, contracting liabilities as such, is allowed to continue apparently as the principal by unknown equitable owners, creditors may sue, on the rules of the common law, against either the corporation or the unknown equitable owners when discovered, and, therefore, either may be proceeded against by an involuntary petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 71.*]

Appeal from the District Court of the United States for the District of Massachusetts.

In the matter of J. W. Calnan Company, bankrupt. From an order of adjudication, the bankrupt appeals. Affirmed.

Clarence F. Eldredge, for appellant.

John H. Blanchard (M. M. Harris, on the brief), for appellee Doherty.

Before COLT, PUTNAM, and LOWELL, Circuit Judges

PUTNAM, Circuit Judge. In this case the J. W. Calnan Company, corporation, was adjudicated a bankrupt by the District Court on an involuntary petition, and thereupon the corporation appealed to us. The adjudication was based upon a payment made to M. H. Curley & Co. The proposition urged on the District Court, and also on us, by the appellant, is as follows:

"Shortly, the appellant contends that M. H. Curley & Co. were never a creditor of it; that it never owed M. H. Curley & Co. anything, hence there could be no preference, and no act of bankruptcy; and it is confidently asserted that upon this ground alone the appellant is entitled to a reversal of the judgment of the court, adjudicating it a bankrupt."

By "it" is intended the appellant. The payment referred to was actually made by the corporation by its check on the First National Bank of Boston to the order of the creditors. Nevertheless, it is said that the real debtor was Mr. Wise. The business to which the account paid related was a retail liquor business at the store No. 321 Tremont street, in Boston, and the merchandise which the account represented was delivered at that store, which the bookkeeper for Curley testified was the store of J. W. Calnan Company, as he understood it. The case, however, is determined by applying the principle that one who credits an agent, who, by the consent or with the knowledge of his principal, is transacting the principal's business in his own name—that is, the name of the agent—may ordinarily pursue for payment the agent, or the equitable owner who lies behind the agent.

J. W. Calnan Company, the corporation, was organized under the laws of Massachusetts in January, 1902. The certificate of organiza-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 12, 1910.

tion shows that at that time it had merchandise to the amount of \$2,000; fixtures to the amount of \$1,500, and cash, making up in the whole \$10,000. While there is no direct proof that this merchandise was the merchandise then at the store 321 Tremont street, there is enough to satisfy the court, which may draw inferences as a jury may draw them, as also the District Court might do, that this merchandise was the same stock of goods remaining, or continuing by renewal, which existed at the store No. 321 Tremont street at the dates when the transactions to which this proceeding in bankruptcy relates took place. It also appears that, at those dates, the daily cash receipts at that store, and the ordinary disbursements made there, were deposited in the name of J. W. Calnan Company in the First National Bank, and paid out on its checks. The record also fails to disclose that there was ever any transfer by J. W. Calnan Company of the stock of merchandise or business which we have described.

It is true that behind the J. W. Calnan Company there were various persons who seemed to be active in carrying on the business, and who made transfers one to the other. Among these were J. W. Calnan & Co., a copartnership, Wise, one Sullivan, and perhaps others. Nevertheless, as we have said, no transfer from the J. W. Calnan Company, the corporation, is shown by the record. Therefore we may infer, as we have also said, that the business was transacted, either purposely or by acquiescence, in the name of J. W. Calnan Company; so that, whoever may have been from time to time the equitable owners of the property involved, and whatever transfers there may have been between them, the rule of law which we have stated applies, and M. H. Curley & Co., and other creditors, had the option to prosecute claims against the corporation involved here, or against the equitable owners of the stock of merchandise and business. Therefore, so far as this proposition is concerned, the adjudication was properly made.

At the last moment the proposition was made to us by the appellant that there was in fact no preference, even if the debtor was the J. W. Calnan Company. This, however, has not been submitted to us, either orally or on brief, in such a way as, if we gave consideration to it, would relieve us from making an original investigation for ourselves of the considerable proofs which the record contains. If the appellant intended to raise this point earnestly, it was its duty to have brought out the facts by brief as required by our rules. As this was not done, we decline to give this view of the case consideration.

A brief has been passed us on the question of costs; but, as the case results, whatever question there is, if any, can be settled on appeal from the taxation of the taxing master.

The judgment of the District Court is affirmed, and the appellees recover their costs of appeal.

WESTERN ENGINEERING & CONSTRUCTION CO. et al. v. RISDON
IRON & LOCOMOTIVE WORKS.

(Circuit Court of Appeals, Ninth Circuit. November 12, 1909.)

No. 1,696.

1. PATENTS (§ 176*)—CONSTRUCTION OF CLAIMS—GOLD DREDGER.

In the Postlethwaite patent, No. 622,532, for a gold-dredging apparatus, claim 3, which contains as one element of the combination "a perforated spray pipe leading into the separator or grizzly from the lower end thereof," the statement of the location of such pipe as entering the grizzly at the lower end thereof is in the nature of a mere description, and is not a limitation of the claim to that precise construction. (Ross, Circuit Judge, dissenting.)

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 250¹/₃; Dec. Dig. § 176.*]

2. PATENTS (§ 328*)—INFRINGEMENT—GOLD DREDGER.

The Postlethwaite patent, No. 622,532, for a gold-dredging apparatus, if conceded validity, is extremely narrow, and its essence is the direct delivery of material from the grizzly with force upon the collecting tables. As so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Northern District of California.

Suit in equity by the Risdon Iron & Locomotive Works against the Western Engineering & Construction Company and the Central Gold Dredging Company. Decree for complainant, and defendants appeal. Reversed.

Charles P. Eells, W. S. Goodfellow, and Francis W. Parker, for appellants.

N. A. Acker and William F. Booth, for appellee.

Charles W. Slack, John H. Miller, and William K. White, amici curiæ.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. This suit was brought for the alleged infringement of claim 3 of certain letters patent, numbered 622,532, dated April 4, 1898, for certain new and useful improvements in gold-dredging apparatus alleged to have been invented by Robert H. Postlethwaite, who was the appellee's assignor. The patent declares:

"This invention relates to certain new and useful improvements in that class of dredgers known as 'gold dredgers,' or those used for the recovery of gold or precious metal from the beds of rivers or streams; and the improvements consist in the arrangement of parts and details of construction, as will be hereinafter fully set forth in the drawings and described and pointed out in the specification. The object of the invention is so to construct the dredge that the working of the river bottom may be accomplished with the minimum expense, in order that river beds may be successfully and profitably worked where the percentage of gold or precious metal is very small per cubic yard, or such beds as cannot be used to advantage with the dredgers now in use, owing to the fact that the expense attached to the working of the machine is greater than the value of the material recovered.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"In order fully to comprehend the invention, reference must be had to the accompanying sheets of drawings, wherein Fig. 1 is a side view in elevation, showing the machine or dredge in working position within a river; Fig. 2 is a top plan view of the dredge; Fig. 3 is a vertical sectional view of the rotary grizzly, showing the water pipe in elevation.

"The letter A is used to indicate the dredge boat, which carries the herein-after described mechanism. To the lower cross-pieces, a, of the uprights, A', placed somewhat to the rear of the dredge boat center, is fulcrumed by the rod, a', the ladder, A², which ladder works vertically in the ladder way, A³, formed in the forward end of the boat. This ladder is raised and lowered by means of the cable, B, connected to a cross-beam, 1, supported by uprights, 2. This cable runs under sheave, 3, connected to the lower end of the ladder, A², by the arm, 4, and over sheave, 5, suspended from the cross-beam, 1, and the free end thereof is connected to a suitable winding drum, which is driven by suitable connections from the engine of the boat. As the cable is wound upon or slackened from the drum, the ladder, A², is raised or lowered. The ladder, A², supports the endless chains, 6, which work over the rolls, 7, and over rolls or drums, 8, secured upon the cross-shaft, 9, working in bearings of cross-pieces, 10. These chains carry the cutting, scooping, or excavating buckets, 11, which cut into the bottom, B', of the river or stream, and carry the cut soil upward to the dredger. The chains carrying the buckets with their load are prevented from sagging by means of the supporting rolls, 12, journaled at given intervals along the ladder, A².

"At any given point on the boat or dredger is located the boiler, B², the steam of which is conveyed to the engine, B³, by the pipe, B⁴. On the shaft, C, of the engine are mounted the belt wheels, C', C². The larger belt wheel, C', transmits its motion to the belt wheel, D, mounted upon the shaft, D', of the force pump D², by means of the belt, D³, while the belt wheel, C², has its motion transmitted to the belt wheel, E, mounted upon a cross-shaft, E', by belt, E². The cross-shaft, E', works in bearings of the standards, E⁴, secured to the boat (only one being shown), and upon said cross-shaft is also mounted, directly behind the belt wheel, E, a second belt wheel (not shown), which is connected with the belt wheel, F, mounted upon the cross-shaft, F', by the belt, F². Consequently the motion of shaft, E', is transmitted to the shaft, F'. Upon the cross-shaft, F', is mounted the pinion, F⁴, which meshes with the gear wheel, F³, secured upon the cross-shaft, 9. By means of the mechanism just described, the movement of the engine shaft is transmitted to the cross-shaft, 9, so as to impart travel to the endless chains, A², carrying the excavating buckets, 11. As the buckets, 11, are carried by the travel of the endless chain carriers over the drums or rolls, 8, the contents thereof are emptied upon a runway or trough, G, which leads the material into the rotary 'grizzly,' G', through the forward open end thereof. This grizzly is set at a slight incline, and it is formed of meshed or reticulated material, being cylindrical in cross-section. To the upper end thereof preferably is formed the cog ring, G², which through suitable connections (not shown) is driven from the cross-shaft, 9, so as to rotate the grizzly. Into the lower open end of said grizzly projects or extends the upper end of the water supply pipe, H, which leads from the suction pump, D². This pipe extends, preferably, the entire length of the grizzly, and is run near the top thereof, being perforated throughout its length within the grizzly, so as to spray its water onto the material entering the grizzly. The water flowing from this pipe into the grizzly serves to thoroughly wash and separate the material entering therein from the trough or runway, G, and to force the finer material from the grizzly onto the separating tables or platforms, H', arranged below the grizzly. The said grizzly is held in position by the supporting frame, H², and as the same is arranged at an incline it is obvious that as the same is rotated the heavier particles, such as stones and foreign substances too large to pass through the openings of the same, will escape from the lower open end thereof, onto an inclined platform or chute, H³, arranged at that end of the grizzly.

"The separating tables or platforms, H', are arranged at a gradual incline, and extend from beneath the grizzly to each side thereof. Of the tables or platforms there are a series arranged one above the other. Consequently the water and the finer material flowing from the grizzly fall upon the first of

the inclined tables or platforms, passing thereover flow onto the next, and so on until they pass off of the lower set of tables or platforms. As the fine gold or precious metal is contained in the material flowing from the grizzly, the same will be gathered or collected as the material is passed over the separating tables or platforms. The water and the base material passing from the last set of tables or platforms enter the sluiceways, K, K' as indicated by arrows, d, and finally discharge into the sump or well, K², formed in the boat or dredge (preferably at its stem end). From this well the base material and the water are raised into the pump, K³, through the stand pipe, K⁴, and forced through the discharge pipe, K⁵, onto the embankment, thus being prevented from flowing back into that portion of claim bottom being dredged, while the heavier material, flowing from the trough, H³, is emptied into buckets, I, secured to the elevator, I', and elevated and discharged by the buckets into a runway, I², which conveys the same onto the embankment. The elevator, I', works over the rolls or wheels, h, h', secured within the upper and lower ends of the ladder, I³, which ladder [line missing] -tion is imparted to the endless elevator by any suitable mechanism driven from the engine, I⁴, of the pump, K³. The discharge pipe, K⁵, is connected to the pump, K³, by a swivel joint, h², so as to be free to move in any direction, and it is raised and lowered by means of the cable, k, attached thereto, while the ladder, I³ is raised and lowered by the cable, k². The water for washing the material flowing into the grizzly is drawn from the river into the suction pump through the pipe, L.

"As thus constructed, the entire operation of dredging and recovering the gold or precious metal from the river's bottom may be conducted with very little help, as the entire working of the machine is automatic, and as the worked material is carried and deposited upon the river's bank there is no danger of the working material flowing back into the pocket or hole being dredged and reworked, which would be a useless loss of time and expense. Having thus described my invention what I claim as new, and desire to secure protection in by letters patent, is: * * *

"3. In an apparatus for dredging and separating the dredged material, the combination, with a boat or platform, of a rotary grizzly or separator mounted thereon, devices for imparting rotation thereto, means for excavating and elevating the excavative material and discharging the same directly into the rotary grizzly or separator, a perforated spray pipe leading into the separator or grizzly from the lower end thereof, a pump for forcing water into said pipe and through its perforations and under disintegrating pressure onto the material fed into the grizzly or separator, collecting tables arranged below the separator or grizzly and by means of which the separated metal from the dredged material is recovered."

Not only does the patent show upon its face that it is not one of a pioneer character, but the evidence introduced in the cause shows that long before the application for the patent was filed by Postlethwaite, which was on the 6th day of July, 1897, apparatus for gold dredging was described in printed publications, and was publicly used in this country, so nearly the same as the invention claimed in the aforesaid claim 3 of the appellee's patent as, if not in truth amounting to anticipation, certainly confines the patent here in question within very narrow limits. The opinion of the court below shows that the trial judge was very much in doubt in respect to the validity of the patent, and the file wrapper introduced in evidence shows that all the expert examiners of the Patent Office held that the appellee's apparatus constituted no invention, although the Commissioner of Patents held otherwise and awarded the patent sued upon.

For the purposes of this case I shall assume its validity. Whether or not the evidence shows any infringement upon the part of the appellants depends upon the true construction to be placed upon

the claim of the patent alleged to have been infringed, to wit, claim 3 above set out. It consists, as will be seen by its perusal, of seven elements, all of which were confessedly old, to wit: (1) A boat or platform; (2) rotary grizzly or separator; (3) devices for imparting rotation thereto; (4) means for excavating and elevating the excavative material and discharging the same; (5) a perforated spray pipe; (6) a pump for forcing water into such pipe, through its perforations, onto the material fed into the grizzly or separator; and (7) collecting tables by means of which the separated metal from the dredged material is recovered. If there be anything converting such aggregation of old elements into a patentable combination, it must necessarily be one or more of the additions to or limitations upon the second, fourth, fifth, sixth, and seventh of the elements just mentioned; that is to say, the rotary grizzly or separator claimed is mounted on the boat or platform, the means for excavating, elevating, and discharging the excavative material claimed discharges such material directly into the rotary grizzly or separator, the perforated spray pipe claimed leads into the separator or grizzly from the lower end thereof, the pump for forcing water into the said pipe and through its perforations onto the material fed into the grizzly or separator is under disintegrating pressure, and the collecting tables, by means of which the separated metal from the dredged material is recovered, are arranged below the separator or grizzly.

I agree with counsel for the appellants that each and all of those limiting clauses in the claim are in the same category. It seems to be conceded by the appellee that all of them are essential parts of the claim, except that limiting the location of the perforated spray pipe, as to which it contends that it is not an essential part of claim 3, in which view it was sustained by the court below. That court, in its opinion, after referring to the fact that the spray pipe of the appellants' machine is introduced into the grizzly from the upper end thereof, instead of the lower end, said:

"It is claimed that by reason of the character of the patent (that is, by reason of the manner of describing it in the claim, and by reason of the history of the claim in its passage through the Patent Office) it must have a strict construction, and be limited strictly to the description here given—a perforated spray pipe leading into the grizzly 'from the lower end thereof,' and, as so construed, that their machine or device is not an infringement of that claim. I have examined the question, as I have all others, with a great deal of care. I am unable to coincide with the views of defendants as contended for. Of course, the claim must be strictly limited to the various elements that are set forth therein; but I do not regard this language as entering into or disclosing an element in the makeup of the machine. I think, as contended by the complainant, it is more in the nature of a mere description, one of those things which merely tends to disclose the idea of the inventor or designer at the time as to his then conception of what was the best way to introduce the particular feature of the device, but not that he intended to bind himself thereby in such a way as to be precluded from varying that method of construction, should experience or conditions show the necessity or desirability for such a change. I do not, as I say, think that feature can be regarded as an element of the claim by which complainant is limited; and I find upon an examination of the opinion by the Commissioner, in overruling the board of examiners in their rejection of the patent, that he entirely ignores that descriptive feature in this claim in his opinion. The allowance of the patent had a very long and hotly contested passage through the Patent

Office. As originally preferred, it was rejected, and then the claim was amended and rejected again by the board of examiners. It may have been rejected more than once. I do not remember as to that; but at any rate it went to the Commissioner of Patents on appeal, and the Commissioner, in arriving at his conclusion that a patent should issue, pays no attention to this feature of the claim, which is counted upon to support this defense. In this I think he was correct, and I am satisfied that that contention cannot be sustained."

As has been seen, the perforated spray pipe of claim 3 of the appellee's patent has two limitations in respect to its location: First, it enters the grizzly; and, second, it enters it from its lower end. The Mining and Scientific Press, of date October 8, 1887, introduced in evidence, gives this description of a gold dredger, which Postlethwaite admits in his testimony he had seen long before the making of his claimed invention:

"A short distance above Alexandra there is a large double action steam dredge at work, which has now been employed in dredging the bed of the river for about four years. It was constructed by Messrs. Kincaid and McQueen of Dunedin, and is well adapted for excavating auriferous drift from the beds of rivers. Indeed, this dredge is the most complete (although far from being perfect) that has yet been employed in gold mining in the colony, and from what I could learn has been successful in obtaining sufficient gold to pay the proprietors for their outlay. Not only is the dredged material lifted, but the whole of it is washed on board. Credit is due to the manufacturers of the dredge for the ingenious manner in which everything is placed so as to economize labor. There are three men on each shift, and the dredge is kept continually at work day and night, stopping only on Sundays, and when it is absolutely necessary for repairs. After lifting the wash dirt out of the river, and emptying it into a hopper, the dredged material goes through a revolving screen, and is washed on board; the large stones passing behind the dredge in one place, and the fine tailings in another.

"The dredge is 66 feet long, built of iron, having two pontoons, one at each side, extending the whole length of the hull, and about 2 feet 6 inches clear from the side, so that the total width of the hull and pontoons is 26 feet. On the deck of the dredge, framing is erected to carry the dredging shaft, hoppers, and washing apparatus. There are two sets of buckets and dredging ladders, one on each side, which work between the hull and pontoons. Each set can be worked separately or together, as required. The buckets are capable of lifting 150 tons of stuff per hour, dredging to a depth of 25 feet below the level of the water.

"The dredged material falls into a shoot, which carries it into a revolving cylinder, 4 feet in diameter and 6 feet long, made of boiler plate and perforated with holes 1 inch in diameter. This revolving cylinder has a dip or inclination toward the stern of the dredge of $1\frac{1}{2}$ inches to the foot. On the inside of this cylinder short pieces of angle iron are riveted here and there all around the cylinder to prevent the stones getting away before they are properly washed.

"All the fine stuff passes through the perforated holes in the cylinder and falls on to inclined screens, thence into riffle boxes, where the gold is collected, and the tailings are carried away clear to the stern of the dredge. The large stones and coarse gravel that come through the end of the revolving cylinder pass into a shoot at the stern of the dredge, and are deposited in the river. Water for washing purposes is lifted by a centrifugal pump, and is so conveyed that jets are made to play on the screens, thereby washing the stones and coarse gravel, and carrying the gold into the riffle boxes. The riffles in these boxes are made of bar iron, laid on the flat across the box, and placed about three-eighths of an inch apart, having under them, on the bottom of the boxes, cocoanut matting. The water coming down these inclined tables forms riffles in each of the interstices, and there the gold is deposited.

"The first set of inclined tables are set across the dredge at an inclination from the outside toward the center, where the tables from each of the re-

volving screens join onto another inclined table, which carries the sluiced material into the river at the stem of the dredge. The whole of the machinery is worked by a vertical inverted compound steam engine, having cylinders of 12-inch and 22-inch diameter, respectively, and 18-inch stroke, working under pressure of 60 pounds to the square inch. A powerful double cylinder steam winch lifts and lowers the dredging ladders, as well as works the mooring chains, of which there are five in number, viz., three at the bow and two at the stern. Each chain has its own drum, which can be connected or thrown out of gear as desired. These are all under the control of one man."

In the course of his testimony Postlethwaite was questioned, and answered, among other things, as follows:

"Q. You had seen dredges before you ever manufactured this one, you had seen or heard of dredges in New Zealand, which had a continuous bucket arrangement for hoisting material, operated by power on board the dredge, a chute, or a hopper for conveying this material into the revolving screen, the revolving screen itself, and the gold-saving tables arranged below the revolving screen to receive the material that came from the screen? All those were familiar to you, were they not, before you ever manufactured your dredge at all? A. Yes. Q. And arranged in that way? A. Yes. Q. And all these on a movable boat? A. Yes. Q. Or hull? A. Yes. Q. Had you known of any device for introducing water into this screen? A. No; other than from the buckets. Q. Other than the water that accompanied the material? A. Yes; other than from the bucket. The old dredgers were very weak, and as a rule did not fill their buckets with gravel, and considerable water used to come up with it. That is simply to explain the water that was in the screen. Q. This water puddled the material in the screen as it revolved, and accompanied the finer material through the meshes onto the tables, did it? A. Any water that there was. But I would like further to explain that. One of the difficulties with water coming into a screen from a bucket is the fact that it does not come in a continuous stream, but in large rushes, which used to take some of the material right from the screen and deliver the same into the tail of the chute. That is the fundamental mistake of introducing— Q. By 'right through the screen' you mean at the end? A. At the tail end of the chute. That is one of the fundamental difficulties of delivering water from a bucket. Q. Was the lower end of the screen all closed? A. No, sir. Q. With meshes or otherwise? A. No, sir; it was open for the delivery of tailings. Q. In what way did you introduce water into this screen in the machine which you made? A. From the spray pipe. Q. In New Zealand—the one which you made in New Zealand? A. From the spray pipe. Q. Entering at which end of the revolving screen? A. I believe from the lower end. Q. How far into the revolving screen did this spray pipe extend? A. The whole distance. Q. Did the spray pipe revolve? A. No. Q. How was it perforated? A. With small holes. Q. Where? A. All along its under side. * * * Q. How was the water supplied to the pipe? A. By a pump. Q. Under what head? A. Which particular dredge are you speaking of, Mr. Eells? Q. The one you made in New Zealand; the first one that you made. A. I never asked. I think we speeded the pump to give about a 12-foot head, the equivalent of a 12-foot head. * * * Q. With regard to the Dunedin dredge shown in the Mining and Scientific Press of October, 1887, you have said, in reply to a question whether there was a spray pipe leading into the revolving screen, that you didn't think so. Do you remember examining the dredge at the time when you went aboard of her? A. Not specifically; no. I saw it. I looked over the dredge. Q. This was before your attention had been called to gold dredging as an art, and before you had evolved this device which you have referred to? A. Yes, sir. Q. It was not until three years or more thereafter that you first evolved your scheme for a dredge? A. I don't remember the exact date I was on the Dunedin; but it was before that date. Q. Before what date? A. Before 1890. Q. Do you know anything about any spray pipe then on the Dunedin? A. Well, I remember that there was a spray pipe outside of the screen. There were some other screens underneath the tables. They were called tables or screens; a sort of secondary washer. Q. You do remember a spray pipe?

A. Yes. Q. A few minutes ago I understood you to say that you had never known of a spray pipe in connection with any New Zealand dredge until you planned your own. A. In a screen. That was simply for a screen. Q. My question was, in or on a screen? A. Well, on a screen. Q. You did know of spraying on a screen? A. My understanding of your question was that you were referring to a circular screen, as that had been the subject of the examination. Q. And you answered with that understanding? A. Yes, sir. Q. Do you know whether the screens of the Dunedin dredge mentioned in the Mining and Scientific Press of October 8, 1887, were revolving screens or not? A. Yes; I think there were two revolving screens. Q. And there was a spray pipe on that revolving screen? A. No; I don't think there was. It was underneath it, underneath and to one side. Q. You are quite positive that it did not spray on the screen? A. I don't think it did; not on the revolving screen. I believe there was another screen underneath; but that I am not certain of. Q. What was the function of the screen underneath? A. A sort of secondary screener. * * * Q. Did you first get the idea of a perforated spray pipe from the Dunedin dredge? A. I could not state."

Turning to the patent itself, it is seen that the alleged inventor expressly declares that "the improvements consist in the arrangement of parts and details of construction, as will be hereinafter fully set forth in the drawings and described and pointed out in the specification," and that the annexed drawings show the perforated spray pipe entering the grizzly at its lower end. The file wrapper from the Patent Office introduced in evidence in the cause shows that it was only by so locating the perforated spray pipe that the claim was allowed. It shows that the original claims made no reference to a perforated spray pipe. The third claim was stricken out on a reference by the examiner to a patent to Robinson of September 18, 1894, and claims 3 and 4 substituted in place of it, in each of which was inserted as an element "a water supply pipe for said screen." Those claims 3 and 4 were rejected on certain references, whereupon claims 3 and 4 were stricken out and claim 3 substituted therefor, as follows:

"In an apparatus for dredging and separating the dredged material, the combination, with a boat or platform, of a rotary grizzly or separator mounted thereon, devices for imparting rotation thereto, means for excavating and elevating the excavative material and discharging the same directly into the rotary grizzly or separator, a perforated spray pipe leading into the separator or grizzly from the lower end thereof, a pump for forcing water into said pipe and through its perforations under disintegrating pressure onto the material fed into the grizzly or separator, collecting tables arranged below the separator or grizzly, and by means of which the separated metal from the dredged material is recovered."

In support of claim 3 as thus substituted the attorney for the applicant contended as follows:

"The foregoing claim is submitted for the earnest consideration of the examiner, in view of oral argument this day had. By the arrangement of the spray pipe as expressed in the foregoing claim, it will be observed that the water forced therein reacts, so to speak, and the escape of the water under pressure is throughout the length of the spray pipe at various points; the strongest jets issuing from the pipe at its lower end, or the discharge end of the grizzly. This brings the whole force of the stream, and directs the issuing jet onto the material requiring the greater amount of water and force to separate the material. As the material enters the feed end of the grizzly or separator, considerable water is carried therewith, which escapes through the mesh of the grizzly; consequently, as the material is conveyed toward the dis-

charge end of the separator, greater force is required to properly disintegrate the same. This feature is not disclosed by a single reference, nor, in fact, does either reference disclose the combination of coating elements set forth in the above claim."

The attorney cited in support of his argument letters patent No. 615,667, granted December 13, 1898, to C. S. Barnett.

Claim 3, as so substituted, was rejected by the primary examiner, from whose decision the case was appealed to the examiners in chief. In rejecting claim 3, as the board of examiners did, they cited the dredging apparatus described in the Mining and Scientific Press of October 8, 1887, already referred to, saying that it included every element of the combination specified in claim 3 of the applicant, except "a perforated spray pipe leading into the separator or grizzly from the lower end thereof," and the statement that the water is under disintegrating pressure." The examiners in chief held "that the only difference between the applicant's device and that of the publication is that he uses a perforated spray pipe leading into the rotary separator from the lower end, and discharging water under a disintegrating pressure," and, finding, further, that it was "old to introduce a perforated spraying pipe into an inclined rotary cylinder from the bottom," their conclusion was that there was no novelty in the device. In sustaining the patent, as the acting Commissioner did, on appeal to him, no reference was made to the location of the perforated spray pipe.

From what has been said in respect to the proceedings in the Patent Office, it cannot be doubted that the location of that pipe was inserted in the claim for the very purpose of securing its allowance. It was so understood by the applicant's attorney, as appears from the quotation from his argument above set out, and was so understood by the examiners, as also appears from the quotation from their decision that I have made. In *Sargent v. Hall Safe & Lock Company*, 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67, it is said:

"In patents for combinations of mechanism, limitations and provisos, imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed, against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers."

In *Walker on Patents*, § 187, it is said:

"Letters patent may be construed in the light of the contemporaneous intention of the inventor and of the Patent Office; and to this end recourse may be had to the files of the application papers, to see what changes were made in the description and claims when the application was pending in the Patent Office."

To the same effect is the case of *Donchian v. Kingston* (C. C.) 138 Fed. 890, where it is said, on page 895:

"It would be unjust to the public, and to all the parties involved in the construction of the patent, if a patentee were allowed to 'understandingly and deliberately' limit the scope of his patent while he is obtaining it, and were afterwards allowed to escape from his limitation when the patent is construed. He ought not to be heard to demand one rule of interpretation in the Patent

Office and another in the courts. The ordinary principles relating to the interpretation of a contract are the principles which prevail in construing a patent. The understanding of the parties to an agreement at the time it is made is always held to be of importance in the construction of such agreement. Courts often find aid in construing a contract by considering what the parties have said and what they have done when the contract was made."

I am of the opinion, as has been said, that each and all of the limiting clauses in claim 3 stand upon the same footing, and that none of them can be disregarded; and, inasmuch as the record shows that the appellant's device has no perforated spray pipe entering the grizzly at its lower end, it results that there was no infringement.

Accordingly the judgment should be reversed, and cause remanded to the court below, with directions to give judgment for the defendants.

GILBERT, Circuit Judge. We are unable to agree that there was error in the conclusion of the court below that the location of the spray pipe as entering the grizzly at the lower end thereof is in the nature of a mere description, tending to show the inventor's idea of the preferable position, and that thereby the claim is not limited to that precise description. In the original application for the patent, filed on July 6, 1897, the only reference in the claims to a water supply is for "a force pump for supplying water into the grizzly to wash and separate the material fed therein." In the amendment made on December 3, 1898, "a water supply pipe" is mentioned, and in the following February claim 3 was amended so as to include "a perforated spray pipe leading into the separator or grizzly from the lower end thereof." To support the application, with the amended claims, the applicant, by his attorney, made no claim of novelty or of advantage in the fact that the pipe entered from the lower end of the grizzly. No such claim appears anywhere in the proceedings in the Patent Office. On the other hand, the applicant's contention was that his apparatus was distinguished from the prior art, in which he said water had been supplied to the grizzly for the purpose of lubricating only, or for cleansing the mesh of the separator wall, and his attorney directed attention to the fact that the applicant by the use of his force pump—

"secures a sufficiently strong stream or streams from the spray pipe to thoroughly separate and disintegrate the material. This point, we believe, is primarily new with applicant, and is absolutely essential to the successful working of applicant's apparatus."

This contention was reiterated on the appeal to the Commissioner, and it was urged that the applicant had incorporated in his machine the one feature which makes it successful—the introduction of the perforated spray pipe into the rotary grizzly, so that the work of disintegrating is very completely carried on, and all the fine material allowed to pass through the grizzly directly upon the receiving tables. The testimony all indicates that it is immaterial at which end the spray pipe is led into the grizzly, and there is nothing in the file wrapper to show that it was upon the specific location of the spray pipe as entering

from the lower end of the grizzly that invention was found or the patent was finally allowed. The objections of the examiner and the examiners in chief, upon which the application was rejected, were that the invention had been anticipated. The location of the spray pipe was treated as immaterial, and in the ruling of the examiner of February 11, 1899, it was expressly declared to be immaterial, for the reason that it made no difference, in securing the water pressure at the desired point, whether the spray pipe entered from the lower or from the upper end; and in the final ruling of the Commissioner, reversing the examiners in chief and allowing the patent, there is no reference whatever to the fact that the spray pipe enters the lower end of the grizzly. The Commissioner considered the prior art and the patents which were said to anticipate the applicant's invention, and, solely upon the claim of the applicant that his apparatus was especially adapted to the recovery of float gold, distinguished it from the prior inventions, which the Commissioner said would require changes in position in order to produce the result sought by the applicant, and in view of the assertion of the applicant that his object in forcing the water into the grizzly under pressure was to disintegrate or break up the material brought up from the bed of the river, and to force the mud and metal through the meshes of the grizzly, and thence to the collecting tables located below the grizzly, allowed the patent. Said the Commissioner:

"While the invention may be slight, yet I think appellant's claim should be allowed, that he may have an opportunity to show, if his patent be attacked, the facts that have led the courts to sustain patents for minor inventions."

We are of the opinion, therefore, that if there was invention in the appellant's combination, and the patent was properly allowed on the considerations which moved the Commissioner in granting it, it is obvious that there is nothing in the file wrapper to limit the claim in controversy to the precise position of the spray pipe therein indicated, and that infringement is not avoided by leading the pipe into the grizzly from the upper end thereof.

All of the elements of claim 3 of the Postlethwaite patent, unless it be that which calls for collecting tables arranged below the grizzly, are old. This fact was pointed out by the Commissioner of Patents on the appeal from the board of examiners, and he allowed the claim and caused the patent to issue solely upon the feature which was brought to his attention, not by the specifications in the application for the patent, but by the argument of the applicant's counsel on the appeal, that water was forced into the grizzly, through the perforated spray pipe introduced therein, with disintegrating force, so as to break the lumps of clay, stones, and sticks, and allow "the metal to pass through the meshes of the grizzly onto the tables." In view of this feature of the applicant's combination, the contention was made by his counsel that he was the first—

"to devise a machine for successfully and profitably working that class of material known as flour or float gold, which material cannot be handled by the devices disclosed by the publications or references cited."

That the patentee was not the first to introduce, with disintegrating force, water through a perforated pipe conducted into a grizzly, is shown by the patent to Kirk, in which, as the Commissioner said:

"The specification states that the water issues into the screen with sufficient force to break up the lumps of clay and gold fed into the cylinder."

But none of the prior devices delivered the disintegrated mass within the grizzly through the meshes thereof directly onto collecting tables located below it. The Commissioner seemed to be particularly impressed by the argument of counsel that the Postlethwaite invention was adapted to saving fine or float gold, and that the machines referred to as anticipating it were not so adapted. On the trial in the court below, the appellee, to sustain its patent, introduced the testimony of one Smyth, an expert, who said that the perforated spray pipe had two functions—first, as a conduit for water; and, second, as a conveyor of energy—and that the water issuing in fine jets under force through the perforations of the pipe served to force the finer material from the grizzly onto separating tables below it. He admitted that if the grizzly were rotated, and the material supplied with water, the function of washing and dissolving would be added to that of the mere receiving function of the grizzly; but he testified that, owing to the peculiar action which streams of limited diameter or spray have upon material of different sizes, the gold values in the form of very fine particles scattered through the mass of materials are sifted out therefrom, and the character of separation which then takes place is radically different from that which would take place from the mere introduction of sufficient water into the grizzly to dissolve the mass thereof. To use his own words:

"In brief, the fine particles of sand and gold will tend to take, and will in effect take, a course along the stream lines, and will be thus driven with force onto the tables beneath the grizzly as described in the patent, * * * and by the fine particles I mean, of course, the sand, including the values, ahead of the larger particles; and this position of separation is maintained till the table has performed its functions of recovering by its riffles or quicksilver, if such is used, and has secured the values."

Again, he said:

"In consequence of the fine character of the gold, it will tend to remain in suspension, if simply flowed onto it without force. The advantage of delivering it with force under the conditions described in the patent is that the fine particles are driven down onto the table and become entangled in the fiber in the rough surface of the cocoanut matting; whereas, if they were not driven with force, they would tend to remain in suspension and be carried over the expanded metal or riffles, and so be lost."

In summarizing the elements of the patented combination, he said that they were (1) a grizzly; (2) a feeder to it; (3) a pump to introduce water under disintegrating pressure; (4) a perforated spray pipe from the pump into the grizzly; (5) "gold-collecting tables below the grizzly, so as to be within the influence of the energetic stream lines from the perforated pipe." The function so attributed by this expert witness to the action of jets of water in selecting out particles of fine gold from a mass of clay, mud, sand, and rocks impresses us

as fanciful, rather than as reasonable or scientific; for the testimony is not convincing that fine jets of water directed under pressure against the material in a grizzly can have the effect to sort out of the commingled mass fine or scale gold, which will float on water, and deliver it ahead of the earth, sand, or dissolved clay. On the contrary, it would seem apparent that the jets have performed their whole function when they have washed the sticks and stones and dissolved the softer material. If, however, such selective action is to be attributed to the fine jets of water, and they do indeed force the fine gold out of the mass and ahead of the other material, it is clearly essential to their successful operation that there be collecting tables to receive the impact of the fine particles of gold before the other material again becomes commingled with it. To do this it is necessary that there be collecting tables below the grizzly, as the same witness says, "so as to be within the influence of the energetic stream lines from the perforated pipe."

In the appellant's combination, as shown in the drawings thereof, there is beneath the grizzly a closed box, into which the material discharged from the grizzly is impounded and retained until released by raising slide gates, whereupon it flows upon the saving devices. There is no testimony in the record that the appellant has operated its machine without the intervention of this box between the grizzly and the saving tables. It is evident that if, in the operation of the appellant's device, the selective action so attributed to the appellee's invention is secured, and fine particles of gold are forced ahead of the other mass of material through its grizzly by the selective action of the jets of water, the advantage thereof is wholly lost by depositing and commingling the whole mass which emerges from the grizzly into a collecting box or hopper before it is conducted upon the riffles or the saving devices. If, in other words, there has been a selection of the metal by the force of the jets through the perforated pipe of the appellant's grizzly, it is nullified by the general commingling of the whole mass under the grizzly before it flows upon the saving devices. In view of this fact, it is clear that the appellant does not infringe the appellee's patent.

This is made more apparent by the further testimony of the same expert witness in reference to the operation of other patented combinations and their adaptability to dredger mining. Referring to the De Groat patent, in which is shown a perforated pipe within a rotating grizzly supplied with water by a pump, the witness found the difference between that and the Postlethwaite device in the fact that De Groat's grizzly consists of a series of three concentric screens, and he said that:

"The number of screens would, of course, interfere with and break up the lines or streams of force in a manner which the single screen would not."

So, in distinguishing the Lay patent, in which there were shown two rotary grizzlies, both provided with perforated spray pipes, the witness pointed out the difference between that and the patent in controversy by showing that in the former the amalgamating table, while it was below the grizzly, was not adjacent thereto and did not receive

the gold-bearing residuum directly, but through a hopper or pipe or runway.

As to the Kirk patent, in which there were two perforated cylinders, one revolving within the other, with a perforated pipe within the innermost, the witness alluded to the fact that no collecting tables were shown below the grizzly, and said that the outer cylinder would contain water to some depth, the presence of which water in constant agitation would break up and destroy any selective action of strong jets of water. If it be true, therefore, that the presence of screens surrounding a grizzly will destroy the selective action of the jets of water, it follows, of course, that the presence of a hopper or a collecting device into which the mass of the material which passes through the grizzly is collected and brought to rest before it is conducted onto collecting tables will have a like effect. In short, in the appellant's combination, it is plainly to be seen that the collecting tables are not so located as to be within the influence of the energetic stream line, and that the material is not delivered with force upon the tables. If there is invention in the Postlethwaite patent, such as to entitle the appellee to protection in the use thereof, it is extremely narrow, and its essence is the direct delivery of material with force upon the collecting tables. Everything else in the combination is clearly anticipated by the prior art and patents. This particular element is not found in the appellant's combination.

It follows that the decree must be reversed, and the cause remanded, with instructions to dismiss the bill.

HUNT, District Judge, concurs with GILBERT, Circuit Judge.

GENERAL SUBCONSTRUCTION CO. v. NETCHER et al.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,580.

PATENTS (§ 328*) — ANTICIPATION — PROCESS OF MAKING SUBSTRUCTURES OF BUILDINGS.

The Ewen patent, No. 718,441, for a process of making and placing in position substructures for buildings and the like, which consists, instead of making the entire excavation in the first place, "in forming a suitable trench where the exterior wall is to be erected and simultaneously placing in position a lining for said trench from the top downward as the work of forming the trench progresses, then placing braces between the two linings so as to transmit the exterior pressure to the core of earth within such proposed wall, and then erecting within the trench a wall of less thickness than the width of the trench" is for a mechanical process, and, reading the claims in connection with the specification, is not entitled to a construction which would include as a step of such process the use of flexible linings for the trench and their progressive and unequal adjustment by manipulating adjustable and extensible braces to meet inequalities or changing conditions in the adjacent material, and without such construction it was anticipated in the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

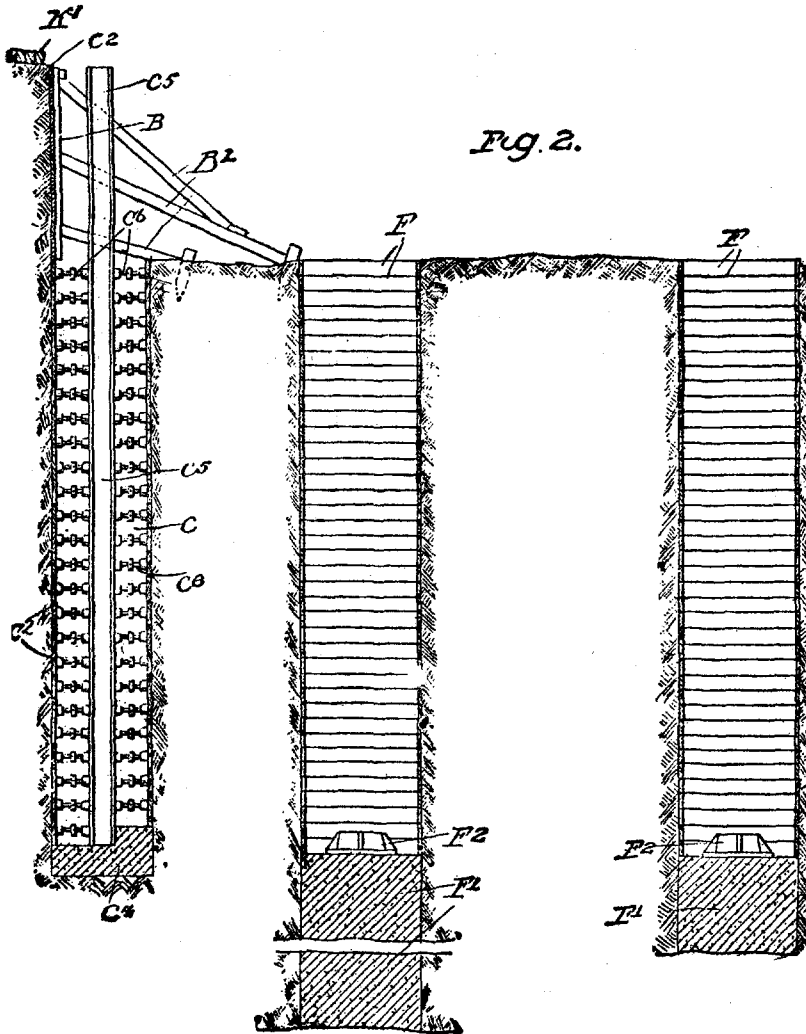
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the General Subconstruction Company against Mollie Netcher and others. From a decree (167 Fed. 549) dismissing the bill, complainant appeals. Affirmed.

Appellant failed in its suit to enjoin infringement of patent No. 718,441, January 13, —, to Ewen. (C. C.) 167 Fed. 549.

The description, the claims relied on, and Fig. 2 of the drawings are as follows:



"My invention relates to a process of making or producing the substructures of buildings and the like. In the ordinary methods of constructing buildings the excavation is first made to the desired depth. Some kind of temporary retaining structure is put in position about the place where the excavating is going on. Obviously this involves great difficulty and danger, and if the buildings surrounding the place to be excavated are heavy, or if the excavation is deep, injury and accident are certain to take place, and the cost and delay involved in proceeding in this manner are certain to be great. When the excavation is completed, the foundations are laid both for the retaining walls to hold up the surrounding property and for the columns and the like which are to receive the weight of the building to be erected above. The increase in value of real estate is such that there is a strong tendency to build, not only basements, but subbasements, to a depth of several 'stories,' so to speak. According to the old method, when the excavation has been completed, the foundations are laid, and then the structure begins to rise story by story from the bottom, until it reaches the street level. In other words, the process of erecting the substructure is exactly the same as the process of erecting the upper portion of the building. I use the earth which forms, so to speak, the 'core' within the retaining wall of the substructure, to support and sustain the various pressures as the work progresses. I have shown diagrammatically, as it were, the application of my process in the drawings, wherein—

"Figure 1 is a vertical section, showing the work of producing a portion of the substructure partially completed. Fig. 2 is a similar view, wherein the work has progressed farther. Fig. 3 is a similar view of the completed work. Fig. 4 is a horizontal section, showing the work in various stages of progress at different points. Fig. 5 is an enlarged detail section of the exterior retaining wall complete.

"Like parts are indicated by the same letters in all figures.

"A, A, are the beams and columns of the original building; A', the floor; A², the column foundations; A³, the curb wall (shown in dotted lines), and A⁵, the sidewalk. (Shown in dotted lines.)

"A⁶ is the basement-space.

"The first step which I take in applying my invention is to remove the curb wall and, perhaps, the sidewalk, though the latter may be shored up and held in position in any desired manner when its supporting curb wall is about to be removed. I now in lieu of such curb wall erect a support, B, which I hold in position by means of the struts, B', B'. The work to this point is of the usual type. I begin to dig a trench along the line where the exterior retaining wall is to be placed. This trench I indicate by the letter C. As the excavation of this trench proceeds, I place upon each side of its walls heavy retaining planks, C', C², and hold them in proper position by means of a series of jack-screws, C³. The retaining boards may be of any length, size, or shape. The number of jack-screws will be varied. When the first one has been placed in position, I make another excavation—say one foot deep—in said trench and place another set of boards with the proper number of jack-screws. Thus I continue the work until the trench is dug the desired depth. I now place in the bottom of this trench a footing, C⁴, preferably of concrete. It will be understood that as much or as little as may be convenient of such trench may be dug out at one time, or the entire trench all the way around the proposed building side may be simultaneously excavated. I now place permanent I-beams, C⁵, vertically in the trench, putting them along at proper intervals, as indicated in Fig. 4, and preferably between the jack-screws, C³. With each of these I-beams I associate a series of short jack-screws, C⁶—one on each side of the beam and bearing, respectively, against the boards, C', and C². As this work is carried forward, it is obvious that the jack-screws, C³, can be removed, as indicated in Fig. 4. The connection at the corner may be made in various ways. I have illustrated one form.

"D is the short board placed diagonally across the corner; D', a block on which rests the longer jack-screw D², the other end of which rests upon the cross-block, D³, in the exterior corner of the trench. Obviously up to this point the conditions of stress and pressure between the earth exterior to the proposed building and the core of earth on the site of the building are prac-

tically undisturbed, and whatever weight there was on the exterior—as, for example, the weight of some building—is properly sustained against the core of earth within the building side. The pressure is taken up by the jack-screws, and then by the shorter jack-screws, which act through the vertically arranged I-beams. The space between the I-beams is now filled with concrete, E, in any desired manner, so as to form an exterior retaining wall of steel and concrete, and this wall may surround the entire building site.

"I now proceed to make the excavation for the columns. This I do by boring through the earth and retaining the earth in any desired manner—as, for example, by means of the rings, F, F'. These rings may be associated with vertical stays or utilized in any manner to hold the earth against the pressure which may be applied to it from any source. This work is carried down to preferably the solid rock, or until at least a proper foundation is obtained. The bottom of this hole is then properly filled with concrete, F', and the column footing, F², is placed in position. A column, F³, is now inserted in this hole within the rings, and it is supported upon the concrete, F', and the footing, F², in proper manner. In cases where, as here illustrated, the substructure is two or three or more stories in depth, the column must be properly supported or stayed, because it is intended to or may carry a considerable load before the excavation is made, as hereinafter explained. This I do by throwing out from the column at suitable intervals supports against the inner walls of the rings. These supports may be short jack-screws, F⁴, F⁴, and they may be arranged as frequently as desired, but should be placed in proximity to the horizontal line of each proposed cross-beam, so as to give the column suitable strength against any tendency which it might develop to buckle under a load. Having proceeded thus far, it will be possible to begin the upper structure, and this is done by forming the first horizontal floor support. This is done by putting in position the I-beams, G, G', G², and the like, and suitably attaching them to the upper end of the exterior vertical I-beams, C⁵, and to the columns. Obviously prior to this action the columns and beams, A, floor, A', and footing, A², of the old building will have been removed. A little further excavating will uncover one or two of the upper boards, C', and the second layer of floor supports are now put in—for example, beams, G³, G⁴, G⁵—and they are properly attached to the respective columns and to the exterior retaining wall. These beams will form the floor of the basement. The earth for the subbasement may now be removed; the parts being sufficiently supported by the beams, columns, and retaining walls, which are bolted together. Of course in this process the upper boards, C', with the inner short jack-screws, C⁶, will be removed. This process of excavating will continue until the floor line of the subbasement is reached, when the supports for such subbasement floor will be placed in position. These beams are indicated by G⁶, G⁷, G⁸. They are in like manner bolted to the exterior walls and the columns. In the same manner the cellar excavation is made, and the floor of the cellar, G⁹, can then be placed in position. Thus there will be constructed within the retaining wall, but securely supporting the same by reason of the lateral beams, a steel structure, which will constitute the substructure of the building, and which will be entirely surrounded, if this be desired, by a retaining wall of steel and concrete. This retaining wall will be coated on the inside in any desired manner, by cement or the like, at J. Its exterior is also properly coated at J', and then, if desired, is further covered by layers of asphalt, J². The short jack-screws on that side are then removed one by one, and the space between the boards, C², and the retaining wall, is filled up with crushed stone, J³, or suitable filling material. Of course, the boards, C', and C², will be taken out during the process, and the struts, B', will be removed at the proper time. When the whole process has been completed, and the entire structure has been finished, it will be found that there is an exterior wall of vertical I-beams and concrete around the building site, and that it is securely attached to and forms part of the structure of the building. This retaining wall is held in position by the cross-beams and may present a vertical interior face, as indicated, if desired. It may thus be said that the exterior pressure on one wall is balanced, as it were, by the exterior pres-

sure on the opposite wall, by means of the beams, C³, C⁴, etc. The sidewalk, K, will be properly supported upon the beams, G, and the pavement, K', will be extended out over the vertical layer of crushed stone or filling material up to the sidewalk. In the lower part of this crushed stone or filling material is preferably placed the drain tile, K², which is connected with the intake, K³, and whence the water which may accumulate in such drain tile may be carried off in any desired manner. It is obvious that this substructure may be carried downward to any desired depth, and that it is a perfectly safe method, because the inner core of earth carries the same load or sustains the same pressure at all times during the process of the work, except as to certain minute areas which are exposed from time to time as the jack-screws are moved. This, however, is a negligible danger, and if there is any shifting of position the new jack-screw placed in position at or near the point from which the old jack-screw was removed can be operated to restore original conditions. These several jack-screws are used because they present adjustable features which permit the work to be adjusted as it progresses, and in the operation of a large building would be constantly attended and operated so as to keep the condition substantially uniform.

"As previously suggested, my process is used in gradually sinking or excavating a trench where the retaining wall is to be placed, and simultaneously supporting the earth to be held up by the retaining wall against the earth within the retaining wall by means of the removable and adjustable jacks. As the trench is deepened, the supporting devices are supplied, until the full depth of the excavation is reached. I now proceed to construct or erect the retaining wall, and its several members, while in process of being assembled, serve as intermediaries between the two masses of earth to transmit the pressure from the exterior earth to the interior earth or core, and thus I practically complete the retaining wall. Such a retaining wall would obviously be insufficient to permanently maintain itself against the exterior pressure when the earth core is removed. I therefore construct within the earth core those parts of my substructure which are to take the pressure from above, and while so doing I support the excavations for such column-like parts, so as to keep the core of earth intact, and I also support the columns within such excavations by lateral stays or struts, so as to prevent them from buckling if any considerable weight should be applied to them. I complete the internal framework of the structure by connecting its horizontal portions from column to column and from the columns to the retaining wall, and as this process continues I excavate the core to make room for such laterally projecting frame members.

"To point out the value and the use of my invention, it is only necessary to suggest that any kind of a retaining wall can be built according to my process. The wall may be thin, as I have indicated, and of uniform thickness, as I have indicated, and may be a dependent wall, as indicated—that is, a wall which is not self-supporting against external pressure. On the other hand, the wall may be of any desired thickness, and of variable thickness, and may be made of any desired materials, and may be a self-supporting retaining wall of the ordinary type or pattern, wide at the bottom and narrow at the top.

"It is obvious that, as previously suggested, the superstructure may be erected on the columns before the substructure is completed, and even, if desired, long before the excavation is completed—that is, the excavating can take place at any time and under any desired conditions. On the other hand, it is equally obvious that these retaining walls and the remainder of the substructure can be erected under a completed building. Thus by the use of my process it is entirely feasible to erect under a standing building which is to be preserved a new retaining wall and a new substructure, and this may be done at any time and without disturbing the occupants of the building above. One advantage in working under an old building in position or erecting the substructure first is that the excavating can then be more conveniently carried on, because of the protection furnished by the superstructure, and because of the ease with which the hoisting and other working apparatus can be attached to such superstructure. Of course, the wall may be wholly or partially completed at any time, and in some instances it may be desirable to have only

a portion of a retaining wall complete according to my system, though when the system is fully applied there should be a retaining wall entirely around the area above which the building is to be erected. I have used the terms 'inside' and 'outside' and other like terms in their ordinary senses, and I have used the word 'core' as applied to the earth within the retaining wall, and, whether the wall be completed or not, it refers to some or all of the earth which lies under the building to be erected, and which receives the external lateral pressure, as described. It will be observed that, as above suggested, this method provides for ample security and makes the work thoroughly safe from liability of injury to adjoining property. At the same time it is evident that there is a great saving of time, both because the work can be begun before the old building is destroyed, or its occupants disturbed, and because in a sense the builder can build in both directions from the floor level at the same time, and because, the retaining wall having been built before the old building is removed, it is possible to proceed at once upon the removal of the old building to the erection of the foundation for the vertical members which are to sustain the superstructure.

"I have shown the application of my process wherein the wall is placed midway between the two trench linings, though, of course, for certain purposes it might be placed at one side, and it might be placed against the inner lining, thus leaving room between the wall and the outer lining for the further carrying out of the process.

"In my description and claims I have necessarily recited the several steps in succession, although it will be understood, and for the most part is obvious, that the precise order of the several steps might be varied without departing from the spirit of my invention, and that some of the steps recited successively might be carried on simultaneously."

"1. The process of making and placing in position substructures for buildings and the like, which consists in forming a suitable trench where the exterior wall is to be erected, and simultaneously placing in position a lining for said trench, from the top downward, as the work of forming the trench progresses, then placing braces between the two linings, so as to transmit the exterior pressure to the core of earth within such proposed wall, and then erecting within the trench a wall of less thickness than the width of the trench.

"2. The process of making and placing in position substructures for buildings and the like, which consists in forming a suitable trench where the exterior wall is to be erected, and simultaneously placing in position a lining for said trench, from the top downward, as the work of forming the trench progresses, then placing braces between the two linings, so as to transmit the exterior pressure to the core of earth within such proposed wall, then erecting within the trench a wall of less thickness than the width of the trench, and, as the wall progresses, substituting for the braces between the two linings braces between one of the linings and the wall."

"10. The process of making and placing in position substructures for buildings and the like, which consists in forming a suitable trench where the exterior wall is to be erected, and simultaneously placing in position a lining for said trench, from the top downward, as the work of forming the trench progresses, then placing braces between the two linings, so as to transmit the exterior pressure to the core of earth within such proposed wall, then erecting within the trench a wall, then substituting for the core of earth within such proposed wall suitable permanent braces to take the exterior pressure transmitted through the wall."

Francis M. Parker and Donald M. Carter, for appellant.

Charles C. Linthicum, for appellees.

Before GROSSCUP and BAKER, Circuit Judges, and HUMPHREY, District Judge.

BAKER, Circuit Judge (after stating the facts as above). Appellant's brief says:

"The problem confronting Ewen was, first, rigidly to hold adjacent streets and heavy buildings on the treacherous soil of Chicago from falling bodily

into the deep hole or trench necessary for a deep substructure while the same was being excavated and the walls erected therein; and, second, simultaneously to manipulate the substances under such streets and buildings so as to produce a seal to minimize the escape of fluid or like substances therefrom, to protect the exposed side of the excavation from air-slacking, and to compress such substances sufficiently to accommodate for the change incident to the escape of fluids and solids, air-slacking, and the like."

The process that Ewen evolved to meet the problem consisted, according to appellant's statement, of—

"digging a continuous trench as distinguished from a series of holes; lining the sides of this trench with separately yielding flexible members; supporting the trench from such flexible yielding members on one side to those on the other by means of adjustable and extensible braces; working those braces continuously to expand and enlarge the trench as occasion requires to seal the surface of the trench, and compress and manipulate the substances under the streets and buildings; building the wall preferably of vertical steel members between the trench faces, when desirable; transferring the pressure to shorter jacks between the trench lining and the wall, if the wall be not built against the trench lining or be of steel members; and then ultimately transferring the load from the wall to the steel structure within the building."

The essential and distinguishing features of this process are said to be—

"the use of the relatively thin, floating, and flexible trench lining in connection with adjustable braces or jack-screws, and the constant operation of the latter to adjust the former so as to minimize, during the operation, the subsidence of the soil in the vicinity of the operation under the weight of, for example, heavy buildings which may surround the lot where the excavation for the new building is taking place."

Ewen's process, so the brief declares, recognized the fact that expert house-movers have a delicate sense of feeling, through jack-screws, which is lacking in other workmen; and the real invention, therefore, lay—

"in putting into the trench a gigantic, living, feeling, moving mechanism, consisting of flexible, floating lining sections, a multitude of extensible jacks, and men who have 'the feeling' not familiar to others, with instructions to climb up and down these jacks day and night to work them to maintain conditions of safety. Ewen created a kind of mechanical *Blareus*, who, in the depth of this pit at this place of awful danger, day and night spreads his hundred hands out over the face of the exposed wall, feels it, and, whenever occasion requires, manipulates it, pushing the flexible lining in here and there in spots, taking up the slack, expanding and enlarging the trench in an irregular manner, so as to make it respond to the changed character, nature, and quantity of the material as revealed here and there over the surface by the hands of this sentient machine."

Thereupon appellant asks that claim 1 (and claims 2 and 10 in like manner) be construed to read:

"1. The process of making and placing in position substructures for buildings and the like, which consists in forming a suitable trench (which may be of any desired length, regardless of the nature of the work, as distinguished from a pocket which must contract as the work increases) where the exterior wall is to be erected, and simultaneously placing in position a (floating and flexible) lining for said trench, from the top downward, as the work of forming the trench progresses, then placing braces (adjustable and extensible)

between the two linings (and manipulating them) so as (adjustably) to transmit the exterior pressure to the core of earth within such proposed wall, and then erecting within the trench a wall of less thickness than the width of the trench."

The patent is for a mechanical process—a series of prescribed steps to be taken by the user in order to reach a certain mechanical result. Claim 1, as written in the patent, directs the user to take four steps: (1) To form a suitable trench; (2) to place in position a lining for the trench, from the top downward, as the work of forming the trench progresses; (3) to place braces between the two linings, so as to transmit the exterior pressure to the core of earth within the proposed wall; and (4) to erect within the trench a wall of less thickness than the width of the trench. Comparing this with the proposed interpretation, it will be seen that additions have been made to the wording of the first, second, and third steps. Would a builder, on reading only the claim in the patent, understand that he would be violating instructions if he should use slabs of stone, or concrete, or inflexible wood, instead of "flexible" boards which could be bent and pushed into the wall of the trench here and there in spots? And likewise that he would be outside of the patent if between the linings he should put braces, which, when adjusted and extended, would passively support the external pressure against the core, and should fail to put in braces which could be farther extended so as actively to pack and compress the soil under adjacent structures? We think not. And we do not understand counsel for appellant to contend that the natural and obvious interpretation of the claim, apart from the drawings and description, is otherwise.

That the prior art fully anticipates the claim as it stands alone is a fact that needs no elaboration. It is clearly established by the record; and appellant's insistence upon the proposed interpretation, above stated, is of itself sufficient proof.

Appellant, of course, is entirely right in saying that the claim must be construed in the light of the specification, and that the patent should be treated with a view to save it, if possible. With these principles in mind, it remains to consider whether the specification furnishes such definitions of terms or such statements of the process that, taking the document as a whole and weighing everything within the four corners thereof, a fair basis can be found for adopting the proposed interpretation.

What was the prior art as disclosed in the patent? In other words, what was the applicant's statement of the problem he was undertaking to solve? Did he show to the Patent Office (what the diligence of appellees has brought into this record) that it was old to make substructures "for buildings and the like" by forming a suitable trench where the exterior wall is to be erected, and placing in position a lining for said trench from the top downward as the work of forming the trench progresses, then placing adjustable and extensible braces between the two linings, so as to transmit the exterior pressure to the core of earth within such proposed wall, and then erecting within the trench a wall of less thickness than the width of the trench? Did he

point out that this old process, as a process for building substructures, was all right as a general thing, but that coincidentally there was frequently another problem—that of sustaining adjoining structures, that he was dealing with the latter problem, and that his invention lay in packing and compressing the soil under such adjoining structures by means of constantly manipulating extensible braces against floating and flexible trench linings, so that underpinning and shoring would be done away with and the structure be sustained without direct contact? Not at all. On the contrary, the evils that he proposed to remedy were those that came from making the complete excavation before beginning to erect the walls. "According to the old method, when the excavation has been completed, the foundations are laid, and then the structure begins to rise story by story from the bottom until it reaches the street level." One evil was that the removal of all the earth from within the proposed wall in advance of the building operations required the "temporary retaining structure" to be supported by long shores extending to the bottom of the excavation, involving the danger and expense of shifting the shores and providing longer and longer ones as the work of making the excavation progressed. This evil was remedied by retaining the "core" as a backing against which the "temporary retaining structure" could be supported by comparatively short braces, easily and securely placed in position. The other evil was the delay and loss of time involved in waiting to begin the superstructure until the substructure should be completed. This was overcome also by the "core" method; that is, the naked columns were erected on the foundations in the bottom of the trenches and interior bores, and then the superstructure and the substructure could be built simultaneously, upward and downward from the street level, without waiting for the remainder of the excavating to be done. So, on examination of the entire document, with a view of gathering the applicant's disclosed idea of his invention, we conclude that the drawings and description accord with the obvious reading of claim 1 in showing that the applicant believed (mistakenly) that he was entitled to a monopoly of the "core" method.

The drawings reveal no indications of floating and flexible linings pushed irregularly into unequally plastic trench walls.

The quality of flexibility is nowhere stated in the description of the process.

The patent, being for a process, should contain a distinct statement of each step, or, at the least, an unambiguous inference of any step that is not distinctly stated. Claim 1 as written names four steps. Appellant's brief names five. The additional step (directing the user to manipulate the extensible braces constantly so as to push back and compress the substances under adjoining structures) is the step that is now relied on to distinguish the claim from the prior art. If it be contended that the step is to be inferred because jack-screws (adjustable and extensible braces) are pictured and named in the specification, then, in our judgment, it was as easy for Ewen to draw the inference from the prior art (McKiernan's patent, No. 145,116, December 2,

1873, for instance) as it would be for the skilled builder to draw it from the present patent. But such an inference is not the inevitable one, for adjustable and extensible braces have the capacity of being adjustably and extensibly used as passive supports as well as active pushers.

Practically the whole contention has its basis in the presence of part of one sentence in the specification:

"* * * and in the operation of a large building (the jack-screws) would be constantly attended and operated so as to keep the condition substantially uniform."

This means, we think, that if the process theretofore fully described in the specification was being used alongside a large building, the jack-screws would (if necessary) be constantly attended and operated "so as to keep the condition substantially uniform." But we do not deem it fair interpretation to take a single expression in a specification and from that determine the color of a claim. Rather should the single expression take its color from the specification as a whole. So viewed, we think it clear that Ewen said:

"I have remedied the old excavating troubles by my new 'core' process, which consists (claim 1) in forming a trench, placing linings in position as the trench goes down, putting braces between the two linings so as to transmit the exterior pressure to the core of earth within the proposed wall, and erecting within the trench a wall of less thickness than the width of the trench. This process can be employed whether the earth be wet or dry, or plastic or firm, and whether adjoining structures, if any, be small or large. If the tension of the braces as originally placed to transmit the exterior pressure to the core should change by reason of the nature of the soil or the amount of weight thereon, of course you should manipulate the braces so as to keep the condition substantially uniform. But such manipulation is no part of the invention that I have hereinabove described and shall presently claim. It relates merely to a contingency that may or may not arise during the practice of my invention, wherein the retention of the core of earth within the proposed wall is the essential and distinguishing feature."

As it is equally impermissible to read the proposed limitations into claims 2 and 10, we affirm the decree of the Circuit Court.

Affirmed.

GENERAL ELECTRIC CO. v. SANGAMO ELECTRIC CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909.)

No. 1,533.

1. PATENTS (§ 109*)—PROCEEDINGS ON APPLICATION—AMENDMENT OF CLAIMS.

An applicant for a patent, after a successful contest in interference proceedings, cannot, without changing his specification, broaden his claims to include something not shown nor claimed in his original application, but which is claimed in the interfering application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152; Dec. Dig. § 109.*]

Amendment of application, see note to Cleveland Foundry Co. v. Detroit Vapor Stove Co., 68 C. C. A. 239.]

2. PATENTS (§ 328*)—ANTICIPATION—ELECTRIC METER.

The Cox patent, No. 791,673, for an electric meter, claims 11, 12, 15, 16, 17, 18, 19, and 20, are void for anticipation.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

3. PATENTS (§ 16*)—IMPROVEMENTS—"INVENTION."

"Invention," in the nature of improvements, is the double mental act of discerning, in existing machines, processes, or articles, some deficiency, and pointing out the means of overcoming it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 15; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3749-3754.]

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Suit in equity by the General Electric Company against the Sangamo Electric Company. Decree for defendant, and complainant appeals. Affirmed.

The appeal is from a decree dismissing the bill in a suit for the infringement of letters patent No. 791,673, issued June 6, 1905, to Frank P. Cox, assignor to appellaut, for new and useful improvements in Electric Meters. The claims sued upon are as follows:

"11. In a meter, two current armature-paths, means for creating a magnetic field in operative relation with one of said paths and for creating a magnetic field of different strength in operative relation with the other of said paths, and means for varying the ratio of the currents flowing through said paths.

"12. In a meter, the combination of two armature-paths carrying torque-producing load-currents, and means for varying the ratio of the torques produced by the currents flowing through said paths."

"15. In a meter of the type described, the combination of two main-current armature-paths in multiple and in which the currents conspire to produce rotation, and means for adjusting the proportion of current flowing through said paths.

"16. In a meter of the type described, the combination of two main-current armature-paths in which the currents conspire to produce rotation, and means for adjusting the proportion of current flowing through said paths.

"17. In a mercury motor meter, the combination with a main armature-current path, of a second armature-current path producing a lesser torque, and means for changing the distribution of current in said paths to adjust the action of the meter.

"18. In an electric meter, a receptacle, a disk of conducting material rotatably mounted therein, a body of conducting fluid contained by the receptacle in contact with the disk, means for establishing electrical connections between the fluid and an outside conductor at two different points adjacent the pe-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

riphery of the disk, a second conductor also electrically connected to the conducting fluid, means for causing current to flow from one conductor to the other conductor through the conducting fluid and disk in two paths, one of said paths being between one of said points and said second conductor and the other of said paths being between the other of said points and the second conductor and means for causing magnetic lines of force to intersect said paths, the density of the lines intersecting one path being greater than the density of the lines intersecting the other of said paths.

"19. In an electric meter, a receptacle, a disk of conducting material rotatably mounted therein, a body of conducting fluid contained by the receptacle in contact with the disk, means for establishing electrical connections between the fluid and an outside conductor at two different points adjacent the periphery of the disk, a second conductor also electrically connected to the conducting fluid, means for causing current to flow from one conductor to the other through the conducting fluid and disk in two paths, one leading from each of said points, and means for creating magnetic lines of force in co-operative relation with said current-paths, the density of the lines in co-operative relation with one of said paths being greater than the density of the lines in co-operative relation with the other of said paths.

"20. In an electric meter, the combination with two armature-paths carrying the load-current and having different torque-producing effects, of a loop or branch conductor connecting said paths."

The original application did not contain these claims.

The invention is set forth in the following descriptive portion of the patent—the patent issuing, as to its descriptive portion, in exactly the language of the application:

"My invention relates to an electric meter in which a current-carrying movable member floats in some conducting fluid, such as liquid mercury. Heretofore in the construction of meters of this character the shaft connecting the movable element of the indicating mechanism has been extended above the surface of the fluid in which the movable element of the meter has been submerged. I have found that the construction and operation of meters of this character can be improved by entirely submerging both the movable element of the meter and its shaft. Among other advantages obtained by this construction the skin friction between the submerging fluid and the shaft where the shaft leaves the surface of the mercury, which would otherwise exist, is done away with. The meter may also be prepared more readily for shipment.

"With my improved meter the motion of the movable element of the meter is transmitted to the indicating mechanism by means of the magnetic attraction existing between a mass of magnetic material carried by the shaft and another mass of magnetic material outside of the submerging fluid connected to the indicating mechanism.

"My meter also possesses novel means for making its accuracy independent of temperature variations and for preventing the injurious amalgamation of the connecting leads.

"Other characteristic features possessed by my improved meter will be pointed out in the specification, in which I have hereinafter described in detail one embodiment of my invention.

"The accompanying drawing is a sectional elevation showing my improved meter.

"Referring to the drawing, a supporting-frame 1 of ordinary construction supports the operative mechanism of the meter. Upon the support 1 is mounted the casing 2, holding the conducting fluid 3. This fluid is preferably mercury. Bearings 4 and 5 are formed on the inside of a casing at the top and bottom, respectively. The movable element or member of the meter comprises a shaft 6, pivoted between these bearings and having mounted upon it a current-carrying member 7, which is a disk of conducting non-magnetic metal. Preferably the material out of which the disk is made is copper; but other metals may be used. In order to prevent an excessive upward pressure against the bearing 4 due to difference in the specific gravities of the mercury and the movable element, a weight 16, of some suitable material, such as tungsten, heavier than the submerging fluid, is carried by the shaft. This weight is also submerged.

"In the construction which I have shown in the drawing the casing 2 is formed in two sections 8 and 9, and the sections comprise central tubular portions 10 and 11, respectively, and circular substantially plane portions 12 and 13 at right angles thereto. In addition the lower section 9 is formed with a tubular portion 14 at the periphery of the plane portion 13. The plane portions 12 and 13 are separated by the tubular portion 14 to form a cylindrical space in which the disk 7 is placed. These portions are so proportioned that the distance separating the disk from the portions 12, 13, 14 is comparatively small. The sections are secured together by screws 15 to form a tight joint. The casing may be formed of suitable non-magnetic material, such as copper, brass, or aluminum.

"A shaft 17, extending in alinement with the shaft 6, is pivoted externally of the casing 2 at the upper end of the tubular portion 10 and is geared to the indicating mechanism of the meter. The shaft 17 carries a U-shaped piece of magnetic metal 18. The legs 19 of the U-shaped portion straddle the tubular portion 10 of the casing 2. The shaft 6 carries a piece of magnetic material 20, which extends transversely to the shaft to near the inner surface of the inclosing casing. One or both of the members 18 and 20 are permanently magnetized. Hence any rotation of the shaft 6 will cause a corresponding rotation of the shaft 17.

"The meter is shown in the drawing as employed to measure the current flowing in the line 21. One side of this line is connected to the binding-post 22, carried by the tubular portion 11 of the casing. The other side of the line is connected to binding-posts 23 and 24 through branch conductors 25 and 26, respectively. The binding-posts 23 and 24 are carried by the tubular portion 24 of the casing and are shown as diametrically opposed to one another. Within the meter the load current flow is in two paths, one between the binding-posts 22 and 23 and the other between the binding-posts 22 and 24, and the current in each path is carried partly by the casing, partly by the mercury, and partly by the disk 7.

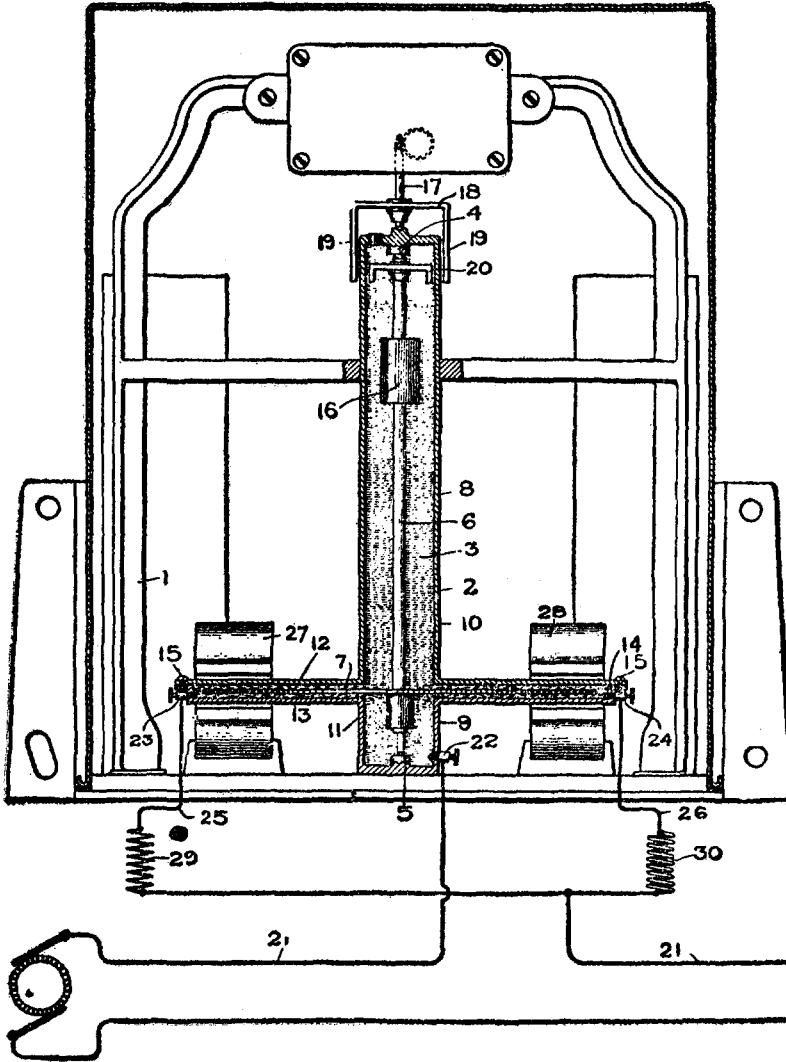
"Magnets 27 and 28 are placed with their poles upon opposite sides of the portion of the casing which incloses the disk 7 in such position that the fields of force produced by them traverse the space through which the current flowing between the posts 22 and 23 and 22 and 24, respectively, passes. The reaction between the flux or lines of magnetic force and the currents in the two paths produce torques tending to turn the disk, as is well understood, and the magnets 27 and 28 have their poles so placed that they both act upon the current carried by the disk to produce a rotation of the disk in the same direction.

"The principal retarding force acting upon the disk 7, tending to restrain its rotation, is that due to the eddy-currents caused in the disk by its movement through the fields of the magnets 27 and 28. The effect of increasing the temperature of the disk from any cause is to increase its electrical resistance. This cuts down the eddy-currents, and so reduces the retarding forces, tending to restrain the rotation of the disk. As a result of this there is a tendency for a meter of this character to run too fast when the disk is heated in any manner. The heating of the meter may arise from the current carried or from the location in which it is placed. To avoid this error, I have made the magnet 28 stronger than the magnet 27, and I have placed resistances 29 and 30 in the lines 25 and 26, respectively. The resistance 30 is made out of some material, such as iron wire, which has a high temperature coefficient. The resistance 29 may be made out of some material, such as German silver, having a very low coefficient of resistance, or it may be made out of some material, such as graphite, which has a negative temperature coefficient. As a result of this construction a change of temperature disturbs the distribution of the current between the lines 25 and 26. When the temperature of the system is raised, more of the current passes through the resistance 29 and less through the resistance 30. The current passing through the resistance 29 passes through the field produced by the weaker magnet 27. The result of this change in division or the current therefore is to reduce the torque tending to rotate the disk 7. A decrease in temperature will of course produce an opposite change in the current distribution and torque. If the resistances 29 and 30 and the strengths of the magnets 27 and 28 are correctly proportioned, a meter may be obtained in which the changed retarding effect,

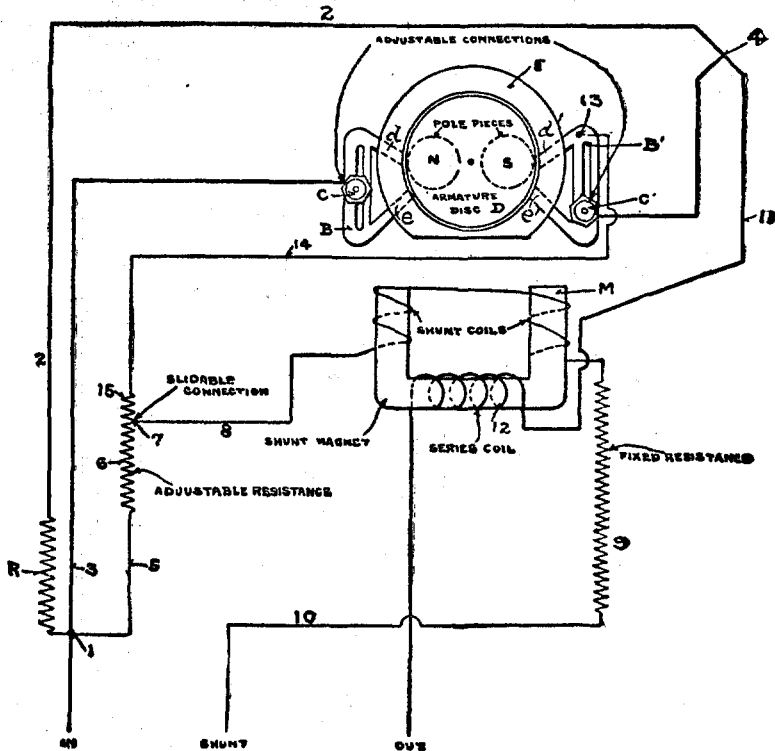
due to a change in the temperature of the disk 7 and resistance 29 and 30, will be exactly met by a corresponding change in turning torque.

"The binding-posts 22, 23, and 24 are preferably made of iron or other non-amalgamating metal, as when made of the ordinary material, such as copper or brass, or when the wires 21, 25 and 26 are directly connected to the mercury, there is a tendency for the mercury to amalgamate with the wires, rendering them brittle and destroying their tensile strength. This difficulty is avoided by making the binding-posts of iron. Instead of making the binding-posts of iron I may place a section of iron or other non-amalgamating metal at some other point in the meter-circuit."

The drawing to which the descriptive portion refers, follows:



The appellee manufactured and sold electric meters embodying the features shown, described and claimed in letters patent No. 816,922, granted to Robert O. Lanphier, April 3, 1906, a diagram of which follows:



In the brief for appellant, the construction and combination embodied in the two patents are described as follows:

"Comparing now this construction and combination of elements with the construction and combination described in the patent in suit for adjusting the speed of an electric meter, it will be seen that they are substantially the same in all essential particulars, differing only in minor details, and that they are both designed to and in fact accomplish the same result in the same manner. In each case the current is divided so as to flow across the armature in two paths.

"In each case one of these paths leads across a weaker magnetic field than the other.

"In each case there are provided means for varying the ratio of the current flow through said paths so that the total turning effect or torque may be made to produce a speed which will correspond with the rate at which the current flows through the meter.

"In each case the means for varying the ratio of the currents depends upon the ratio of the resistance of the two paths which are provided for the currents, the only difference being that in the patent in suit automatic means are described for varying the ratio of these resistances while in defendant's meter the ratio is varied by manual adjustment."

The further facts are stated in the opinion.

Thomas B. Kerr and Parker W. Page, for appellant,
Charles E. Pickard, for appellee.

Before GROSSCUP and BAKER, Circuit Judges, and ANDERSON, District Judge.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion.

Cox, in his original application, described as one element of his invention, the automatic means for varying the ratio of the resistances, and limited his claims to a combination of which such automatic means was an element. The application of Lanphier was for a combination that embodied the varying of the ratio of resistance by manual adjustment. The two applications having come into interference and priority having been awarded to Cox upon the features set forth in his application, additional claims were filed and allowed, which, if valid, extended the patent so as to include the variation of resistances by manual adjustment as well as by automatic means. These are the claims here sued upon.

Invention, in the nature of improvements, is the double mental act of discerning, in existing machines or processes or articles, some deficiency, and pointing out the means of overcoming it. A reading of Cox's original application discloses either that Cox did not discern that there was a deficiency in existing meters other than that produced by the variation of the plate by temperature; or, discerning that the plate was varied by causes other than temperature, he did not know the means of overcoming them; or (and this probably is the fact), discerning that the disk was varied by causes other than temperature, and knowing the means of overcoming them, he did not regard either the discernment of the deficiency or the perception of the means as something that was new; for, had he regarded such discernment of the deficiency, and such perception of means, as something new, he would have embodied them in his application and original claims. True, the fact that Cox may have mistakenly regarded these things as not new, and therefore not the subject of a patent, would not have prevented him from correcting his mistake if done in apt time, by amending his application and broadening his claims. But this must be done by a showing in his application that the conception was his, and that it was new and novel; and this he did not do. His application, either before or after the new claims were inserted, discloses no conception of the deficiency to which the Lanphier patent was directed, antedating Lanphier; and, of course, such conception after the reading of Lanphier's application would be anticipated by the Lanphier disclosures; so that there is nothing in the record before us showing that Cox anticipated Lanphier in either one of the two acts constituting invention, so far as either of those acts relate to the variation of the disk produced by causes other than temperature. The claims of the Cox patent to this extent, therefore, are invalid.

The decree of the Circuit Court is affirmed.

CROWN CORK & SEAL CO. v. STANDARD BREWERY.

SAME v. GREENBERGER.

(Circuit Court, N. D. Illinois, E. D. December 16, 1909.)

Nos. 28,804-28,807.

1. COURTS (§ 322*)—JURISDICTION OF FEDERAL COURTS—PLEADINGS.

In a suit in equity in a federal court, an allegation of complainant's citizenship in the bill, though denied in the answer, stands admitted, unless a plea to the jurisdiction is filed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 882; Dec. Dig. § 322.*]

2. PATENTS (§ 256*)—LICENSES—RESTRICTION ON USE OF PATENTED ARTICLE—INFRINGEMENT.

A contract by the user of a patented machine, under which he obtained such machine from the owner of the patent, that it shall be used only in connection with an article also made and sold by such owner, is valid and binding upon such user, even though he buys and pays for the machine and is vested with the legal title thereto, and its use by him in violation of the restriction imposed by such contract is an infringement of the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 256.*]

3. PATENTS (§ 259*)—INFRINGEMENT—CONTRIBUTORY INFRINGEMENT.

The furnishing to the user of a patented machine, under a license binding it to use such machine only with an article purchased from the owner of the patent, of similar articles made in imitation of those of the patentee, and adapted for use and used only on such machines, constitutes contributory infringement.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 259.*]

Contributory infringement of patents, see notes to Edison Electric L. Co. v. Peninsular Light, P. & H. Co., 43 C. C. A. 485; Aeolian Co. v. Harry H. Jueig Co., 86 C. C. A. 206.]

4. PATENTS (§ 328*)—INVENTION—BOTTLE STOPPING DEVICE.

The Painter patent, No. 468,258, for a bottle sealing device, was not anticipated, and covers a patentable combination; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suits by the Crown Cork & Seal Company against the Standard Brewery and Max Greenberger, respectively. Decrees for complainant in each case.

Edwin G. Baetjer, James Q. Rice, and Robert H. Parkinson, for complainant.

William O. Belt (S. L. Moody and Louis C. Raegener, of counsel), for defendants.

SANBORN, District Judge. These are four suits for infringement, commenced in September, 1907, of patents 468,258, February, 2, 1892, for the crown cork or seal bottle sealing device in common use, and three patents on machines for putting on the crown cork, Nos. 473,776, April 26, 1892, 638,354, December 5, 1899, and 643,973, February 20, 1900. Complainant alleges that the Standard Brewery is its licensee of machines covered by the three machine patents, and the only infringement charged is the use of infringing corks, not made by com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plainant, but by defendant Greenberger and others, in violation of licenses taken by it. As to Greenberger, he is charged with infringement of the crown cork, and a decree for injunction, damages, and profits is demanded against him; and he is also charged with contributory infringement of the machine patents by furnishing infringing corks to the Standard Brewery, and a like decree demanded. As to the Standard Brewery, it is charged with infringing the crown cork patent by the use and sale of infringing corks, and it is also charged with a violation of its license by the same use and sale. In the machine patent cases the Standard Brewery is charged with infringement by the use of the machines in connection with infringing crowns, and Greenberger is charged with contributory infringement of the machine patents by causing to be used thereon infringing crowns, adapted to no other use, and by furnishing such crowns to complainant's licensees of machines, who were restricted by their licenses to the use of complainant's crowns, thus procuring the application of the crowns for purposes not authorized by the licenses; that the only market for the infringing crowns is among complainant's licensees of the machines, there being no other apparatus on the market or in use, practically adapted to the use of the crowns; and that this condition is well known to Greenberger, who furnished the crowns without any distinguishing marks, purposely to cause them to be confounded with complainant's crowns.

It will be seen that the suits are brought, not only in the exclusive federal jurisdiction for the infringement of the patents, but also in the concurrent state and federal jurisdiction for the breach of the alleged licenses; but diverse citizenship and a sufficient sum in controversy are alleged in each case. Complainant is alleged to be a Maryland corporation, and a citizen of that state, and defendants citizens of Illinois, and residents of the district where suit was brought, and the matter in dispute is averred to be \$50,000 in each case. The citizenship of defendants and amount in dispute are admitted by failure to deny, but the answers deny the citizenship of complainant. However, there was no plea to the jurisdiction, so that in equity it stands admitted, whatever the rule may be at law. *Butchers' & Drovers' Stockyards Co. v. Louisville & Nashville R. Co.*, 67 Fed. 35, 14 C. C. A. 290, 31 U. S. App. 252; *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579. Complainant, therefore, may have relief in both aspects of the case, if otherwise entitled to it.

The case is thus stated by counsel for complainant:

"The bills show, and the proofs establish, that complainant has, from prior to the date of each of the several patents, been the sole owner of the inventions secured thereby, as assignee of the applications therefor and all rights to be secured thereunder; that prior to the issue of the first-mentioned patent it established a plant for manufacturing machines embodying the invention of such patent, and for manufacturing sealing devices adapted to use therewith, and ever since has carried on such manufacture on an extensive scale, including the invention of each of the subsequent above-mentioned patents from about the issue thereof, supplying such machines and the patented sealing devices adapted to use therewith throughout the United States in very large and constantly increasing quantities; that it is and has been prepared to supply the entire market therefor throughout the United States; that it has uniformly, throughout the terms of these patents, retained to itself the exclusive

right to manufacture and supply these inventions, and has supplied these patented machines uniformly under a license authorizing their use only for the purpose of applying sealing devices furnished by it, the licensee in all cases stipulating, as a condition of obtaining such machine, to use it for such purpose only; that these patented machines, thus licensed, have been put into very extensive use throughout this country, and are the only means in practical use, or upon the market, for applying sealing devices of the character referred to; that the validity of these patents has been acquiesced in, and complainant's rights thereunder respected, except for the recent infringements herein complained of, and some others of like character, also of recent date; that the defendant the Standard Brewery is a licensee of complainant under the patents in suit, its license expressly limiting its rights thereunder to the use of these machines in applying sealing devices obtained from complainant; that this defendant obtained and is now holding these patented machines subject to such license, wherein it expressly agreed, as a condition of being furnished with these machines, not to use them for any other purpose; that shortly before the suit was begun it procured, in violation of its license, from unauthorized persons, imitations of complainant's sealing devices, made in such exact counterfeit thereof as to be applied with these machines and to pass for complainant's; that, when complainant discovered that it was using these patented machines for purposes not authorized by the license, it promptly notified it, calling its attention to the restriction of the license, and requesting it to desist; that it refused so to do, and continued thereafter to procure from unauthorized persons sealing devices made in exact imitation of complainant's, and to use said patented machines in applying the same in violation of its license, setting complainant's rights under its patents at defiance, while retaining the possession and unlawful use of the patented machines; that the defendant Max Greenberger, carrying on business under the assumed name 'Spanish-American Cork Company,' is, with full knowledge of the premises, supplying imitation sealing devices to complainant's licensees holding its above-mentioned patented machines under the aforesaid restricted license, these sealing devices being exact counterfeits of complainant's, and being made and sold for the express purpose of, and with exact adaptation for, application to the complainant's above-mentioned patented machines licensed as aforesaid, being solely furnished to bottlers holding such patented machines under such licenses and using no other means of applying such seals; that the only market for such sealing devices is for the purpose of being applied to bottles by complainant's above-mentioned patented machines held under the above-mentioned restricted licenses; that they have been supplied and offered by this defendant for use on such licensed machines and so used with full knowledge of the fact that such machines were subject to this restricted license, and could not be used on sealing devices furnished by others than complainant, except in violation of the license under which they were held; that this defendant was fully advised by complainant, both by publications in trade journals and by special notices served upon him, of the fact that those to whom he was furnishing these imitation sealing devices were using them, and could only use them, in violation of their aforesaid licenses, that all machines in use for applying such sealing devices were covered by complainant's aforesaid patents, and licensed only for use with complainant's seals, and that by furnishing such seals to complainant's licensees he was contributing to and inducing the violation of said licenses and the infringement of said patents; that he was requested to abstain therefrom, but refused so to do, and has continued to supply such imitation sealing devices to complainant's licensees for use on complainant's patented machines held under said restricted licenses, intending that they should be so used, and well knowing that they were being and would be so used."

The system adopted and used by complainant is thus described by counsel for complainant:

"When complainant started, early in 1892, to introduce what it has called the 'Crown Cork System of Bottling,' a system which has completely revolutionized the art of bottling, it adopted at the outset the plan which it has uniformly pursued since of furnishing the patented machines for applying the

new sealing devices only upon condition that they be used solely upon sealing devices obtained from it. At the same time it agreed to furnish these sealing devices at a price not to exceed 35 cents a gross, which was afterwards reduced to 25 cents a gross. This made the cost of sealing a fraction of what it had been by inferior methods before. These machines, and sealing devices so formed that their corrugations and the seal inclosed in the crown, became active factors co-operating with the patented mechanism in effecting the closure, and were correlative elements in working out this new system of stoppering bottles. There had been so many unsuccessful schemes for replacing the long cork, and their failure had involved so much loss to bottlers who had experimented with them, that every new project of this kind was looked upon with distrust. Bottlers hesitated to invest largely in machinery, where such investment would be sunk if the system proved unsatisfactory or was used only to a limited extent. It was necessary to have special adaptation of sealing devices to the engaging mechanism of the machine, and of the machine to the sealing devices, and to have each throughout as perfectly as possible adapted to each other, in order to secure the best results. To safeguard itself and the public in these respects, and to apportion as far as possible the tribute it was to receive from the invention to the extent of use to which the invention was put, complainant adopted this license plan, by which the patented machines, instead of being sold outright, were furnished only to licensees, whose use of them was restricted by the terms of their license to the application of sealing devices furnished by complainant. As each sealing device represented a use of the machine for stoppering a bottle, this method of obtaining compensation for the franchise gave an exact registration of the extent to which the machine was actually used, and made the compensation proportionate to such use. Those who made but little use of the machine paid but little tribute. If the bottlers found it to their interest to use the machine extensively, the tribute paid increased proportionately. In any event it was a small fraction of the saving made by the use of the machine. This was in every respect the fairest method of securing revenue from the franchise, since the revenue paid was only a percentage of the saving actually made by the user of the franchise, stopped when the use stopped, and began again when the use was resumed. If the bottling establishment was idle, or if it dispensed with the use of these machines, it was relieved from tribute. If it was using the machines constantly, and getting continued benefit from the invention, it was paying for the franchise a small fraction of the saving effected by it.

"This also afforded some check upon secret infringement. Bottling is often done in out of the way places, where it can easily be concealed, and this sealing device can be made in cellars and garrets, and so delivered as to escape notice. It would therefore be easy to make and operate infringing machines without detection, and to supply them with counterfeits of complainant's caps, also made in concealment, without being detected, if it were not for the record complainant is thus able to keep of the authorized use of both machines and sealing devices. While it may be possible for licensees to occasionally work in with the genuine sealing devices some counterfeits without detection, and may be possible for a few counterfeit seals to be made in cellars and garrets, and furnished in small quantities to such licensees without exposure of those who furnish them, the fact that complainant has a record of the machines furnished and the number of sealing devices supplied to each licensee, and that the amount of bottling done by each licensee is approximately obtainable, makes it much more difficult for either infringer to long conceal the infringement. This is well illustrated in the present records, where each infringer owed detection to the double check thus furnished.

"It is shown without contradiction that, from the inception of its business in the early part of 1892, complainant has uniformly refused to sell the patented machines outright, or to authorize any one else to build or deal in them, or to use them, except upon condition that their use should be confined to sealing devices furnished by it; that it has in every possible way advised the trade of this fact, and uniformly adhered to this rule; that every person authorized to use a machine embracing the invention of either of the patents in suit has obtained that authority only through and in accordance with a license so limit-

ing its use, and upon the condition that the licensee expressly bound himself or itself to obtain all its sealing devices from complainant and to use the machine only for the application of sealing devices so obtained, complainant at the same time obligating itself not to charge beyond a stipulated price for such sealing devices; that the defendant the Standard Brewery obtained its machines, which it has been using for the infringing purposes, under such a license, and that the defendant Max Greenberger has been furnishing counterfeit sealing devices of other manufacture (whose manufacture he refuses to disclose) to complainant's licensees, adapted and intended for use on these licensed machines, with full knowledge that they were held under licenses which excluded their use for applying any sealing devices except those furnished by complainant."

The license contract issued by complainant to the Standard Brewery under its system is as follows:

"To one Automatic Crown Machine, \$1,800. With license to use the same in Chicago, Ill., upon the conditions named herein. The conditions upon which this license is granted, and the machine furnished, are that Standard Brewing Company has agreed to operate the crown cork system, as covered by patents No. 468,226, 468,258, 468,259, dated February 2, 1892, No. 473,776, dated April 26, 1892, No. 638,354, dated December 5, 1899, and No. 643,973, dated February 20, 1900, and that the machine furnished by the company shall only be used in connection with crown corks made and sold by the Crown Cork & Seal Company, which the said company agrees to supply at a price not exceeding 25 cents per gross for plain crown corks. It is further agreed that no claims for consequential damages shall be allowed by the Crown Cork & Seal Company."

The defenses advanced by the Standard Brewery are that defendant is not a licensee, but that its machines bought from complainant are generally licensed by the fact of sale, and that the use of machines is limited only by collateral contract, and only in the case of its automatic machine; that the defense of the patent is open to the Standard Brewery, that the patent is invalid, and that the use of infringing crowns was enforced upon it by the conduct of complainant itself, so induced and procured by the complainant, and so justified by necessity and the equities of the case. The Standard Brewery further alleges that its machines were purchased outright, and that their use with crowns of other manufacture than complainant's was at most in violation of a contract between the parties, whose violation gave no right to procedure under the patent law, but at most gave the complainant the right to demand damages for its violation.

In the Crown Cork Case it is also alleged that the patent in suit expired February 2, 1909, before the proofs were closed, and that no injunction should therefore be granted against either of the defendants. It is admitted that the crowns are unquestionably substantial duplicates of those manufactured by complainant and completely embody the inventions of every claim in suit. The only defense, therefore, advanced by Greenberger, is the invalidity of the patent and claims sued upon. In the machine cases the defenses of the Standard Brewery are substantially the same as in the other cases above stated. Greenberger's defenses are that the machines were not licensed; that the crowns are a common article of merchandise, no more especially adapted for use on complainant's machines than others; that Greenberger is not shown to have any knowledge that his crowns were intended for use on complainant's machine, or knowledge of any license touching such

machines, if there be any such license; that Greenberger is not shown to have threatened or intended that his crowns were to be used in violation of any license; therefore that no accounting can be ordered as against him, and no cause for injunction is shown.

The last license so called, dated April 17, 1907, was applied for by Mr. Francis J. Dewes, president of the Standard Brewery, after trying to obtain a waiver of the restrictive features of the license, by signing a written application stating that defendant applies for a license to operate the crown cork system and crown machine, covered by the patents in suit, requesting the furnishing of a machine for \$1,800, and stating that upon granting the license the system and machine should be used by the company only in connection with crown corks purchased from complainant, at not to exceed 25 cents per gross. The bill above referred to, dated May 11, 1907, was thereupon sent, stating the same conditions as the application. It is true that the two earlier applications and bills were not signed by the president of the company, but by managers of the bottling department. However, the testimony clearly shows that the Standard Brewery well understood the complainant's system, and had on its files receipted bills expressly stating the terms on which only it was authorized to use the machines. After the license of 1907 was issued, signed by the president, and after his attention was called to the matter in the clearest possible way, he signed and verified the answer of the corporation, stating that it was not advised, except by the bill, whether complainant had sold, leased, or furnished the machines upon special conditions or restriction. The bill required an answer to each of its paragraphs, waiving verification, and was entitled to be met by a truthful answer. Mr. Dewes states on oath that he has read the answer, and knows its contents; so it can hardly be called "lawyer's bluff." It was open to defendant to state the fact that the machines were sold with conditions as to restricted use, but that such conditions were inconsistent with the sale of the machines, and ineffectual and void, thus admitting the facts, and leaving the law to be determined. In addition to this, the circumstances of the infringement show that defendant placed no reliance on its defense of no license. It had agreed not to use infringing corks, and the last machine was sold with this understanding; but nevertheless their use was continued. When called to his attention, Mr. Dewes gave assurance that it would stop; but further supplies of the infringing corks were soon after obtained and used. The infringing crowns so used were in exact imitation of the patented devices, without any distinguishing mark. Mr. Dewes states that he wanted to have the spurious crowns gradually worked in, while also using complainant's corks. It should be stated that it is claimed that this infringing use was because the defendant brewery could not obtain suitable corks from the complainant, and used the others in self-defense; but this would not justify infringement, nor did the brewery ever squarely take this position. It ordered a new machine, after using the crowns for many years under the same conditions, and then at once proceeded to use upon it the infringing crowns.

It is clear, therefore, that the Standard Brewery cannot fairly plead

ignorance of the terms of the so-called licenses, however much it may desire to do so. But their legal effect is still to be determined. By the terms of the application the brewery asks for license to operate the machine, to be used in Chicago, and requests that a machine be forwarded at \$1,800. It obligates itself that the system and machine shall only be used and operated by it in connection with the crown corks purchased from complainant. From these terms it is argued by counsel for defendants that the intention to pass the full legal title to the machine is clear, and this may be conceded without examination, so far as the power of transfer is concerned. A sale by the licensee would probably be good; but that is not the question. Merely because the legal title to the machine passed to the vendee or licensee, are the restrictive conditions as to use thereby avoided and made inoperative so long as the vendee retains the machine? Why should a result so opposite to the one contracted for be thus produced? Why cannot the conditions as to use be given effect, so long as the person who agreed to them, and obtained the machine on faith of them, is before the court? Infringement would not be a cause of forfeiture, it is true. The title would still remain in the Standard Brewery. But why should that circumstance excuse all infringement? The contract, it may be assumed, without decision, passes the full title, but restricts the actual user, so long as the Standard Brewery keeps and uses the machine, to the putting on of corks furnished by complainant. If this restricted use is within the power of the vendor and purchaser to agree on, then any other use is an infringement. The sale of books with a condition of resale only at a certain price, as in *Bobbs-Merrill Co. v. Straus* (C. C.) 139 Fed. 155, 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766, and 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, is quite different, because the sole value of books to a bookseller is the power of resale. Here almost the sole value is in the use, and it is quite difficult to see why a restricted one may not be effectively bargained for.

"Restrictions in respect to methods or purposes of use * * * may properly accompany any sale of a patented article." Walker on Patents, § 301.

"Any conditions, not in their very nature illegal, * * * imposed by the patentee and agreed to by the licensee, for the right to manufacture, or use, or sell the article, will be upheld by the courts." *Bement v. National Harrow Co.*, *infra*.

The clear tendency of recent cases is to permit any lawful restriction of use, and some even go so far as to seemingly allow unlawful use, if not clearly beyond the patent domain. *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 47 U. S. App. 146, 35 L. R. A. 728; *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Cortelyou v. Lowe*, 111 Fed. 1005, 49 C. C. A. 671; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58; *Brodrick Copygraph Co. v. Mayhew* (C. C.) 131 Fed. 92; *Rupp & Wittgenfeld Co. v. Elliott*, 131 Fed. 730, 65 C. C. A. 544; *Aeolian Co. v. Juelg Co.*, 155 Fed. 119, 86 C. C. A. 205; *Crown Cork & Seal Company v. Brooklyn Bottle Stopper Company* (C. C.) 172 Fed. 225; *Crown Cork & Seal Company v. Standard Crown Cork Co.*, Cir. Ct. S. D. N. Y., May, 1908, and *Same v. Central Bottling Co.*, Cir. Ct. S. D. N. Y., August, 1908,

cases in which no opinion was filed. And in several cases in this circuit the dominion of the patentee over the patented article has been pushed so far as to justify restrictions on sales in territory not effectively, but only theoretically, covered by the patent monopoly, or by methods which the patentee alone could not use, and which were made possible only by a combination of licensees. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358, 83 C. C. A. 336; *Indiana Mfg. Co. v. J. I. Case Threshing Machine Co.*, 154 Fed. 365, 83 C. C. A. 343; *The Fair v. Dover Mfg. Co.*, 166 Fed. 117, 92 C. C. A. 43. It is true that the whole question is still regarded by the Supreme Court as an open one (*Bobbs-Merrill Case*); but it has often approved the *Button-Fastener Case*, and until the court adopts a contrary rule the one here indicated should be followed, especially as it is the settled law of this circuit. *A. B. Dick Co. v. Milwaukee Office Specialty Co.* (C. C.) 168 Fed. 930. The direct question was certified to the Supreme Court March 16, 1909, by the Circuit Court of Appeals of the Second Circuit, in *A. B. Dick Co. v. Henry*. See *Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co.* (C. C.) 172 Fed. 225. The *Cotton Tie Case*, 106 U. S. 89, 1 Sup. Ct. 52, 27 L. Ed. 79, which seems on first reading to fully support restricted licenses to use patented articles, has been held not to be an authority on that point. *Bobbs-Merrill Co. v. Straus*, *supra*, in the Supreme Court.

The legal effect of a transfer of a machine by the licensee, made to a purchaser with full notice of the restriction, is fully discussed in *Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co.*, *supra*, and the restriction held binding on such a purchaser. If the crown cork patent is valid (to be presently considered), the Standard Brewery has no valid defense on any ground connected with the form of the license contracts.

As to contributory infringement by Greenberger, the case is equally clear. With full knowledge of the situation in respect to complainant's licensed machines, he furnished crowns exactly adapted to be used on them, so like the genuine article that experts cannot distinguish between them. He writes letters urging complainant's licensees to disregard their obligations under the license contracts, and he arranged in advance for the defense of the licensees if infringement suits were brought by complainant. The crowns themselves are adapted to no purpose but use on the patented machines, except as to a few machines which have in some way escaped from the patent monopoly. Infringement by him is clearly established by the proofs, and the record shows his liability in the machine patent cases, even if the crown patent were invalid, because he knowingly contributes to infringement of a patent by aiding a use beyond the limits of the license made by the patentee. See the cases in the Southern district of New York, where the crown patent is treated as invalid, cited *supra*.

As to the validity of the crown cork patent, the Standard Brewery cannot raise the question in any of the four cases because it is a licensee, and Greenberger can raise it only in case No. 28,807, brought against him directly upon the crown cork patent; the bill in that case making no charge of contributory infringement. This patent has been

litigated with varying success. In 1903 it was sustained by Judge Morris in a case brought by Baltimore Crown Cork & Seal Co. v. Imperial Bottle Cap & Machine Co. (C. C.) 123 Fed. 669. In the next case the patent was likewise sustained (Crown Cork & Seal Co. v. Standard Stopper Co. [C. C.] 136 Fed. 199, Townsend, C. J.), but the decree was reversed by a divided court in the Circuit Court of Appeals for the Second Circuit; Judges Wallace and Lacombe for reversal, and Judge Coxe dissenting (Standard Stopper Co. v. Crown Cork & Seal Co., 136 Fed. 841, 69 C. C. A. 200). Meanwhile the Imperial Bottle Cap Case was appealed, and the Circuit Court of Appeals for the Fourth Circuit, having before it Judge Wallace's opinion in the Standard Stopper Case, held unanimously, by Judges Goff, Pritchard, and Brawley, that the patent was valid. Crown Cork & Seal Co. v. Imperial Bottle Cap & Machine Co., 139 Fed. 312, 71 C. C. A. 442. Six judges have sustained all the claims before them, including Nos. 1 and 3 here in question, and two judges have held the first three claims invalid. All the judges who have passed on claims 4 and 5 here in question have sustained the patent as to those claims.

This brings the discussion down to the question of the validity of the first, third, fourth, and fifth claims of the Painter patent in the Greenberger suit on the crown patent only. The fourth claim follows:

"4. The combination, with a bottle having a head provided with an exterior annular shoulder, of a sealing disk and a metallic sealing cap which encircles the disk and has its pendent flange corrugated substantially throughout its depth, and also having its inner corrugations bent to conform with or to the annular shoulder on the head of the bottle, substantially as described."

The other claims limit or broaden the fourth by specifying a metallic sealing cap, a sealing disk at the mouth of the bottle (excluding a plug), a flange corrugated in the bent portion, a continuous and unbroken pendent flange corrugated throughout its depth in lines parallel with the axis of the cap, a corrugated flange bent into locking contact with the shoulder, and a projected edge on the flange to engage a bottle opener. There is no claim to a combination of the capping machine with the crown cork, so as to bring any of these actions within the decision of Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805.

The sealing cap, composed of a thin cork disk covered and surrounded with a metal cap corrugated at its bottom flange, used on pop and beer bottles, is so familiar as to require no further description. Its efficiency is sufficiently established by the fact that 2,500,000,000 of them were put out by complainant in 1907. At the hearing a view of the latest machine was had, in actual operation. Eighty-two sealing caps per minute were being applied.

The main conception of the Painter patent is the bending of the corrugated pendent flange into a firm locking contact with the bottle shoulder under heavy elastic vertical pressure, and also the practical possibility of doing this on each individual bottle of slightly varying size and shape of mouth and shoulder. An important feature requiring the inventive faculty was the conception that by applying vertical pressure, resulting in lateral or inward pressure, by a conical hood

(shown in the contemporaneous machine patent) to the outer corrugations the inner ones could be made to lock firmly and tightly under these varying shoulders, so as to form, when the lip of the bottle is by the same vertical pressure caused to be firmly embedded in the sealing disk, a gas—and water-tight seal cap. And this cap, being of hard metal, can be easily thrown off by the ordinary bottle opener pulling on the corrugated edge with the bottle top as a fulcrum. The practical features referred to cannot be found in the prior art. Corrugations are found to improve exterior appearance, like frills or tucks upon an article of dress, as in the Whittlesey patent. Numerous hooks, fingers, etc., for catching or springing under the shoulder of a can or bottle, may also be found, as in many of the fruit can and other patents, notably in those of Elizabeth Taylor, 325,877, September 8, 1885, Geo. P. Goulding, 406,832, July 9, 1889, and J. Bellerjeau, 76,149, March 31, 1863. But these devices tend to destroy any close locking contact, rather than to secure it.

Corrugations also appear in the Goulding device, in order to stiffen the hooks which hold the cork in place, while those in complainant's patent are for the opposite purpose of being bent out of place. In the French and English patents of 1877 and 1878, called the Berthoud-Wedge patents, there was a most ingenious and long-continued attempt to spin a sealing cap upon the bottle neck, so as to make a hermetical seal. This was accomplished, but the difficulty was to get it off. The most effective means apparently was to smash the bottle head. In direct proportion to the success of the spinning process was the failure of the opening process. Both the on and off processes were slow and laborious. This discovery never was, nor could be, in the same class as the Painter inventions, being as far apart as the daguerreotype and the moving picture. Something similar might be said of all the inventions of the prior art. It is difficult to compare them with the Painter process. They all accomplished mainly old results in a new way, and their various features are constantly reappearing in numerous forms of boxes, tins, cans, and packages. The French-English invention, showing by far the greatest inventive genius, was perhaps the greatest failure of all, in a practical way.

On the other hand, the Painter cap, in direct and almost unbelievable disproportion to its extreme simplicity, at once achieved wonderful success. It is a very small affair. Its constituents are quite inconspicuous. It often happens that an inventor fails to grasp the really important and far-reaching feature of his device or process, and becomes bewildered in matters of detail. An example of this is the Ewen subconstruction patent (*General Subconstruction Co. v. Netcher*, 174 Fed. 236), where the inventor just failed to seize, and consequently to claim, an enormously important principle of the method of safely digging deep basements in the skyscraper districts of large cities. Not so Painter. His is one of the most minute and carefully thought out specifications to be found. Nothing escaped him. Its very completeness prejudices it, and led Judge Wallace to criticize and condemn it as verbose, and as designed to pre-empt the whole earth. But the inventor was dealing with small, simple, and inconspic-

uous things, which he realized were to have far-reaching results. It was necessary to explain fully. No one can misunderstand what he is seeking to accomplish, for it is all set down with great elaboration and wealth of detail. Perhaps it might be improved on, as a model of English style; but it certainly has unity, mass, coherence, force, and clearness, with some over-elaboration. It is much safer for a patent solicitor to err on this side than the other.

All the claims are for a combination. "A combination is a union of elements which may be partly old and partly new, or wholly old or wholly new. But, whether new or old, the combination is a means—an invention—distinct from them. They, if new, may be inventions, and the proper subjects of patents, or they may be covered by claims in the same patent with the combination. * * * They are not identical with the combination. * * * Certainly one element is not the combination, nor, in any proper sense, can it be regarded as a substantive part of the invention represented by the combination, and it can make no difference whether the element was always free or becomes free by the expiration of a prior patent, foreign or domestic. In making a combination, an inventor has the whole field of mechanics to draw from." *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 301, 318, 29 Sup. Ct. 495, 500, 53 L. Ed. 805, 813.

The doctrine here announced has always been the law, but was disregarded in the opinion of Judge Wallace in *Standard Stopper Co. v. Crown Cork & Seal Co.*, *supra*. Here was a new and enormously important result, produced by new and improved means. Old elements are combined to create a thing absolutely new and greatly successful. If the law requires the court to deny its patentability, few combinations could logically be saved. It should be sustained, in my view, without the slightest hesitation.

Complainant is entitled to a decree as prayed in each of the four cases.

LORAIN STEEL CO. v. UNION RY. CO.

(Circuit Court, S. D. New York. November 29, 1909.)

STREET RAILROADS (§ 58*)—OPERATION BY RECEIVERS—TRAFFIC CONTRACTS WITH OTHER COMPANIES.

Authority granted to the receivers of a New York City street railway company to enter into a proposed traffic arrangement with a suburban company, by which each company is given the right to run its cars over a portion of the line of the other to carry passengers without change and for a single fare to points on such lines.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 135; Dec. Dig. § 58.*]

In Equity. Suit by the Lorain Steel Company against the Union Railway Company. Application by receivers for authority to make traffic arrangement. Authority granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Inde.es

Stetson, Jennings & Russell, for Lorain Steel Co.
Evarts, Choate & Sherman, for receiver of Union Ry. Co.
Francis K. Pendleton, for City of New York.
Bowers & Sands, for Union Ry. Co.

LACOMBE, Circuit Judge. This is an application by the receivers of the Union Railway Company for authority to enter into a proposed traffic agreement with the Westchester Electric Company. The object of the agreement is to improve the conditions of traffic between the Bronx and Westchester as they were left after severance of old relations between the two companies. A narrative of the occurrences which have led to this agreement will be found in prior decisions of this court. 165 Fed. 494; 165 Fed. 500.

The bondholders have been notified of this application, and make no objection. All other parties in interest unite in the application. Under the proposed agreement Westchester Electric Railway cars will carry their passengers to the termini, in the Bronx, of subway and elevated railroads without collecting an extra fare from them, and Union Railway cars will carry their passengers to the Mt. Vernon station of the New York, New Haven & Hartford Railroad in the city of Mt. Vernon without collecting an extra fare. The only opposition is made by the city of New York, which insists that each road should operate only to the boundary line between Bronx borough and Mt. Vernon, where passengers going further would have to change cars and pay an extra fare.

It is suggested that the proposed arrangement will be more beneficial to the residents of Westchester than to those who live in the Bronx; indeed, it is asserted that "no benefits will result to residents of the Bronx." This assertion is not persuasive. There will certainly be many residents of the Bronx who may wish to go to the city of Mt. Vernon, and it will undoubtedly benefit them to be carried there without change of cars for a single fare. Apprehension is expressed that as a result of the new arrangement the Union Railway will run fewer cars on the White Plains road, because many passengers will be carried on that road to the termini of elevated and subway by Westchester Railway cars. But, if too few cars are run by the Union Railway—which is not likely, since it will be competing with the Westchester road and can take fares only from the passengers carried by itself—the Public Service Commission will undoubtedly require more to be put on.

It is further suggested that the Union Railway, in order to handle the traffic in the Bronx, should "be as sound financially as possible." It is certainly hoped that the future operator of this road, whether it be a reorganized or a new company, will be sound enough financially to render proper service; but it is not thought that the making of this proposed traffic agreement will operate to impair its solvency.

Finally, it is suggested that the city's percentage of gross receipts may be less, because some passengers, who otherwise might be carried on Union Railway cars, will be carried on Westchester cars. Even if this were so, the advantages which will accrue to the traveling public by the new arrangement are of much more importance than the

trifling shrinkage in the amount realized to the city by the 3 per cent. of gross receipts of the Union Railway. Moreover, as pointed out in the brief, the city contends that under the law it will be entitled to a similar percentage on passengers carried by the Westchester cars when running within the city limits. If this contention be sound, there will be no shrinkage.

The agreement will terminate an unfortunate situation apparently to the satisfaction of all parties interested, and it is a matter of congratulation that the communities in Westchester and the representatives of the two roads have been able by mutual concessions to improve traffic conditions at the point in question.

The application is granted, the agreement approved, and receiver authorized to make the proposed arrangement for giving security to the city of Mt. Vernon and the village of Pelham Manor.

COPPOCK v. BALTIMORE & O. R. CO.

(Circuit Court, E. D. Pennsylvania. November 24, 1900.)

No. 554.

1. RAILROADS (§ 350*)—ACTION FOR INJURY AT CROSSING—QUESTIONS FOR JURY—NEGLIGENCE.

In an action to recover for the death of a person killed by a train at a railroad crossing, where it was shown that the train was running at a high speed, which affected the question whether the crossing signals were given in due time before the crossing was reached, defendant's negligence was a question for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1161; Dec. Dig. § 350.*]

2. RAILROADS (§ 350*)—ACTION FOR INJURY AT CROSSING—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

The question of the contributory negligence of a traveler on a highway killed at a railroad crossing *held* one for the jury, under the evidence and the state law that he must be presumed to have done his duty and stopped, looked, and listened.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1169-1176; Dec. Dig. § 350.*]

At Law. Action by Emma V. Coppock against the Baltimore & Ohio Railroad Company. On motions by defendant for a new trial and for judgment notwithstanding the verdict. Motions denied.

A. D. MacDade, for plaintiff.

Kingsley Montgomery and Wm. B. Linn, for defendant.

J. B. McPHERSON, District Judge. I have no doubt that sufficient evidence was offered in this case to establish the negligence of the defendant. The train that killed the decedent was running very rapidly and this fact had an important bearing upon the question whether the whistle was sounded at a proper distance from the road crossing, so as to give an approaching vehicle timely notice that a train was coming. The testimony upon this point was not in harmony, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its total effect was for the jury. So, also, the testimony concerning the ringing of the electric bell at the crossing was in conflict, and could not be passed upon by the court.

The difficult question is whether the decedent is chargeable with contributory negligence, and upon this point it is not too much to say that, if the plaintiff's case had not been helped out by the presumption that her husband performed his duty, and stopped, looked, and listened before he attempted to cross the track, the weight of the evidence would have been so much against her that the verdict could only be regarded as perverse. But since such a presumption undoubtedly exists under the Pennsylvania law, and I am therefore bound to take it into account, I find myself unable to assent to the proposition, either that the case should have been withdrawn from the jury, or that the defendant is now entitled to judgment notwithstanding the verdict.

The defendant's motion for judgment on the reserved point is refused, and to this refusal an exception is sealed. The motion for a new trial is also overruled, and it is ordered that judgment for the plaintiff be entered upon the verdict.

THE M. E. LUCKENBACH.

(District Court, E. D. Virginia. November 3, 1909.)

1. SEAMEN (§ 11*)—MEDICAL TREATMENT—DUTY OF MASTER.

It is the duty of the master of a vessel to look out for the care and health of his crew, and when a seaman is ill, with no physician on board, to procure for him intelligent medical treatment as soon as possible, and, if necessary, send him to a hospital, whether he requests it or not.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. § 39; Dec. Dig. § 11.*]

Rights and liabilities of seamen as to medical treatment, see note to *The Cuzco*, 83 C. C. A. 186.]

2. SEAMEN (§ 11*)—MEDICAL TREATMENT—LIABILITY OF VESSEL FOR FAILURE TO FURNISH.

Libelant shipped as fireman on a tug, on a voyage from Newport News to Colon, Panama. Seven days out from Colon, libelant became ill, and on reaching Colon a man was employed in his place; but no medical attendance was procured for him, and after remaining in Colon and Port Antonio for four days the tug proceeded to New York, where libelant's substitute passed the quarantine officer in his stead, and three days later libelant was discharged and sent to a hospital, where he remained for nearly two months, ill with typhoid fever. While on board his quarters were not changed, and he was given very little care. *Held*, that the master was derelict in his duty, and the vessel was liable to libelant for the suffering and damage resulting from his neglect.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. § 40; Dec. Dig. § 11.*]

3. DAMAGES (§ 130*)—PERSONAL INJURIES—FAILURE OF VESSEL TO FURNISH MEDICAL TREATMENT TO SEAMEN.

Where a seaman, who became ill with a fever on a voyage, was not given medical attention or sent to a hospital for some three weeks, although both could have been done, and after that lay in a hospital for nearly two months, and at the time of trial, eight months afterward, had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not recovered his health, nor been able to work, an award of \$1,200 damages was given against the vessel.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 130.*]

4. EVIDENCE (§ 75*)—PRESUMPTIONS—FAILURE TO CALL WITNESSES.

Where it was within the power of a party to produce evidence on controverted issues, the failure to produce it warrants a presumption against such party on those issues.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 95-100; Dec. Dig. § 75.*]

In admiralty. Suit by Axel Falkenstrom against the steam tug M. E. Luckenbach. Decree for libellant.

James F. Duncan and N. T. Green, for libellant.

Peter S. Carter and Harry S. McCoy, for respondent.

WADDILL, District Judge. The libellant seeks to recover damages against the respondent, the steam tug M. E. Luckenbach, for the failure of her master to provide proper medical treatment and attendance for him while in the service of the tug as a fireman; he having fallen sick during the voyage from Newport News, Va., to Colon, Panama. In many respects the facts are undisputed, namely, that the libellant was employed as a fireman on the tug; that on the voyage from Newport News to Colon, which lasted some twelve days, he was taken with fever some seven days out from Colon; that the boat stopped at Colon two days, and then proceeded to Port Antonio, consuming one day en route, and remained there one day; then proceeded from Port Antonio to New York, consuming seven days; and, after remaining in New York some three days, the libellant was on the 8th day of September, 1908, sent to the Norwegian Hospital, where he remained ill with fever until the 30th of October following.

Libellant insists that he was not given proper treatment nor furnished suitable food and medicine during the entire voyage; that at Colon, though sick, he was required to stand in line for inspection by the quarantine officials and health officer at the port; that at that port a man was employed to take his place, who did thenceforth discharge his duties, and he was confined practically to his bunk in the forecabin, though he would sometimes come out on deck; that the examination by the quarantine officials at Port Antonio was very perfunctory, the officers not coming on board, and at New York his condition was such that he was not able to appear in line for inspection; that he was hid in his room, and that the man who had taken his place was passed off in his stead. Libellant further insists that a doctor should have been called to see him at Colon, and that he should, if necessary, have been sent to hospital there; that he asked to be so sent, but the captain informed him that it was an undesirable place to leave him, and that he would be taken to Newport News, to which libellant made no objection. The captain denies that libellant made any request for a doctor, or to be sent to the hospital, and says that he offered to take him to a hospital, and libellant asked not to be sent.

It is admitted that no doctor was sent for, either at Colon or at Port

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

Antonio, nor was libelant sent to a hospital at either place, and he was taken from Port Antonio to New York, where no doctor was called to see him, and at the end of three days, and after his discharge from the ship, he was sent to the hospital. There is some dispute as to the extent of libelant's illness, as there is, also, about the circumstances under which the man was taken on at Colon, and whether he was actually employed to take libelant's place, and appeared in line before the quarantine officials at New York for the libelant. A careful review, however, of the testimony, convinces the court that it was manifest from the first that the libelant was ill, and that he required, at the earliest practicable moment after he was taken sick, the attention of a physician, as it is, also, that his disability for work, certainly at Colon, was recognized by the master, and that the man was taken on board and employed in his place and stead, because of his illness, and thereafter performed the duties of fireman in place of the libelant, and passed the quarantine officer in New York in substitution for the libelant. Whether the libelant may have been actually secreted in his bunk or not, certain it is the fact of his illness was not called to the attention of the health officer, nor his presence on board the tug made known.

The ship's master seems to have proceeded largely, as does his counsel in the examination of witnesses and in argument, upon the theory that it was the duty of the libelant either to have gone personally to see, or to have asked for, a doctor, or requested to be sent to a hospital; and the ship's master apparently acted upon the idea, in which he may doubtless have been sincere at first, that the man was only slightly sick. But in all this he manifestly failed to recognize his obligation in the premises. It was the duty of the master to look out for the care and health of the libelant, whether he made a request of him so to do or not; and from this testimony it is clear that libelant's condition, lasting during a period of seven days before reaching Colon, was such as to require of the master, in the exercise of that degree of care, consideration, and responsibility which his position imposed upon him, to see what was the character of the fever from which libelant was suffering, and was something as to which he could not hesitate, vacillate, speculate, or take chances upon. Ships of the size of the Luckenbach having no physician on board, the crew have to look to the master for proper care and medical treatment in matters affecting their health; and, when taken ill upon a voyage, the laws of humanity require that the master, having sick members of his crew in charge, should treat them with the utmost care, kindness, and consideration consistent with the circumstances in which he is placed, and see that intelligent medical assistance is furnished as soon as possible. In cases of emergency, voyages have to be deviated from; and there would certainly seem to be no good excuse why, upon arrival at a port with a sick man on board, medical advice should not be had at once, and the seaman sent to a hospital, if necessary. In this case, confessedly, this was not done, either at Colon or Port Antonio, nor at New York until the ship had been in port three days, and then libelant was discharged, taken from the ship on a stretcher, carried to the hospital, where he

was confined for a period of nearly two months, and treated while there, as shown by the doctor's certificate discharging him, for typhoid fever, and as libelant understands, as shown by his testimony, for typhoid pneumonia.

Not only is the negligence of the master apparent in his failure to secure proper medical aid and hospital treatment at the earliest practicable moment, but it is quite apparent from the entire testimony that but little attention was shown by the master to the libelant during his entire illness on shipboard. His quarters were not changed; his meals were not looked after; indeed, save furnishing him on several occasions with some whisky and quinine, nothing whatever was apparently done looking either to his health or comfort, such as his condition required, although part of the time the vessel was in a very hot and unhealthy climate; and the failure to send for a doctor after the arrival of the vessel at the port of New York, for a period of three days, in his then condition, was inexcusable, if not inhuman. The law applicable to this case has recently been fully considered by the Supreme Court of the United States, the Circuit Court of Appeals for this circuit, and by this court, and hence mere citations of the authorities will be sufficient. *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; *The Iriquois*, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955; *Id.* (D. C.) 113 Fed. 964; *Id.*, 118 Fed. 1003, 55 C. C. A. 497; *The Svaeland* (D. C.) 132 Fed. 932; *Id.*, 136 Fed. 109, 69 C. C. A. 97.

Considering the amount of the compensation which should be allowed the libelant, the case is one of rather more than usual difficulty, in that at the threshold we are confronted with the uncertainties arising from cause and effect incident to the frailties of the human body resulting from long illness. The libelant was discharged from the hospital on the 30th day of October, 1908. He was examined as a witness in this case on the 24th day of June, 1909, and testified that he had not been able to work since leaving the hospital; that he had been sick, weak, unable to get his strength back, and also suffered from swelling of his legs. A physician was examined at the trial, who testified that he first saw libelant about the middle of November, 1908, when he found both legs very badly swollen, and the man thoroughly unable to work, and in an anæmic condition, and that he examined him on the day of the trial, and still found him weak and his limbs swollen. Libelant's appearance upon the stand also indicated his enfeebled condition.

Counsel for respondent contended that it did not follow that libelant's condition arose from the master's neglect hereinbefore recited; that libelant had been the subject of a serious attack of malarial fever some four months before entering the ship's employ; and that his ailments while on shipboard, and at the hospital, might have been malarial, and not typhoid, fever. Suffice it to say that it was easily within the power of the respondent to have cleared up all these matters, if it desired to do so. The quarantine officer at New York could readily have been called to explain the circumstances connected with allowing the ship to pass quarantine with the libelant on board in his then condition, as could the doctor at the hospital, whose certificate was furnished,

showing the existence of typhoid fever, and, indeed, the man who took libelant's place while sick at Colon could have explained whether he passed quarantine at New York as and for the libelant; none of which things were done, and the usual presumptions from such failure should arise. Kirby v. Tallmadge, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; The Georgetown (D. C.) 135 Fed. 854, 859; The Luckenbach (D. C.) 144 Fed. 980.

Upon the whole case, the court thinks that it is fully justified in holding that the libelant's ailment was that of typhoid fever, and that it is fairly inferable that his condition of ill health arose therefrom, and as the result of the respondent's failure to properly discharge its duty to him, while in its service as a seaman, and that an award of \$1,200, would be reasonable to the libelant for the suffering that he has been subjected to and the damages he has sustained.

TRUST CO. OF AMERICA v. NORFOLK & S. RY. CO.

(Circuit Court, E. D. Virginia. October 13, 1909.)

1. RAILROADS (§ 153*)—BONDS—RIGHTS OF HOLDERS AS BETWEEN THEMSELVES.

Bonds secured by a railroad mortgage are of peculiar character, and the rights of no holder thereof can be considered, without having proper regard for the rights of other holders and others in interest who are to be affected.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 467-471; Dec. Dig. § 153.*]

2. RAILROADS (§ 186*)—SUITS TO FORECLOSE MORTGAGES—INTERVENTION BY BONDHOLDER.

In a suit by the trustee to foreclose a railroad mortgage, a bondholder is not entitled, as matter of right, to intervene and be made a party defendant, and leave to do so should not be granted, where the case has so far progressed that the trustee is entitled to a decree of foreclosure and sale, which is desired by a large majority of the bondholders, who have perfected arrangements for a reorganization, and the effect would be to delay such sale and prolong a receivership of the property, and where the rights of the applicant can be fully protected in the proceeds of the property.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 616; Dec. Dig. § 186.*]

In Equity. Suit by the Trust Company of America against the Norfolk & Southern Railway Company to foreclose mortgage. On petition of Fergus Reid to be allowed to intervene as an individual bondholder. Leave denied.

The purpose of this litigation is to foreclose a certain consolidated mortgage, executed by the Norfolk & Southern Railway Company to the Trust Company of America, trustee, upon its railroad property and franchises, and is before the court at this time upon the application of the trust company for a decree of sale in advance of the ascertainment of liens upon the property, and upon the petition of Fergus Reid to be allowed to intervene as an individual bondholder for the purpose, among other things, of opposing the motion for sale, and to present sundry questions which it is claimed by him the trustee failed to take cognizance of, and as to which it is incompetent to act in its fiduciary capacity.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

T. L. Chadbourne, Jr., and Frederick Hoff, for complainant.
Edward R. Baird, Jr., for defendant Norfolk & S. Ry. Co.
Williams & Tunstall, for petitioner.

WADDILL, District Judge (after stating the facts as above). On Wednesday, the 29th day of September, 1909, two days before the time set to hear the application for sale of the property of the defendant railway, the petitioner, Reid, appeared and presented his petition, setting forth charges, briefly, that certain members of the syndicate having for its object the purchase of the securities of the defendant railway at the time of and with a view of its formation, collusively with the company and the Trust Company of America caused the indebtedness of the company to be augmented largely in excess of its real indebtedness; and said petitioner prayed, among other things, that the court, through its receivers or otherwise, would thoroughly investigate the circumstances respecting the formation of the syndicate, and take the necessary steps to collect, in behalf of the defendant company, from the persons profiting by this wrong, the amount appearing to be due by them respectively; and petitioner specially asked that the court would delay any proposed action looking to the sale of the property under its control until this inquiry could be had, and this proceeding taken. The Trust Company of America, trustee, and the defendant company, appeared by counsel and resisted the filing of this petition and granting of the motion to delay the sale; and after full hearing thereon, and mature consideration thereof, the court, on the 1st day of October, allowed the petition to be filed, and gave leave to the defendant company, to the receivers, or to any person in interest, to answer or make such other defense thereto as they might be advised on or before the 3d day of November, 1909. The court further decided that the sale should not be postponed on account of any of the questions presented by the petition, but that the property should be at once sold, reserving from the operation of the sale, for the benefit of the defendant company and its creditors, any estate to be recovered as the result of the investigation growing out of the said petition.

Counsel for the petitioner thereupon asked that the sale might be postponed until the coming in of the answers to his petition, which the court took under advisement until Saturday, the 9th day of October, 1909, that being the time set for the entry of the decree of sale and hearing formal objection thereto, but with the intimation on its part that, as then advised, it did not think that the sale should be delayed pending the making of defense as aforesaid to the petition. On the 9th day of October, 1909, petitioner presented what purports to be his amended and supplemental petition, asking leave to intervene as an individual bondholder, to be made a party defendant, and in which petition he assails the bond issue under the mortgage sought to be foreclosed, and asks that the sale be delayed pending consideration of the questions presented by his said amended and supplemental petition. The Trust Company of America, trustee, and the defendant railway company, thereupon appeared and resisted the filing of said amended

and supplemental petition, and it is as to the propriety of filing this last-named paper that the court has now to determine.

Several considerations present themselves: First, this is in no sense, in the opinion of the court, an amended and supplemental petition to the one allowed to be filed by the petitioner on the 2d day of October as aforesaid. On the contrary, it seeks to do just what that petition did not do. The petitioner did not there ask to be made a party defendant to the cause, but, on the contrary, that this petition might be filed, and that the court, through its receivers, investigate and inquire as to whether or not certain assets might not be recovered for the defendant company. This amended petition asks leave to intervene as an individual bondholder, and become a party defendant to the suit, and in effect take part in the management and direction of the same, upon the assumption that the trustee is incapacitated so to do, and that the defendant company has been derelict in the discharge of its duty regarding the matters and things sought by the petition to be remedied.

Assuming that the petitioner, upon the face of his petition, has stated such a case as technically might entitle him to intervene in his own behalf, which, in passing, may be said to be exceedingly doubtful, still, whether he should be permitted to do so at this time, and under these circumstances, here, is an entirely different question. Securities of the class involved in this litigation, namely, bonds secured under a railroad mortgage, are of peculiar character, and the rights of no holder thereof can be considered, without having proper regard to the rights of other holders of such securities, or others in interest who are to be affected thereby. What the petitioner seeks to do would tend to affect the value of every security issued under the mortgage which he claims, and, if permitted to intervene at this stage of the case, would largely, if not entirely, prevent the use of the mortgage securities in the sale of the property, for the purpose of the legitimate reorganization of the company, and result in indefinitely tying up the same, and continuing it in the hands of the court, instead of its owners. This ought to be avoided, unless there is some controlling reason making the same necessary. The trustee, in opposing the filing of this petition and in asking for the sale of the property under the mortgage sought to be foreclosed, has the support of, and speaks for, more than \$13,000,000 out of an issue of \$14,000,000 of securities outstanding under the refunding mortgage of \$15,000,000 under foreclosure. The reason for not allowing the intervention in this cause becomes more apparent, because it by no means follows that the petitioner may not, in effect, secure the relief he asks by his amended and supplemental petition from the investigation that may be ordered under his petition asking therefor, heretofore allowed to be filed; and likewise he will have preserved to him the right against the proceeds arising from the sale of the property asked to be sold to assert his claim, and then to make proper contest between himself and any other bondholders claiming to hold bonds under the mortgage as between themselves.

The cause has matured, and sufficiently progressed to entitle the complainant trustee to the entry of a decree foreclosing the mortgage

sought to be enforced. A decree of reference was duly entered, the master's report filed, and time for exceptions thereto has elapsed. The declaration of the ascertainment of the amount due under the mortgage, and for which the mortgagor company may redeem, of course, is not conclusive of the amount of the debt actually due; and the court sees no reason why the sale may not now be had, and, indeed, believes that the interests of the parties affected will best be subserved by at this time disposing of the property.

The court is not unmindful of the fact that the receivership in this cause has not been of long duration, and that the same has been successful, and the property, as a result, largely increased in value, as claimed by the petitioner; but it does not follow therefrom that it is not desirable for the court to discontinue the administration of property of this character at the earliest moment, and the court cannot lose sight of the fact that it is rarely practicable to effect a sale of property of this class and size, except through the co-operation of the owners of the property seeking to reorganize the same, and at a time when they themselves by concerted action can either acquire the same or effect a sale thereof.

The questions under consideration are now so well settled that no general review of authorities is necessary. The recent decisions of this court in *Bowling Green Trust Co., Trustee, v. Virginia Passenger & Power Co.*, 132 Fed. 921, and 164 Fed. 753, in *Fink v. Bay Shore Railroad Co.*, 144 Fed. 837, 75 C. C. A. 665 (a decision of the Circuit Court of Appeals of this circuit), and in *Central Trust Co. v. Cincinnati, H. & D. R. R. Co.* (C. C.) 169 Fed. 466 (a decision of Judge Lurton, of the Sixth circuit), and authorities cited in said cases, will be found to contain a full discussion and consideration of the subject.

The right of the petitioner to file his amended and supplemental petition, and to intervene as a bondholder, will be denied, but without prejudice to him hereafter, as against the proceeds of sale of the property, to take such steps as he may be advised to assert his claim, and to challenge those of other bondholders, the allowance of whose claims will tend to diminish the petitioner's share of the fund.

The decree for sale of the property will at this time be ordered.

THE HORTENSIOUS. THE ROBERT W. PALMER. THE EASTMAN NO. 2.

(District Court, S. D. New York. December 7, 1909.)

COLLISION (§ 64*)—EVIDENCE—NEGLIGENCE.

Collision near the West Bank Light, New York Bay, between the steamship *Hortensius* and a scow in tow on a hawser of the tug *Palmer*. *Held* that the scow was properly lighted and the collision was the result of fault on the part of the *Hortensius* in not having a proper lookout and on the part of the tug in not keeping her tow on the starboard side of the channel.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 81, 82; Dec. Dig. § 64.*]

(Syllabus by the Judge.)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Actions by Franklin P. Eastman and others against the steamship Hortensius and the tug Robert W. Palmer, and by the British & South American Steam Navigation Company, Limited, against the scow Eastman No. 2 and the tug Robert W. Palmer, to recover for a collision. Libel against the scow dismissed. Decree in favor of Franklin P. Eastman and others against both vessels, and libel of the British & South American Steam Navigation Company sustained.

Wing, Putnam & Burlingham, for the scow.

Convers & Kirlin, for the Hortensius.

Wallace, Butler & Brown, for the Palmer.

ADAMS, District Judge. This action was brought by Franklin P. Eastman et al., the owners of scow No. 2, against the steamship Hortensius to recover the damages, alleged to have been \$8,000, caused by a collision between the scow and the steamer on June 5, 1908, about 10:45 p. m., just above the West Bank. The tide was flood, the wind fresh from the eastward and the weather clear.

The further allegations of the libel are that the scow was bound into New York, after having dumped her load of street sweepings, in tow, on a hawser of about 200 fathoms, of the tug Robert W. Palmer; that the tow was coming through the Swash Channel at the rate of about 4 miles an hour by the land; that in passing the bell buoy the tug headed up the Main Channel keeping to the eastward of mid-channel and carrying the Conover Beacon and Chapel Hill Beacon range lights a little on her port quarter; that while proceeding thus, the Hortensius was sighted coming down the Main Channel a little on the tug's port hand, showing her green light; that the Hortensius blew a signal of one blast which the Palmer answered with one blast, and both vessels ported their helms; that the green light of the Hortensius was shut in and her red light came into view; that the two vessels kept on, the Hortensius passing the Palmer well clear port to port; that instead of keeping on her course, the Hortensius sheered to the eastward and struck the scow a head-on blow breaking the bunker log and doing other serious damage; that by the collision the hawser was parted at the bridle. It is then alleged that the collision was not caused by any negligence on the part of the libellants or those in charge of the scow but was due to the negligence of the Hortensius in that: (1) the steamship was not under the command of a competent person, (2) she did not keep a good lookout, (3) she did not keep on the starboard side of the channel as required by Article 25 of the Inland Rules (Act Aug. 19, 1890, c. 802, 26 Stat. 327 [U. S. Comp. St. 1901, p. 2870]), (4) she undertook to make a close shave, (5) after passing the tug she sheered into the scow, (6) she did nothing to avoid a collision and (7) she did not stand by as required by the Act of Congress.

The claimant of the Hortensius, after some admissions and denials, alleged:

"Third: It alleges that the facts with regard to the collision are not fully and correctly set forth in the third article of the libel herein but that they are as follows:

On the evening of June 5th, 1908, the steamship Hortensius was proceeding from her pier at Atlantic Dock to sea. After leaving her dock at or about

6:30 o'clock p. m., she came to anchor off the Statue of Liberty, awaiting her papers. After they were received, she got under way again and started for sea shortly after 9 o'clock.

At that time and up to the time of the collision, the steamship Hortensius was seaworthy and in all respects properly equipped and ready for her voyage, and at all times she was properly officered and manned, had a careful and competent lookout stationed on her forecastle head, and was in charge of a duly licensed full branch New Jersey Sandy Hook pilot.

After leaving her anchorage off the Statue of Liberty, and making the Main Channel, the Hortensius steered down the channel course, keeping well to the westward of the range lights. When she was off the West Bank bell buoy No. 9½ which she had passed well to the westward of the range lights, a tug and tow were sighted standing up the harbor and bearing on the port bow of the Hortensius. The Hortensius thereupon blew a single blast whistle signal which was answered by the tug. The tug proved to be the Robert W. Palmer, with the scow Eastman No. 2, for damage to which this libel was brought, in tow astern on a long hawser.

The Hortensius after blowing the signal changed her course a little to the westward and slowed her engines, the tug passing her on her own port side. It was then observed that the lights of the tow were being carried around to the westward by the wind and tide and were getting on the starboard bow of the Hortensius. These lights got over to the westward of the range lights and on the westerly side of the channel. The engines of the Hortensius, which had been slowed down when the tug was passed, were at once put full ahead to get better steerage way and the helm was put hard aport in order to attempt to sheer clear of the scow. Almost immediately after the order to start the engines ahead was given, the pilot finding that a collision could probably not be avoided in that way, had the engines put full speed astern. The wheel was left still hard aport and a three blast signal was blown on the Hortensius' whistle to indicate that her engines were going full speed astern. The engines had been going full speed astern for a period of about two minutes and the Hortensius had practically stopped in the water when the scow came in contact with her.

The scow struck the Hortensius almost squarely on the bow, the stem of the Hortensius striking the scow slightly inboard of her forward port corner. Considerable damage was done to the Hortensius by the collision.

At the time of the collision, the Hortensius was dangerously near the shallow water on the western side of the channel and it was necessary to exercise extreme care in order to round West Bank Light to the eastward. This was done and then the Hortensius turned and stood by to ascertain that the tug and tow were safe, and after having done so proceeded to an anchorage off Gravesend Bay.

At the place and time of the collision, the night was fine and clear, the wind was blowing freshly from a point about east by south and the tide was about half flood and running in a general north-westerly direction.

* * * * *

Eighth: Further answering herein, the claimants allege that the steamship Hortensius at all the times mentioned was fully and properly officered, manned and equipped and was in all respects tight, staunch and seaworthy, and the collision referred to was not caused by nor contributed to by any fault or negligence on the part of the steamship Hortensius, her owners or anyone for whom she or they may have been responsible. The scow Eastman No. 2, as the claimants are informed and believe, had no rudder and no means of directing her course on the occasion of the collision. She was practically at the mercy of the wind and tide and her direction depended largely on the sheer which the course of her tug, taken in connection with the other forces operating on her, might give her. Consequently, the towing of her by the tug Robert W. Palmer on a long hawser of upwards of 200 fathoms was improper and constituted a serious menace to navigation in crowded waters such as those of New York Harbor.

The collision was caused by or contributed to by the fault and negligence of the tug Robert W. Palmer and to the inefficiency and negligence of her master, officers and crew and those in charge of her: 1. In not keeping a proper look-

out. 2. In using a tow line much too long for the towing of a scow without steering gear. 3. In not keeping her tow on the starboard side of the channel as required by the rules. 4. In towing a light scow without steering gear astern on a hawser instead of abreast of the tug. 5. In making too long a sweep in turning into the Main Channel in view of the nature of the tow which she had and her manner of towing it. 6. In having no efficient means of casting the scow adrift in case it became necessary. 7. In that she did not cast the scow adrift when it was seen that there was danger of collision. 8. In that there was no efficient means of communication between the tug and tow. 9. In that the tug did not communicate with the tow or sound any warning signals to the steamer. 10. In that the tug did not make any effort to avoid the collision. 11. In other respects which will be shown at the trial of the cause.

Ninth: Further answering herein the claimants allege: The collision was also caused by or contributed to by the fault and negligence of the scow Eastman No. 2 and to the inefficiency and negligence of her master, officers and crew, her owners and those in charge of her:

1. In not keeping a proper lookout. 2. In permitting the scow to be towed in on a hawser which was much too long, and in a manner which they knew or ought to have known would be dangerous to other vessels, because the scow had no steering gear, and in other respects which will be shown at the trial."

The claimants then petitioned the Palmer into the action, alleging that she was in fault as above.

The owners of the Hortensius then filed a cross libel against the scow and the tug, alleging the facts as in their answer and asking for a recovery of their damages, said to be \$3,500.

This cross libel was duly answered by the owners of the scow and of the Palmer.

The officers on the bridge of the Hortensius claim that the scow had no lights, but that she was duly displaying proper lights is shown by practically all the other witnesses in the case, including the lookout on the Hortensius, who said he saw them some little time before the collision but did not report them because he assumed that those on the bridge had also seen them.

The scow was a side dumper, about 134 feet long, 34 feet wide and with 14 feet depth of hold. She had no steering gear or motive power but had two skags or stationary rudders, one on each side of her stern, the object of which was to steady her. She was struck on her square bow which was cut into within a foot of the water line.

The scow was in tow of the Palmer on a long hawser, about 175 fathoms, but she was under the Palmer's control in such respect, as well as others, and no fault having been shown on her part, her owners are entitled to their damages.

The Hortensius.

The Hortensius was a steel screw steamship 363 feet in length, her beam was 47 feet and her depth of hold 25 feet. She was bound on a voyage from New York to the River Plate and in charge of a Sandy Hook pilot. She left her pier at 6:30 p. m., drawing at the time 24 feet of water. She came to anchor below the Statue of Liberty, where she remained until 9 p. m., and then proceeded down the bay. A lookout was stationed forward and the wheelsman, the third officer and the captain and pilot were on the bridge. When the steamer passed the Craven Shoal, three tows were noticed coming up the bay, the tugs

of which were showing three mast head lights. One of these tows was passed to port off Swinburne Island. The other two, the Hallenbeck's tow and the Palmer's tow, came shortly after, the former being ahead. The Palmer was seen turning into the Main Channel from the Swash showing a green side light. At this time the Hortensius blew one blast to the Palmer, to which the latter replied with a signal of one and ported, shutting out her green light and showing her port light. Both of the tows were extending somewhat across the channel. The tail of the Hallenbeck's tow was about the center of the channel, while the tow of the Palmer was more to the westward as the latter was overtaking the former, going about 3 knots an hour, while the latter, being lighter, was making about 4 knots per hour. After the exchange of signals the Hortensius slowed. It is claimed that the scow in tow could not then be seen, even with marine glasses, and the slowing was a precautionary measure. Previous to the slowing, the speed of the steamer was about 8 knots and the slowing was equivalent to half speed, or perhaps not more than 3 knots. The tide at this time was setting about northwest, and together with a fresh easterly breeze, had the effect of swinging the tow to the westward. The Hortensius kept well to the westward side of the channel. The scow was first discovered by those on the bridge of the steamer when she was a short distance, 700 or 800 feet away, and it is claimed, the lights of the scow were then discovered at the same time as the scow herself. The steamer's helm was put hard-a-port and the engines put full speed ahead in order to cause her to swing quickly. This speed was maintained for about a minute but the pilot saw she was not going to clear in that way, so he ordered the helm to starboard and had the engines reversed at full speed, and as the reversing was a couple of minutes before the contact, the steamer's headway was practically overcome, her back water being nearly as far forward as the bridge. The tow continued to advance, and at the time of the contact was going forward at some speed, probably, as aided by the tide, at the rate of 5 or 6 knots. The collision occurred at a point above the West Bank Light, on the westerly side of the channel, perhaps 300 or 400 feet from the westerly bank.

It is urged that the Hortensius was in fault for not standing by the tow, and in proceeding some $3\frac{1}{2}$ miles down the channel before she turned back, but she saw that the tug was returning to the tow and I fail to find any condemnatory action in this respect.

I think, however, that the Hortensius was in fault in failing to see the scow much sooner than she did. That the scow could have been seen is obvious from the fact that her lights were properly displayed and seen by the steamer's lookout but not reported by him as stated above. He said he saw the scow's lights before the steamer blew her signal of one blast and heard those on the bridge talking about them before he left it. Even if there was no such conversation, a proper observation from the bridge, upon a report being made, would have shown the barge on the westerly side of the channel, requiring care on the part of the Hortensius in stopping sooner to allow it to be pulled out of the way. This duty she failed to perform and it was undoubtedly a cause of the collision. Apart from the obligation to see the

scow's lights, the tug's three towing lights, advising the steamer that the tug had a tow astern more than 600 feet in length, were seen, and should of themselves sufficed, in view of the wind and set of the tide to cause the steamer to proceed with more caution than she exercised. The pilot said that he would not have been able to avoid the collision by stopping and reversing as it would have caused the steamer to be carried ashore on the western bank but that does not seem probable. Perhaps there would have been some reason for such an apprehension if the steamer had remained motionless in the water for any length of time, but there was no apparent necessity for that. If she had slowed sooner than she did she would doubtless have been under such command that a stoppage, even if necessary, could have been made without danger. The master of the steamship, who was also on the bridge, stated that the cause of the collision was the failure to see the lights. He said when they went astern it was—

"too late to avoid collision. If the lamps had been seen there would have been no collision * * * We would not have proceeded on so far, we would have been going full speed astern long before we ever approached the lights."

The Palmer.

The Palmer had been out to the dumping grounds with her tow. When coming in, the tide was flood and the wind fresh from the eastward. After rounding to the west of the bell buoy which marks the junction of the Swash Channel and the Main Ship Channel, she changed her course so as to reach buoy No. 10. She was drawing 10 or 11 feet of water and the scow about 3 or 4 feet. The master of the Palmer, who was at the wheel, saw the white light and the green light of the Hortensius just before the latter turned down from Craven Shoal. The steamer then shut out her green light and showed her red light. The tug at the time was showing her red light to the steamer. At this time the signals to pass port to port were exchanged. The tug ported her helm and hauled to the eastward but made no change in her speed. The Hallenbeck with her tow was then on a similar course to the Palmer's but inside of the latter. The Palmer took a course to the westward of the Hallenbeck's tow, and was gradually passing it, without change of speed, which was not made until after the collision took place, when the Hortensius and the scow came together.

The principal charge of fault against the tug is towing with such a long line. It has been held that while there is no rule or regulation prohibiting the use of such long hawsers, yet the courts have said it is a dangerous practice and that tugs using it will be held to a strict accountability in case of disaster. In the Circuit Court of Appeals in *The H. M. Whitney*, 86 Fed. 697, 700, 30 C. C. A. 343, 346, it was said, quoting from *The Gladiator*, 79 Fed. 446, 25 C. C. A. 33:

"While * * * we can not condemn a tow of the character of that in this case as absolutely unlawful, yet we must hold tugs which navigate this coast with such long and essentially hazardous fleets to the use of the extreme care in the interests of common safety."

Here the Palmer took no especial care to avoid the steamer. Under the effect of the easterly wind and the set of the tide, it should have

been evident that the tow would take a considerable sheer across the channel. It was therefore impossible for the Palmer to draw the tow sufficiently to the eastward to pass safely, and she should have taken some measures to avoid blocking the channel, as by stopping and permitting the Hallenbeck's tow to go on, in which case, having reduced her speed, she could have drawn in behind the Hallenbeck's tow to the eastward. Some measures should have been taken on the Palmer's part to avoid the effect of the western drift and she was evidently in fault for not adopting timely measures for that purpose. The Sea King, 114 Fed. 535, 52 C. C. A. 349. She was evidently not entitled to occupy practically the whole channel with her tow but should have kept it on the starboard side under Rule 25, and there is nothing in the case to show that it was not safe and practicable for her to do so. The agreement by signals meant that the tug would keep her tow to the right and if she were not going to be able to do so, she should have signified it by alarm whistles and not have consented.

The libel against the scow is dismissed. There will be a decree in favor of Eastman et al. against both vessels, with an order of reference. The libel of the British & South American Navigation Company is sustained for half damages, with an order of reference.

HOGARTH SHIPPING CO., Limited, v. FEDERAL SUGAR REFINING CO. MANCHESTER & SALFORD S. S. CO., Limited, v. SAME. FEDERAL SUGAR REFINING CO. v. MANCHESTER & SALFORD S. S. CO., Limited.

(District Court, S. D. New York. December 2, 1909.)

EVIDENCE (§ 333*)—SHIPPING (§ 58*)—DELIVERY OF CARGO—DISPUTE AS TO QUANTITY—EVIDENCE—GOVERNMENT TALLIES.

Delivery of sugar cargoes at Yonkers, New York. Disputes as to the quantities delivered by the steamships determined in favor of the government tallies and the respondent's tallies. Also held that the cross libellant was entitled to recover wharfage.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1265; Dec. Dig. § 333;* Shipping, Dec. Dig. § 58.*]

(Syllabus by the Judge.)

Actions by the Hogarth Shipping Company, Limited, and by the Manchester & Salford Steamship Company, Limited, against the Federal Sugar Refining Company. Judgments dismissing the libels, and rendering decree for the Federal Sugar Refining Company on its cross-libel.

Convers & Kirlin, for Hogarth Co. and Manchester & Salford Co. Ernest A. Bigelow and James T. Kilbreth, for Federal Refining Co.

ADAMS, District Judge. The Hogarth Shipping Company brought the first of the above entitled actions against the Federal Sugar Refining Company, to recover a balance of charter hire of the steamship Baron Cawdor, amounting to \$513.46, alleged to have been earned

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under charter party dated at Hamburg, Germany, May 5, 1908. The said sum of \$513.46 consists of \$499.58, the freight on 49,510 bags of sugar and an additional claim of \$13.88 for freight on 102 bags of sugar, claimed to have been delivered in excess of the bill of lading quantity of 49,510 bags.

The defence is that the libellant did not deliver the 49,510 bags but only 49,423 bags, weighing 10,864,686 pounds, together with 59,326 pounds of sweepings, and the invoice value of the missing sugar was upwards of \$499.58, which sum the respondent retained from the freight, and the respondent denies that there was any freight earned in excess of that on the said quantity delivered.

The second action was in behalf of the Manchester & Salford Steamship Company, Limited, against the Federal Refining Company to recover \$213.60, the value of 43 bags of sugar delivered to it by mistake, and for \$45.99, the freight on 254 bags of sugar delivered in excess of the bill of lading quantity, and for \$629.69, improperly deducted by the respondent because of alleged shortage. These amounts aggregate \$889.28.

The defence is a denial of the libellant's allegations with respect to the sum of \$213.60 and \$45.99, and a further allegation that the libellant delivered a portion of the sugar in a damaged condition and further failed to deliver the full amount of sugar called for by bills of lading held by the respondent, whereby the respondent suffered loss and damage, \$629.69, of which it has retained \$607.55 out of the freight. And the respondent further alleged that the Salfordia incurred wharfage charges at the respondent's wharf amounting to \$103.74, which it also seeks to recoup and set off.

The third action was a cross libel in the second action on the part of the Federal Refining Company against the Manchester & Salford Steamship Company, Limited, to recover for 123 bags not delivered. The alleged value of the missing bags was \$629.69, as above stated, and the further claim is for the above mentioned wharfage of \$103.74, making in all \$733.43, of which \$607.55 has been deducted from the freight as above stated, leaving a balance due of \$125.88.

The answer to this cross libel alleges that 43 bags of sugar, of the value of \$213.60, were delivered by mistake by the steamship Salfordia, which were not its property, but the property of B. H. Howell, Son & Company; it also alleges that 254 bags of sugar were delivered by the Salfordia to the cross libellant in excess of the quantity called for by the bills of lading and the freight thereon amounted to \$45.99, which is due to the respondent; it also alleges that the cross libellant has deducted \$629.69 from the freight due the respondent because of an alleged shortage in delivery of 123 bags of sugar. These sums aggregate \$889.29, which is the subject of the second above entitled actions.

There does not seem to be any dispute about the wharfage, \$103.74, being due to the Refining Company, and the controversy really is concerning the number of bags of sugar on the Baron Cawdor and the freight on the alleged excess delivered by the same vessel over the bills of lading quantity.

The libellant says, in its brief, in the first mentioned action:

"The only question in this case is whether the vessel delivered 49,612 cargo bags of sugar as the libellant claims, or only 49,423 as the respondent claims."

The respondent, in its brief in the same action, says:

"Respondent claims a short delivery of 87 bags, the value whereof, \$490.58, has been deducted from the freight money."

Other features of the controversy are mentioned below in the consideration of the case of the *S. S. Salfordia*.

S. S. Baron Cawdor.

First considering the *Hogarth* case, the libellant's claim is based upon the testimony of the tally men who kept a record of what they claimed was discharged by the vessel. Their tally books, however, do not commend themselves favorably because there are admitted errors in them, for example on June 23d, one of the tally men recorded a discharge of 1,771 bags while his companion, who was keeping tally in practically the same place has it on his book that 1,759 bags were discharged. On the same day there was a discrepancy between 1,831 bags and 1,838 bags. The appearance of the books otherwise was not such as to create an impression of their reliability.

On the other hand, the tally kept by the Refining Company appears to be correct and is corroborated by a transcript from the weighers' dock book, filed in the Custom House and certified by an assistant Deputy Surveyor of the Port. This was not proved in detail but formal proof thereof was waived by the libellant.

With respect to the transcript, it is provided that if any part of a vessel's cargo is unloaded without a permit by the proper officer of the customs, the officer in command of the vessel shall be liable to a penalty (Rev. St. U. S. § 2867 [U. S. Comp. St. 1901, p. 1908]); that the said permit shall specify the number and description of the packages (Id. § 2870 [page 1909]); that the master, with certain exceptions, shall be liable to a penalty in case of shortage (Id. § 2887 [page 1916]). It is made the duty of the U. S. Naval Officer to examine whether the deliveries of goods imported in a vessel correspond with the landing permits and if there is any error or disagreement to report the same to the collector (Id. § 2627, subd. 6 [page 1811]) and the weighers, etc., are required to make returns of the discharge of vessels in books prepared by them for the purpose and kept in the Custom House.

It is contended by the libellant that the certified copy of the transcript called a "freight sheet," is not proof of the statements of weights which it contains "for any purpose except as it might show the amount of the duty demanded by the government." It seems, however, to come within the rule that admits in evidence records kept by persons in public office, where they are required to write down particular transactions occurring in the course of their duties. *Greenleaf* on Evid. § 483; *Galt v. Galloway*, 4 Pet. 332, 341, 7 L. Ed. 876. Here was a record kept in the manner indicated and it contains this notation, opposite an entry of 500 bags, viz.: "87 not found 413 bags," and the weight column shows 90,508 (pounds) while the remaining entries of

the same quantity of bags show upwards of 109,000 (pounds). According to the government certificate, therefore, the ship discharged 49,423 bags, showing a shortage of "87 not found" as stated above.

The respondent's tally was exactly the same. The bill of lading quantity was 49,510 bags. There having been delivered 49,423 bags only, the shortage of 87 bags, as claimed by the respondent, was established.

The libellant contends, however, that the respondent's tally does not show the number of bags actually delivered by the libellant over the ship's side and quotes from the charter party that the cargo was to be "taken from alongside at merchant's risk and expense." It also quotes from the bill of lading: "Twelfth: Goods to be taken from the ship by the Consignees directly they come to hand in discharging the ship, and the Carrier's responsibility to cease package by package, immediately the goods leave the ship's deck or tackle, * * *" and contends that as the other tallies were made at some distance from the side of the ship, from 35 feet to 30 yards, they should not be depended upon to the same extent as the ship's tallies which were made as the bags went over the side.

It would be extremely technical to hold in a case of this kind, that testimony of what occurred a short distance from the side of the vessel should not be considered as against testimony of those on board of the vessel. The witnesses away from the vessel did not see everything that took place on or near the ship, but there is no contention, and could not reasonably be, that anything affecting the cargo occurred after it left the ship and before reaching the scales, where the outside witnesses took charge of it. I think there can be no doubt that all of the bags that were discharged reached the scales, together with the sweepings which were placed in bags but not counted as bags of cargo.

The libellant further contends that apart from the tallies, the evidence shows that all of the cargo loaded on the ship was delivered to the respondent but I doubt if testimony to this effect tends to establish the delivery of all of the cargo that was loaded on the vessel. The tallies showed an unmistakable deficiency in the delivery and if the libellant could not account for it, it should suffer the loss.

So far from there being an excess delivery as claimed by the libellant, there was actually a deficiency, as above stated.

S. S. Salfordia.

This action was to recover a balance of freight money, \$629.69, for freight alleged to have been earned in excess of the bill of lading quantity, \$45.99, also for \$213.60, the value of 43 bags, the property of B. H. Howell, Son & Company, not parties to this action, delivered by mistake to the respondent, making a total of \$889.28.

The cross libellant also claims to be entitled to recover \$103.43, wharfage, which is not vigorously disputed.

With respect to the claim for \$629.66, the testimony shows a short delivery of 123 bags, amounting to that sum.

That there was such a short delivery appears by the returns of the government weighers, certified copies of which have been offered in evidence. What has been said in the S. S. Baron Cawdor case, supra,

with regard to a similar document is equally applicable here. These are corroborated by the tallies of the Refining Company's clerks and it must be regarded that the deficiency in the quantity delivered was duly established. Also what has been said in the Cawdor case, in connection with the method of delivery, is equally pertinent here and it need not be repeated.

The claim for the value of 43 bags of the Howell shipment does not exist because the goods were sent from Yonkers by a lighter to the Howells. In any event, the libellant is not in any way entitled to recover on the claim.

The sum of \$103.74 for wharfage is due to the cross libellant and to this sum should be added the difference between \$607.55 and the value of the deficient sugar \$629.66, viz.: \$22.11, making a total of \$125.88, for which a decree may be entered in favor of the cross libellant, unless there is some question about the figures, in which case a reference will be had. The libels of the Hogarth Company and of the Manchester and Salford Company are dismissed.

Ex parte CHIN HEN LOCK.

(District Court, D. Vermont. November 2, 1909.)

HABEAS CORPUS (§ 23*)—EXCLUSION OF CHINESE—REVIEW OF DECISIONS OF IMMIGRATION OFFICERS.

Where an immigration inspector has made an order denying a Chinese person admission to the United States after a fair hearing in good faith, and his decision has been affirmed on appeal by the Secretary of Commerce and Labor it is conclusive, and will not be reviewed by the courts on habeas corpus; and a petition alleging that a fair trial was not given should set out facts in support thereof to warrant the granting of the writ in the first instance.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

In the matter of Chin Hen Lock. Hearing on writ of habeas corpus. Writ dismissed.

J. J. Walsh, for relator.

Alexander Dunnett, U. S. Atty., for defendant.

MARTIN, District Judge. The petition for the writ is made by John Walsh, Esq., a member of the Massachusetts bar, and alleges that he is authorized to act in behalf of Chin Hen Lock; that the said Chin Hen Lock is restrained of his liberty in the Detention House at Richford by Arthur L. Weeks, the inspector in charge; that the said Chin Hen Lock is imprisoned in said Detention House contrary to law, in that the said Chinaman is an American citizen by birth; that he has been a resident of the United States for 17 years, and that his right to be and remain in the United States was judicially determined by William A. Lord, United States commissioner for the district of Vermont, on September 21, 1897; that the said commissioner issued to the said Chinaman a certificate of discharge, which was duly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

presented to the said Weeks; and that the said Weeks has no jurisdiction over said Chinese person. The petitioner further alleges that the said Chinaman—

“has been deprived of a full and fair hearing as to his right to enter, to be, and to remain in the United States, and said Weeks and the United States Commissioner of Immigration have unjustly and arbitrarily decided that the said Chin Hen Lock is an alien Chinese person and not entitled to enter the United States.”

This matter came on for hearing at chambers, in Brattleboro, district of Vermont, October 25th, at 2:30 o'clock p. m. On motion, the United States district attorney for the district of Vermont, Hon. Alexander Dunnett, intervened on the part of the government, and the petitioner, Walsh, appeared for the relator; the said Chin Hen Lock being present. The only witness called by the relator was the said Arthur L. Weeks, who produced a copy of the record of the proceedings before him and of the proceedings on appeal before the Honorable Secretary of Commerce and Labor.

Counsel for the relator sought to cross-examine Mr. Weeks as to his reasons for denying the Chinese applicant admission into the United States. The district attorney objected to this line of inquiry, whereupon I ruled that the question before me was whether or not the Chinese applicant had had a fair trial before the inspector or before the Honorable Secretary of Commerce and Labor, and that all other evidence was excluded until that question was passed upon. To this ruling an exception was allowed. No other witness was called. No claim was made that any evidence was offered before the inspector that was not received.

The record shows that the Chinese applicant testified before the inspector that the seal of Commissioner Lord, covering a portion of the photograph attached to the certificate of discharge, which he then produced, was affixed at Montpelier by the commissioner at the time the certificate of discharge was issued by said Commissioner Lord, September 21, 1897, and that subsequent to the giving of this testimony the inspector made inquiry of ex-Commissioner Lord, who stated, under oath, that he was quite positive that the applicant's photograph was not so affixed by him to the certificate, and that he had no recollection of its ever having been done by him, whereupon the inspector further inquired of the applicant whether he was correct in his first statement as to his photograph being affixed at the time aforesaid. He at first adhered to his former testimony; but, upon being informed of ex-Commissioner Lord's testimony, he then said he would tell the truth, which was, in substance, that just prior to the taking of the Chinese census in Boston, in 1905, he got a certain Chinaman there to “fix it,” and had his photograph attached, and paid that Chinaman \$10 therefor. He was further inquired of whether he could give the name of any person in the United States who might be able to give the officers of the service information in regard to his claim of birth in the United States, to which he answered, “I don't know any one now.” He was further asked:

“Can you give the name and address of any person, who is now in the United States, who knows anything at all about your claim that you were

tried and discharged at Montpelier, Vt.? A. No; I don't know any one. Q. Have you fully understood the interpreter? A. Yes, sir. Q. Do you desire to add to or change any statement that you have made? A. No, sir; nothing to be changed."

Upon all the evidence before him the inspector was of the opinion that the Chinese applicant was not the "Chin Hin Lark" who was tried and discharged by Commissioner Lord, that he was an alien, and not a member of the exempt class of Chinese persons, and therefore denied him admission into the United States, and so notified him, and also informed him of his right to an appeal. The record was made up and forwarded to the Commissioner of Immigration at Boston, Mass., for the inspection of the applicant's counsel, whereupon an appeal was prayed for, and, upon request of the applicant, Chin Wah Soon, of 18 Harrison avenue, Boston, Mass., was notified of the result of said hearing, and of the right of an appeal.

The inspector's opinion was filed August 21, 1909, and on the 25th the inspector received a letter reading as follows:

"We respectfully appeal from your decision in the case of Chin Hen Lock, serial No. 745, ex S/S Empress of China, Richford, Vt., July 30, 1909, in having been denied admission into the United States. We would request permission to examine evidence in this case, and would also suggest that you advise us where we can examine same.

"Will you also kindly inform us where we may submit any additional evidence that we may deem advisable to furnish, and to whom we shall submit our brief.

"We would also request an extension of time in which to furnish additional evidence and prepare our brief.

"[Signed]

Frank L. Roberts."

The inspector replied in part as follows:

"I beg to advise you that the evidence in this case will be forwarded to the Commissioner of Immigration, Long Wharf, Boston, Mass. in order that you may have access to and make copies of the testimony incident to your preparation of appeal. The Commissioner of Immigration has also been requested to examine any witness or witnesses and take charge of any additional evidence that you may desire to furnish. Your brief can be filed with the Commissioner at Boston for transmission with the complete record. * * * In compliance with your request, you are granted an extension of 10 days in which to furnish additional evidence and prepare your brief."

On the 30th of August the said Roberts wrote the inspector as follows:

"With further reference to case of Chin Hen Lock, serial No. 745, ex S/S Empress of China, Richford, July 30, I would respectfully request that, if it is in order, you advise me the reason why this applicant was rejected.

"I note that there was a photograph attached to William A. Lord's (U. S. Commissioner) certificate, and we will be glad to know if this photograph corresponds with the applicant."

The inspector replied as follows:

"Replying to your letter, dated August 30, 1909, which was not received until yesterday, in which you request to be advised the reason why your client, Chin Hen Lock, serial No. 745, ex S/S Empress of China, Richford, Vt., July 30, 1909, was rejected, I beg to advise you that from the evidence submitted before this office it is not shown that Chin Hen Lock has identified himself as the proper holder of the alleged order of discharge presented by him."

On September 1st the said Roberts wrote the inspector as follows:

"With further reference to the case of Chin Hen Lock, serial No. 745, ex S/S Empress of China, I respectfully request that the applicant be further examined. On page 22 of the evidence, the applicant states that he took his certificate of discharge to the store of S. Y. Tank Co., for the purpose of having his picture put on same. Will you kindly question the applicant as to where he was situated at that time, giving the street and number, and also if he knows of any one in the United States having actual knowledge of the certificate of discharge being in his possession at that time that picture was attached.

"I would also request that I may have a further extension of time in order to prepare my brief, as it will be impossible for us to secure return of above information and prepare my brief within the time given for that purpose."

The inspector's reply thereto reads as follows:

"I beg to acknowledge receipt of your letter of September 1, 1909, in which you request that Chin Hen Lock, serial No. 745, on appeal, ex S/S. Empress of China, Richford, Vt., July 30, 1909, be further examined relative to where the applicant resided at the time that he claimed to have taken his alleged order of discharge to the store of S. Y. Tank Co. for the purpose of having his picture put on same, and whether he knows of any one in the United States having knowledge of the said certificate being in his possession at that time.

"I beg to advise you that Chin Hen Lock, serial No. 745, was this day examined with reference to the above, and transcripts of said examination have been forwarded to the Commissioner of Immigration, Boston, Mass., for access by you.

"In compliance with your request for further extension of time in order to prepare your brief, you are advised that ten (10) days additional time is hereby granted. At the completion of this period it is expected that you will have had ample time to complete any evidence or documents that you desire to present in this case."

Pursuant to the statement in the letter of September 2d, copy of said further examination was forwarded to the Commissioner of Immigration at Boston, and on September 3d said Roberts wrote the inspector as follows:

"I am in receipt of your favors of the 2d inst. in reference to the case of Chin Hen Lock, serial No. 745, on appeal, ex S/S Empress of China, Richford, Vt., July 30, 1909, and have examined the testimony forwarded to the Chinese inspectors at this port, and note that my request for 10 days' additional time to prepare my brief has been granted, for which please accept my thanks.

"The additional evidence taken does not give us the information which we desire. The applicant, on page 22 in the evidence, speaks with reference to the Chinese census, and I would request that this applicant be further examined as to where he was at the time the census was taken, and if he had his certificate of discharge at that time, and if he was asked to produce same by the inspector. If the certificate was produced, we would request that you let us know who the inspector was, and if the photograph was attached to the certificate at that time.

"In my letter of August 30th it would appear that you have overlooked answering the last paragraph, in which I request that you state as to whether or not the photograph attached to the certificate of discharge corresponds with the applicant, in your opinion, as I am unable to see the applicant and am very anxious to receive this information.

"I would also request that you advise if the seal on the certificate of discharge, in your opinion, is the genuine seal of Lord, as we believe that you have in your possession a copy of impressions of Lord's seal."

On September 10th the inspector replied as follows:

"Replying to your letter dated September 3, 1909, which was not received at this office until September 6, 1909, requesting a further examination and

certain information regarding Chin Hen Lock, serial No. 745, on appeal, ex S/S. Empress of China, Richford, Vt., July 30, 1909, I beg to advise you that the record in this case has been referred to you for your preparation of an appeal. If you have any claims to make with regard to the genuineness of the alleged certificate presented by your client, or with relation to the truth of any of the statements therein contained, it is proper for you to set such claims forth in your brief or argument, or in any affidavits which you may desire to file on behalf of your client. Any additional evidence or statements which you may produce before me will be fully investigated before the record is finally forwarded to the Department, if they require investigation.

"In the meantime this office does not feel that it is justified in burdening the record with repeated further examinations of this applicant on isolated points involved in the case."

No affidavits or further evidence were furnished, either to the inspector or to the Secretary of Commerce and Labor. I am convinced, from this record, that the inspector not only acted in good faith, but exercised good judgment and was fully justified in his conclusions.

When the petition for writ of habeas corpus was first presented to me, there were no allegations as to the trial of the Chinese applicant before the inspector or the Honorable Secretary of Commerce and Labor, whereupon I declined the issuing of the writ. Later the present petition was presented. In it there was the allegation above quoted, which is in effect that the applicant has not had a fair trial. It is silent as to what was done, or left undone, that was unfair. Let it be understood that hereafter a petition for habeas corpus in like cases that does not spread before the court the facts upon which the charge of an unfair trial by the tribunal which Congress has created to try these cases is based will be denied. It is not the province of the district judge to try the facts upon which a Chinese immigrant claims the right to enter the United States. Congress has provided that all these facts are to be heard by the appropriate immigration officer—in this case it is Arthur L. Weeks, Esq.—and that his decision shall be final, except on an appeal to the Honorable Secretary of Commerce and Labor; and in that case his decision shall be final. It has been held by the Supreme Court that a hearing by that tribunal is due process of law. *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

Some of the judges of the Circuit Court of Appeals have stated that this decision has been somewhat modified by the *Chin Yow Case*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. I do not so understand it. The *Chin Yow Case* simply holds that where an applicant claiming to be an American citizen by birth has had no trial, or the hearing before the inspector gave the applicant no "chance to establish his right" in the mode provided by the statutes, or his hearing was not conducted "in good faith, however summary," it is the duty of the courts to take jurisdiction; otherwise not. In the language of Justice Holmes, speaking for the Supreme Court in the *Chin Yow Case*:

"If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair, though summary, hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all."

And the opinion closes in this language:

"But unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, was denied, the merits of the case are not open, and we may add the denial of a hearing cannot be established by proving that the decision was wrong."

The opinion in this case is entirely consistent with that in the *Ju Toy Case*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and previous decisions of the Supreme Court on this question. The law seems to be plain enough as promulgated by the Supreme Court, and in expounding the law it is entirely useless to use any other language than that of Justice Holmes above quoted. Applying the principle that the district judges are not to interfere with the conduct of the immigration officer or the Honorable Secretary of Commerce and Labor in the performance of their statutory duty, where they have given the applicant a fair hearing, however they may have weighed and decided the facts, if they have acted in good faith, the judges should keep their hands off.

Upon hearing in this case it was charged by counsel for the relator that the inspector failed to re-examine the applicant to the full extent that he was asked to do. Whatever may have been the honest intention of counsel for the applicant, it seems quite apparent that the inspector was led to believe that re-examinations, procrastination, and delay were what counsel was striving for. Further inquiries as to where the applicant was, or to whom he showed his certificate of discharge, with his photograph on it, were unnecessary, in view of the fact that he had already stated fully and definitely to whom, when, and where he showed it, and that he had shown it to no one else, and had sworn twice that the photograph was affixed at the time of his hearing at Montpelier in September, 1897, and then admitted that it was not affixed until eight years later, and then not in his presence, thus admitting fraud and committing perjury.

It is further contended by counsel for the Chinese applicant that the appeal in this case was not considered by the Honorable Secretary of Commerce and Labor, but by some assistant. No evidence was offered to sustain that claim, except the record, which reads as follows:

"The department acknowledges the receipt, under cover of letter of the Commissioner of Immigration at Montreal, No. 10,417, dated September 29th last, of your letter of the 27th ultimo, transmitting record on appeal in the case of Chin Hen Lock, a Chinese applicant for admission at your port as a citizen of the United States by virtue of birth therein.

"After a careful consideration of all the evidence presented in this case, the department is of the opinion that the right of Chin Hen Lock to admission upon the status claimed has not been established. Your excluding decision is accordingly affirmed.

"Respectfully,

[Signed] Ormsby McHarg, Acting Secretary."

I overrule this contention. Wherefore, it is ordered that the writ be dismissed, and the Chinese applicant remanded to the custody of Immigrant Officer Arthur L. Weeks, at Richford, Vt.

THE CHARLES C. LISTER.

(District Court, S. D. New York. December 14, 1909.)

COLLISION (§§ 56, 129, 132*)—EVIDENCE—OVERTAKING VESSEL—SALVAGE.

Collision in Chesapeake Bay between the schooner Charles C. Lister and the hawser of a line of barges in tow of the tug Bohemia by which three of the barges were cut adrift. Proceedings in the United States District Court for the Eastern District of Virginia resulted in a salvage award in favor of a rescuing tug. *Held*, that the barges were duly lighted, and that the schooner was an overtaking vessel and in fault for the collision because of a defective lookout. Also *held* that the Transportation Company and Redman were entitled to recover the amount of salvage awards with costs paid by them and that the latter should recover the value of the broken hawser.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 283; Dec. Dig. §§ 56, 129, 132.*

Overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

(Syllabus by the Judge.)

In Admiralty. Actions by the Inland Transportation Company by the Southern Transportation Company and by John C. Redman against the schooner Charles C. Lister. Decree in favor of the Southern Transportation Company and John C. Redman.

Hyland & Zabriskie, for claimant.

James J. Macklin, for Inland Transp. Co.

Horace L. Cheyney, for Southern Transp. Co.

Carver, Wardner & Goodwin and Horace L. Cheyney, for The Carroll.

ADAMS, District Judge. The first of the above entitled actions was a proceeding against the schooner Charles C. Lister, which resulted in a decree of condemnation and sale. The proceeds of the sale are now in the registry of the court. The second action was brought by the Southern Transportation Company, the owner of the barges Roanoke and Nansemond, against the said proceeds to recover the damages caused by the cutting adrift of those barges by the Lister sailing into the hawser of the tow of the Bohemia. The third action was brought by the owner of the barge Carroll, and bailee of her cargo of coal, against the Lister to recover the damages caused by the cutting adrift of the Carroll from the said tow of the tug Bohemia in the same accident; also the value of the broken hawser. All of these accidents happened in the lower Chesapeake Bay, about 11:30 p. m. on the 26th of January, 1908. The first action, the Inland Transportation Company, resulted in a sale of the schooner as above stated. When the second action came to trial, the owner of the Carroll intervened and the trial proceeded on the merits of the action.

The libel and petition of intervention allege that the Bohemia was proceeding down the Chesapeake Bay, bound into Hampton Roads, with the barges Albemarle, Carroll, Nansemond, Roanoke and Mascot in tow on hawsers, tandem; that about 11:30 p. m. the tow had reached a point a little to the south of Thimble Light Ship, and the Lister came

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

up astern; that notwithstanding the tug and barges were properly lighted, the schooner came in contact with and parted the hawser between the barges Albemarle and Carroll, causing the Carroll, Roanoke, Nansemond and Mascot to go adrift; that thereafter the Carroll, the Roanoke and the Nansemond were anchored and early the following morning were taken in tow by the tug Dauntless and towed to Lamberts Point; that subsequently libels were filed in the District Court of the United States for the Eastern District of Virginia by the master of the Dauntless against the Carroll, the Roanoke and the Nansemond and their cargoes of coal and freight, to recover salvage compensation for the services rendered; that the collision between the schooner and the hawser was due to the negligence of the Lister: (1) in not keeping a proper lookout, (2) in not avoiding said tow, coming up astern of same, (3) that the navigation of the schooner was in charge of incompetent persons. At the time of filing this libel, the said suit in the Eastern District of Virginia had not been tried but has been since. The decree against the barges has been affirmed on appeal and has been paid, viz.: \$2,024.74 for salvage of the said barges Roanoke and Nansemond, and \$468 for salvage of the barge Carroll with \$329.64 and \$259.63 costs. The libel also alleges that the schooner has heretofore been sold by the marshal of this court for the sum of \$4,500, and that the proceeds of the sale, or a bond in lieu thereof, are in the registry of the court. A recovery is also sought in the latter action of the sum of \$34, the alleged value of the hawser destroyed, which was the property of Redman, the owner of the Carroll.

The answer, after some admissions and denials, alleges:

"That on the 26th day of January, 1908, the said schooner Charles C. Lister was then proceeding up the coast on her way to New York, N. Y. That shortly after 9:30 o'clock P. M. the weather was so rough and the seas so high outside that it was necessary to go into Hampton Roads for harbor, and accordingly she rounded Cape Henry at about that time; about 11:30 P. M. she was proceeding on a course west-north-west going into Hampton Roads. At said hour when about a mile or two from Thimble Light House she discovered a white light on a vessel which bore about two points on her starboard bow and about a mile off. That for several hours before the collision hereinafter referred to said tug Bohemia and her tow of five boats, together being from $\frac{2}{3}$ to $\frac{3}{4}$ of a mile in length had been lying practically still across the course on which the said schooner Charles C. Lister was sailing, with the tug Bohemia and a part of her tow on the port side of the said schooner's course, exhibiting no lights at all to the approaching schooner until the latter vessel was only a short distance away when the tug Bohemia apparently circled around so as to show her red light, then both her red and green lights, and then shutting out her green light and showing only a red light on the schooner's port bow, all of which lights were so exhibited and visible for only a few moments before the collision, and not in time for the schooner to do anything to avoid such collision, whilst the latter vessel held her course. At about that time, which was as above stated 11:30 P. M., the schooner ran across the hawser between the first and second barges in tow of said tug, cutting the hawser in two, but doing no other damage.

That from half an hour to an hour and a half before the schooner Charles C. Lister appeared upon the scene the barge Mascot had foundered and sunk and become lost and not by reason of the cutting of the tow line between the first and second barges of the said tug by the schooner Charles C. Lister. That the tug Bohemia had come down from Baltimore, Md., as claimant is informed and believes and had reached a point abreast of said Thimble Shoal Light House at about 6 o'clock P. M. or a little latter in the evening of the said 26th

day of January, 1908. That owing to the lack of sufficient power in the tug, and to the then boisterous condition of wind and weather the said tug was unable to manage her tow but would forge ahead a little and then the tow would drift her back so that for several hours before the alleged collision the said tug had made practically no headway at all. That at the time of the collision the wind and seas had moderated somewhat but still the tow of the tug Bohemia was close to the light house and liable to drift against the light house there. That as claimant is also informed and believes the captain of the Bohemia ran across the bows of the schooner Charles C. Lister and then circled around in an endeavor to pull his tow away and off from the shoals at the said light house.

XI. That the schooner Charles C. Lister held her course, had proper and sufficient lookouts on deck, properly stationed and attentive to their duties and had her regulation lights all properly set and burning. That as claimant is informed and believes, the vessels in tow of the tug Bohemia did not have their regulation lights properly set and burning, and the last barge in said tow did not show a flare-up light or any other light as by law she was bound to do, and the tug Bohemia did not have competent and sufficient lookouts properly stationed and attending to their duties, nor did she give any signals or warnings of any kind to the schooner to make known the presence of herself and tow across the course of the schooner which was the regular channel course up from the Capes.

XII. That the steamtug Bohemia did not have sufficient power to handle the tow she had in charge at that time and that the said steamtug Bohemia ran across the course of the schooner Charles C. Lister as aforesaid, instead of keeping out of her way, as by the laws and rules of navigation (being a steam vessel) she was obliged to do.

XIII. That the tow of the steamtug Bohemia was so long and unwieldy as to be a menace to navigation and that the steamtug Bohemia blew no whistles to the schooner Charles C. Lister at any time before the collision of the latter vessel with the said tow line.

XIV. That the said schooner Charles C. Lister sailed up Hampton Roads as aforesaid on the usual course which was west-north-west, the wind at the time being west-south-west and the tide ebb."

The testimony shows that the Mascot broke adrift some little time before the collision and her claim is out of the case. The controversy now is with respect to the charges of fault against the Lister for cutting the barges Carroll, Roanoke and Nansemond adrift, and involves the question of lights on the tug and the barges, and of the care exhibited by the Lister, she being an overtaking vessel.

It appears that the towing line between the tug and the Albemarle was about 100 fathoms in length and the lines between the barges were about 75 fathoms in length. The whole tow, including the tug and barges, was, according to the master of the tug, about $\frac{3}{4}$ of a mile.

The Inspectors' provisions with respect to lights to be carried by barges and canal boats in tow of steam vessels on the waters in question, are:

"On the inland rivers, bays, sounds, and harbors of the United States—except on the waters of the Hudson River and its tributaries from Troy to Sandy Hook, the waters of the East River and Long Island Sound, and the waters entering thereon, and to the Atlantic Ocean, to and including Narragansett Bay, R. I., and tributaries, and Lake Champlain—barges and canal boats towing astern of steam vessels, when towing singly, or what is known as tandem towing, shall each carry a green light on the starboard side and a red light on the port side."

These are the only lights required to be carried on barges towed in the Chesapeake Bay. The regulations with respect to screening, etc., are, viz.:

"The colored side lights referred to in these rules for barges and canal boats in tow shall be fitted with inboard screens, so as to prevent them from being seen across the bow, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 2 miles, and so constructed as to show a uniform and unbroken light over an arc of the horizon of 10 points of the compass, and so fixed as to throw the light from right ahead to 2 points abaft the beam on either side. The minimum size of glass globes shall not be less than 6 inches in diameter and 5 inches high in the clear."

The rules further provide:

"Any barge or canal boat in tow of a steam vessel, when the last boat of a tow, and not required by these rules to carry a light on the stern, on being overtaken by another vessel, shall show from her stern to such last-mentioned vessel a flare-up light; or, in lieu thereof, a white light fixed and carried in a lantern, which shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of 12 points of the compass, viz., for 6 points from right aft on each side of the vessel, so as to be visible at a distance of at least 1 mile.

Provided, That nothing in these rules shall be construed as compelling barges or canal boats in tow of steam vessels, passing through any waters en route or directly to or from a port where lights for barges or canal boats are different from those of the waters whereon such vessels are usually employed, to change their lights from those required on the waters from which their trip begins or terminates; but should such vessels engage in local employment on waters requiring different lights from those where they are customarily employed, they shall comply with the local rules where employed."

The provision for vessels towed tandem on the waters in this vicinity carrying "a white light on the bow and a white light on the stern" did not prevail in the Chesapeake Bay.

The provisions covering a towing vessel were:

"Art. 3. A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than three feet apart, and when towing more than one vessel shall carry an additional bright white light three feet above or below such lights, if the length of the tow measuring from the stern of the towing vessel to the stern of the last vessel towed exceeds six hundred feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in article two (a) or the after range light mentioned in article two (f).

Such steam-vessel may carry a white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam." U. S. Comp. St. 1901, p. 2864.

It appears that the *Bohemia* was exhibiting the regulation side lights. It is claimed by the libellant that she was exhibiting three towing lights, also two white lights back of the house which showed aft. There has been some criticism of the towing lights in that they were not in conformity with the regulations requiring them to be "not less than 3 feet apart." According to the testimony of the chief engineer of the *Bohemia* the distance between them was only "a foot or so." The witnesses for the schooner say there were only two visible, although they were looking for them carefully. The master, however, said that the lights were properly displayed, i. e., there were three of them and there were 3 feet between them. These lights as shown, assuming the three were visible, as I think they were, would indicate that the tug had a tow astern, exceeding 600 feet in length. It seems that the *Bohemia* was 95 feet long, the hawser to the *Albe-*

marle 600 feet long, while she was 170 feet long. The hawser between the Carroll and the Albemarle was about 450 feet, so that assuming the hawser was struck one-third of its length between the barges from the Carroll, that would be, say 1070 feet from the stern of the tug. The towing lights on the tug advised the schooner that there was a tow of at least 1000 feet behind her.

The course of the tug, after turning Thimble Shoal about 6 o'clock, was west by south. The course of the Lister when coming in, was west-north-west, a difference of three points. The latter, therefore, could not see the colored lights of the tug or of the barges and she was dependent for information as to the tow upon the towing lights exhibited by the tug and by those on the respective boats of the tow.

The master of the Albemarle, the first barge in the tow, said that in addition to his side lights, he showed—

“* * * two lights back on the stern at the same time which we wanted for the barge astern of us in distress. * * * Q. Did you see those lights after the Lister struck the tow line? A. Yes, sir.”

The master of the Carroll, the second in the tow, said his barge carried, in addition to side lights, a bright light 10 to 11 feet above the deck, not visible from forward.

The deck hand of the Carroll, standing in the pilot house, saw the Lister's green light as she passed ahead and saw her luff to avoid striking the Carroll. He said that his boat was exhibiting two mast-head lights to signal to the tug, and a bright light astern “right back of the pilot house” which was used that night for anchoring; he also said they had two lights on the pole before he saw the Lister, to signal to the tug at the time the Mascot was in trouble, but they were taken down before the Lister came up. He also said the lights were taken down at the time they anchored, which was after the Lister passed.

The master of the Roanoke, the rear barge, said he had in addition to his side lights, a light aft of the cabin, fastened in a hook on the cabin about 6½ feet above the deck. The deck hand of the Roanoke testified to practically the same.

There were no witnesses from the Nansemond, but the foregoing practically establishes that some of the stern lights of the barges were displayed and should have been seen by the Lister but they were not seen and the Lister kept on her course across the tow and collided with the towing line between the first two barges. There is no contradictory testimony.

The testimony shows that the Bohemia and her tow at the time of the collision were either standing still in the water or going back. They had progressed beyond the point of striking and retrograded from the force of the wind and tide. It is not clear whether or not the tow was still going astern when the Lister approached, but it does appear that it was at least not making any progress. This was doubtless due to a strong wind, adverse to proceeding, but I do not see that the tow should suffer from this fact, nor from the fact, if it be such, that the tow was in the southern instead of the northern side of the channel. If it was on the wrong side—I am rather inclined to believe the

contrary—it was due to the storm and the tow is not responsible for its effects.

I think the collision with the hawser was primarily due to the Lister's lack of a proper lookout. It was said in her behalf, that she had one properly stationed, but if so, he did not see and report the lights exhibited by the tow, and the accident should be attributed to that cause.

The claim of the schooner that the Bohemia was heading toward her seems incredible and should not be sustained. Perhaps she was not directly ahead of her tow, but her general direction was toward her destination.

It follows from what has been said that the libellant should succeed. It is urged in this connection that a decree should not cover the costs of the salvage proceedings, citing *Greenwood v. The Fletcher* (D. C.) 42 Fed. 504, which relies for authority upon *The Brig Homely*, 8 Ben. 495, Fed. Cas. No. 6,661, and *The Tug C. F. Ackerman*, 8 Ben. 496, Fed. Cas. No. 2,562. It does not appear from the reported cases that such a decision was made. Judge Brown seemed to think so, however, and he based his decision thereon, saying: "I am not at liberty to depart from that adjudication." I am unable to see any reason why if resort to the amount awarded in the case was proper, the taxable costs of obtaining the decree should not be allowed. I therefore hold that this point is not well taken.

There will be a decree for the Southern Transportation Company and John C. Redman for the amount of the salvage awards, with interest. There will also be a decree in favor of Redman for the value of the broken hawser, said to have been \$34. If there is any dispute about the latter item, a reference will be had to ascertain the value.

THE NEIDENFELS.

(District Court, S. D. New York. November 26, 1909.)

SHIPPING (§ 141*)—LOSS FROM LEAKAGE—LIABILITY OF VESSEL.

Leakage from cargo of coconut oil shipped from Colombo, Ceylon, to New York. On arrival at New York it appeared that there had been considerable leakage of the oil but in view of the exception in the bill of lading covering such loss, in the absence of proof of negligence, *held* that that the ship was not liable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497-499; Dec. Dig. § 141.*]

(Syllabus by the Judge.)

Action by the India Refining Company against the steamship Neidenfels. Libel dismissed.

Horace L. Cheyney, for libellant.

Wing, Putnam & Burlingham, for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ADAMS, District Judge. This action was brought by the India Refining Company against the steamship Neidenfels, to recover the damages suffered, said to amount to \$2,000, by reason of a shipment of 60 packages of cocoanut oil, from Colombo, Ceylon, not being delivered at New York in the same good condition in which it was received. The oil was to be forwarded from New York to Philadelphia and there delivered to the order of the Fourth Street National Bank, Philadelphia. It is alleged in the libel that upon the arrival of the vessel in New York, 32 of the packages were in a greatly damaged condition and that the cause of the damage was unknown to the libellant but it believes the same to have been caused "by fault and negligence or want of proper care in the loading, stowage and custody of the said packages."

The answer admitted the shipment in good order, and after admissions and denials, alleged:

"Ninth: Further answering, the claimant alleges that the steamship Neidenfels at the inception of the voyage on which libellant's cargo was shipped, was tight, staunch and strong, and in every way seaworthy and fully manned and equipped and for any damage which may have been sustained by libellant, said steamship is absolved by the Harter Act; that said cargo was carefully stowed in the usual and customary manner and any damage or loss sustained by the libellant was due to perils of the sea and owing to bad weather encountered on the voyage, for which the claimant or said steamship was not liable."

The bill of lading which covered the shipment from Colombo to New York, provided:

"The Carriers are not liable for * * * Perils of the sea * * * drainage, and leakage, breakage * * * on the voyage * * * or any loss or damage arising from the nature of the goods, prolongation of the voyage or land damage."

The libellant seeks to recover on the theory that the ship has failed "to meet the burden of proof which the law has imposed upon" her, and further "that the real cause of the damage was the bad stowage of the casks by the stevedore at Colombo."

The claimant's defence is based upon the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), the bill of lading, and the exceptional weather encountered by the steamship.

It is well settled that where the loss is covered by an exception, there can be no recovery against the vessel unless the libellant shows some negligence on its part. The *St. Quentin*, 162 Fed. 883, 89 C. C. A. 573. The exceptions above outlined fully cover the loss and the only question that remains is whether there was improper stowage.

The libellant's claim in this connection is that the testimony of the officers of the vessel showed that chocks were placed under the bilges of the barrels, etc., and it is said in the brief "* * * it is obvious that the sharp corner of the chock placed under the middle of the barrel would, during this long voyage, force the staves inward at the point of contact and would cause leakage of the contents of the cask" and testimony given for the libellant in Philadelphia is cited to show that the casks were in bad condition there.

The contract in the case, however, covered, as far as this ship was concerned, the goods from Colombo to New York only. It provided:

"* * * And to be delivered, subject to the exceptions, liberties, terms and conditions of this Bill of Lading, in like good order and condition, from the ship's deck (where the Carrier's responsibility shall cease) at the aforesaid port of New York, * * * the agents of the Hansa Lines of steamers to be forwarded by them at Carrier's expense, but at risk of the owner of the goods * * * to Philadelphia unto order of Fourth Street National Bank, Philadelphia. * * *"

Anything that happened to the goods on their way to Philadelphia from New York can not be justly charged to this vessel, which is responsible for her own contracts only, and the condition of the casks when in New York is the only matter to be considered. As the Philadelphia testimony related principally to a condition of the packages, subsequent to what it was in New York, it can have little effect and need not to be considered.

There was undoubtedly some loss of the oil, perhaps unusual in amount, but that does not show that the vessel was liable, where the loss is covered by an exception. If the stowage was bad there would be liability but that has not been shown. The testimony of the officers of the vessel proved that the stowage was usual and proper and it was approved by claimant's expert in New York, who said that the barrels were stowed—

"with chocks underneath each quarter of the cask to keep the bilge clear of the deck. * * * Q. Was there anything under the bilge of the cask? A. Under the bilge of the cask was absolutely clear of the deck. Q. As a matter of fact that is the only proper way to stow cargoes of that kind, is it not? A. Yes sir."

Negligence can not be inferred merely from the large quantity of leakage. The packages were apparently intact upon the vessel's arrival in New York.

There was no such bad weather as would account for the loss but as it is covered by exceptions, persuasive proof in that respect is not necessary.

Nothing appears in the case from which liability on the ship's part can be based and the libel must be dismissed.

ACTIESELSKABET ALBIS v. ARRUE

(District Court, S. D. New York. December 8, 1909.)

SHIPPING (§ 51*)—CHARTER PARTY—LOSS OF TIME OF VESSEL—LIABILITY.

The contract provides that the vessel should be under the orders of the charterer but when negotiations were taking place for the renewal of the charter, the owner was communicated with by its agents in New York and it instructed them to wire the vessel to sail. *Held*, that the sending of the cable was at the risk of the owner and it should bear the loss consequent upon the nondelivery.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 51.*]

(Syllabus by the Judge.)

Action by Actiesselskabet Albis against Miguel S. Arrue to recover a balance of charter hire. Libel dismissed.

Wheeler, Cortis & Haight, for libellant.

Gibson & Hulbert, for respondent.

ADAMS, District Judge. The libellant, Actiesselskabet Albis, the owner of the steamship Albis, brings this action to recover from Miguel S. Arrue, a balance of charter hire, amounting to \$414.27, under a continuation of a charter party, dated August 4, 1906. The respondent deducted this amount, on account of alleged lost time from September 11, 1906, at 9 a. m. to September 15, 1906, at 2 p. m.

The answer admits the making of the contract and further alleges:

"Fourth: That the respondent in pursuance of said charter notified the libellants on or about September 1st, 1906, that he would redeliver the said steamship Albis to them at Guantanamo on her arrival there and the discharge of her cargo, which would be on or about September 10th, 1906, that the said steamship did arrive at Guantanamo and her cargo was discharged on or about September 10th, 1906 and said steamship was redelivered to the libellants and her delivery was accepted by them on or about September 10th, 1906 and that thereafter and on the said September 10th, 1906, the respondent entered into an agreement with J. H. Winchester & Company, as agents for the libellants, a copy of part of which agreement is annexed and made part of the libel, and endorsed on the back of Libellants' Exhibit A; that the part of said agreement omitted from the said endorsement on the back of the Exhibit 'A' was 'that the said agents would direct the captain or master in charge of the said steamship Albis by cable that day, September 10th, 1906 that as soon as she had discharged her cargo at Guantanamo to proceed immediately to Baracoa and take on a cargo of fruit for the respondent for shipment to New York'; that the said agents of the libellants did not direct the captain or master of the said steamship Albis by cable on September 10th, 1906 as they agreed as aforesaid and the said steamship instead of sailing from Guantanamo on the afternoon of September 10th, 1906, at which time her cargo was discharged the said agents of the libellants did not cable the captain or master of the said steamship Albis until on or about September 15th, 1906, more than four days after the cargo of the said steamship had been discharged, to proceed to Baracoa and take on a cargo of fruit for the respondent; that the respondent, relying upon the said agreement that the agents of the libellant would cable the captain or master of the said steamship Albis on September 10th, 1906 to proceed immediately to Baracoa on the discharge of her said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cargo at Guantanamo and that said steamship would sail from Guantanamo on the evening of the 10th or the morning of the 11th of September, 1906 and would arrive at Baracoa on September 12th, 1906, instructed his agents at Baracoa to have a cargo of bananas cut and ready for shipment by the said steamship Albis on September 13th, 1906, which was done, but through the carelessness, neglect and default of the libellants and their said agents, the said steamship did not arrive at Baracoa until September 16th, 1906 and the said cargo of fruit was greatly injured by the four days delay of shipment on the said steamship Albis for New York, without any neglect, carelessness or default on the part of the respondent by which he sustained damages to the amount of Four hundred fourteen and 27/100 Dollars.

Fifth: That on or about October 4th, 1906, and before the commencement of this action and the filing of the libel herein the libellants and their agents and the respondent settled and compromised the claim sued for in the libel herein and the libellants discharged and released the respondent from the same and accepted and received satisfaction and payment thereof."

* * * * *

"Fifth A: That the libellant, a foreign stock corporation, was doing business in the State of New York on August 4th, 1906, contrary to the provisions of Section 15 of the General Corporation Law of said State of New York, being the Laws of 1892, Chapter 687, and the acts supplemental thereto and amendatory thereof. That the said action is upon a contract made by the libellant, a foreign stock corporation in the State of New York, on the 4th day of August 1906, and since September 1st, 1901. That prior to the making of such contract the said libellant being a foreign stock corporation, had not procured from the Secretary of State of the State of New York a certificate that it had complied with all the requirements of law to authorize it to do business in the State of New York, and that the business of the corporation carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State for such or similar business, or, if more than one kind of business, by two or more corporations so incorporated for such kind of business respectively."

The testimony shows that a clerk of Winchester & Company, the agents of the libellants, deceased at the time of the trial, informed the respondent, when a conference was in progress just prior to the renewal of the charter, in reply to a statement by the latter, that if the clerk would cable to the steamer, the respondent would sign the contract. This the clerk agreed to do. Of course if there were nothing further the libellant would not be bound by the clerk's statement, as it evidently was unauthorized, but it appears that cables were being exchanged at the time and the owner sent the following to Winchester & Company:

"Albis, have done our utmost with your offer, and best we can do is as follows: Direct continuation, Captain telegraphs, she will be discharged today, she is awaiting your orders, please wire definite orders and instructions to master and us."

It therefore appears that instructions were to be sent by Winchester & Company to the steamer. This was an obvious modification of the charter provision that the vessel should be under the orders of the charterer and made the sending of the cable a duty of the owner. It probably was sent by Winchester & Company but for some reason was not delivered and in consequence thereof the steamer remained at Guantanamo awaiting orders when she should have been on the way to Baracoa.

It seems to me the loss of time should be borne by the owner. When it undertook to send the cable it assumed the responsibility of non-delivery and the lost time can not be justly charged to the respondent.

This conclusion renders a decision of the other points in the case unnecessary and requires a dismissal of the libel.

AVENT v. DEEP RIVER LUMBER CO.

(Circuit Court, E. D. North Carolina. November 26, 1909.)

No. 559.

1. REMOVAL OF CAUSES (§ 79*)—TIME FOR REMOVAL—EXTENSION OF TIME TO PLEAD.

Under Code Civ. Proc. N. C. (Revisal 1905) §§ 473, 512, requiring a defendant to plead on or before the last day of the term to which the summons is returned, "unless the time therefor be extended by the judge," an order made by the court on the last day of the term, extending the time for a defendant to answer, operates to extend the time within which he may file a petition for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 144; Dec. Dig. § 79.*]

2. REMOVAL OF CAUSES (§ 17*)—WAIVER OF RIGHT—PLEADING IN STATE COURT.

The filing of an answer in the state court by a defendant after his petition for removal has been denied does not affect his right to file the record in the federal court and obtain an order of removal therefrom before the time when his answer was due.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 10; Dec. Dig. § 17.*]

Waiver of right, see note to Atlanta, K. & N. Ry. Co. v. Southern Ry. Co., 66 C. C. A. 612.]

At Law. Action by George H. Avent against the Deep River Lumber Company. On motion by plaintiff to remand to state court. Motion denied.

Lem H. Gibbons and A. A. F. Seawell, for plaintiff.

Aycock & Winston and D. E. McIver, for defendant.

CONNOR, District Judge. Plaintiff, a citizen of North Carolina, issued summons against defendant, a corporation organized under the laws of, and domiciled in, the state of Virginia, on July 7, 1909, returnable to the July term, 1909, of the superior court of Lee county, in said state, which convened on July 19, 1909. On the first day of the term plaintiff filed his complaint, alleging that, while in the employment of defendant corporation, operating in North Carolina, he sustained personal injury by reason of defendant's negligence, putting his damage at the sum of \$10,000, for which amount he demanded judgment. On July 30, 1909, being the last day of the term of said court, the following order was made and entered of record in said case:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Forty days allowed defendant to file answer." On August 10, 1909, defendant filed its petition in the said court, accompanied by a bond, with surety, in the sum of \$500, asking for a removal of said case into the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh, said county of Lee being within said district, which was refused by the judge of said court, whereupon defendant filed its answer. On September 6, 1909, having theretofore filed a transcript of the record in said case with the clerk of said Circuit Court at Raleigh, together with the bond required by the statute, defendant obtained from the judge of said court an order directing the removal of said case and docketing thereof in the Circuit Court of the United States. Plaintiff, upon notice duly given, on November 1, 1909, made a motion to remand the case to the superior court of Lee county, alleging, as ground of said motion, that the petition for removal was not filed within the time prescribed by the act of Congress—before the time for filing the answer had expired.

The Code of Civil Procedure of North Carolina (Revisal 1905, §§ 473, 512) prescribes that the defendant shall answer or demur to the complaint on or before the last day of the term to which the summons is returned, unless the time therefor be extended by the judge. It is conceded that the question raised upon the record has not been expressly decided by the Supreme Court of the United States and that the decisions of the Circuit Courts are conflicting. Judge Dillon says:

"In respect to the effect on the right of removal of an extension of time allowed the defendant to plead or answer the authorities are in much apparent conflict. It is possible, however, to extract some general rules which may be said to be fairly well established by a preponderance of authority. In the first place, an extension of time by mere consent of the parties out of court—that is, by a stipulation, agreement, or understanding, not having the sanction of an order of court—will not extend the time for filing a petition for removal of the case. * * * But, on the other hand, if the laws of the state and the established practice of its courts require that the defendant shall plead or answer within a certain limited time, 'unless such time shall be extended by order of the court' (or words to that effect), then it seems that extension of the time granted by order of the court will correspondingly lengthen the time within which a petition may be filed." Dillon on Removal, § 156.

Among other cases cited to sustain the rule is *Wilcox & Gibbs Guano Co. v. Phoenix Insurance Co.* (C. C.) 60 Fed. 929 (Fourth Circuit), in which Simonton, Circuit Judge, examines the decisions of the federal courts in the several circuits and concludes that the correct rule is as stated by Judge Dillon. The case arose in South Carolina, in which state the Code provision in regard to the time for answering and the power of the judge to extend it is substantially the same as in North Carolina. Whatever may have been held in other circuits, and whatever may be the strength of the reasons upon which the decisions to the contrary are based, the *Wilcox Case* has been uniformly followed in this circuit, and, in the absence of any decision by the Supreme Court of the United States, is controlling authority. The opinion of Judge Simonton is well considered and sustained by reason. It is followed in the Second circuit. *Lord v. Lehigh Valley R. R. Co.* (C. C.) 104 Fed. 929. This case arose in New York, wherein the Code of Civil Procedure, in respect to the power of the court to extend the time to plead

or answer, is the same as in North Carolina. The fact that defendant, after the refusal of the judge of the state court to grant the order of removal, filed an answer, does not affect its right to file the record in this court and obtain an order of removal before the time for filing the answer, as extended, had expired. It was but respectful to that court and prudent to comply with its ruling, but did not affect defendant's rights in this court.

Under the authority of the decision in *Wilcox Case*, supra, defendant was entitled to file its petition and otherwise conform to the provisions of the statute in this court at any time before the answer was due under the order fixing the time—40 days from July 30, 1909. It is important that the rule, at least in this circuit, be settled and uniform. There are cases holding that an extension of time to answer by stipulation of the parties, without any order of the court, has the effect of extending the time to file the petition; also that, where there is a general or standing order in all cases that defendants have time to file answer, the same result follows. The rule is not extended beyond the facts appearing in this record.

I am not inadvertent to the fact that the Supreme Court of North Carolina has reached a different conclusion, and that while a member of that court I concurred therein (*Howard v. Railway*, 122 N. C. 944, 29 S. E. 778; *Lewis v. Steamship Company*, 131 N. C. 652, 42 S. E. 969); but the decision of the Circuit Court is controlling, and upon that authority the motion to remand must be denied.

RIVER & HARBOR TRANSP. CO. v. BARBER ASPHALT PAVING CO.

(District Court, S. D. New York. December 15, 1909.)

SHIPPING (§ 58*)—CHARTER PARTY—LOSS OF VESSEL—LIABILITY OF CHARTERER.

Sinking of carfloat at Maurer, New Jersey. A claim of faults upon the part of the Asphalt Company in failing to properly care for the libellant's float, which sank at the respondent's wharf, not sustained, there being no proof to show any negligence on the part of the respondent.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 58.*]

(Syllabus by the Judge.)

In Admiralty. Action by the River & Harbor Transportation Company against the Barber Asphalt Paving Company. Libel dismissed.

Robinson, Biddle & Benedict, for libellant.

Kellogg & Rose, for respondent.

ADAMS, District Judge. The River & Harbor Transportation Company brought this action against the Barber Asphalt Paving Company to recover the damages caused, on or about April 7, 1907, by the sinking of the libellant's float No. 2 and the loss of certain railroad ties loaded thereon. It is alleged that the float was lying at the respondent's pier at Maurer, New Jersey, in the sole possession, custody

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and control of the respondent, and that during that night, or the next day, by reason of the carelessness and negligence of the respondent it sank at its moorings, causing the loss of some of the ties and damage to the float, said to have been altogether \$3,000.

The answer, after some admissions and denials, alleges:

"That heretofore and on or about the 11th day of October, 1906, this respondent entered into a contract with the Long Island Railroad Company, a corporation organized and existing under and by virtue of the Laws of the State of New York, to creosote 50,000 yellow pine cross-ties, of the sound square edge variety, sometimes called sap ties, and in the event that the shipment was to be made by water, this respondent was to do no handling of the treated ties after putting them over the rail of the vessel on which they were to be shipped.

That thereafter and on or about the 21st day of March, 1907, this respondent entered into another agreement with the said the Long Island Railroad Company whereby this respondent agreed to stow the said 50,000 creosoted ties on cars on floats of the said Long Island Railroad Company, alongside of the respondent's pier at Maurer, New Jersey.

That on or about the 6th day of April, 1907, the said Long Island Railroad Company placed or caused to be placed alongside of respondent's pier at Maurer, New Jersey, 'Long Island Railroad Carfloat No. 2.'

That on the 6th day of April, 1907, respondent proceeded to stow the said creosoted ties of the Long Island Railroad Company on cars on said float, and on Saturday evening, April 6th, 1907, had loaded in a careful and thoroughly workmanlike manner four cars, containing in all about 2,000 of said creosoted ties.

That upon information and belief, the said 'Long Island Railroad Carfloat No. 2' was unseaworthy and not properly equipped with lines and appliances; that there was want of due care on the part of the owner or master and a failure to exercise proper supervision for the safety of the vessel while she was moored at respondent's pier for the purpose of being loaded, and on Sunday, the 7th day of April, 1907, at about 9:30 A. M., the said 'Long Island Railroad Carfloat No. 2,' while alongside of respondent's pier at Maurer, New Jersey, during a heavy storm and while a violent northeast wind was blowing, sank at its mooring at said pier without any fault on the part of the respondent, but solely by reason of its unseaworthy condition and because of improper and insufficient lines and equipment, and for lack of proper care and attention on the part of the owner or master or the said Long Island Railroad Company."

It appears that, in conformity with the agreement alleged in the answer, the carfloat No. 2 was landed and tied up on the northerly side on the evening of April 5th, 1907, of the respondent's wharf, a short distance from the outer end. This wharf was on the New Jersey side of the Arthur Kills. It extended some 400 feet out in the Kills and had a dredged channel on the northerly side, 6 or 8 feet deep at low water. It was ordinarily a safe place for boats to load and unload, and during the time that this float was at the place, although there was a strong wind, nothing happened to the other boats which were there. Some time early Sunday morning, the 6th, the float was discovered by the respondent's watchman to be sunk at the pier. He immediately notified the officers of the respondent, living at Sewaren, a short distance away, who went to the place as soon as they reasonably could and made some efforts to save the ties which were floating in the vicinity.

The immediate cause of the accident does not appear. The vessel may have been seaworthy. The libellant claims that she was properly made fast with 4 lines, 2 spring lines and 2 breast lines, the former running from cleats on the side of the float and the breast lines running

from the middle of the ends of the float forward and aft to the wharf. When she was found in the morning after the sinking, she had but 2 or 3 lines and 2 of them were running to the ends of the outside of the boat. The libellant claims that the lines were changed after the first mooring and that the change caused the sinking but if such is the fact there is nothing whatever to connect the respondent with the change. It contracted to creosote the ties and load them on the float. When loaded the float was listed somewhat but it was only about 10 or 12 inches and not enough to cause the sinking, as she still had about 2 feet of freeboard. The listing does not show a sufficient want of care on the respondent's part to condemn it, even if it had held itself out as possessing customary skill in the loading of boats.

The respondent defends on several grounds, i. e., the storm, the unseaworthiness of the float, and the lack of proper care and attention on the part of the Long Island Railroad Company.

The first two defences have already been considered. Upon the third, the question arises whether the libellant, or the railroad, as its agent, failed to properly fit out the float. She had no one on board to care for her. She had made three trips to this place. The first time she had a man on board. The second and third times, she did not. While the absence of a person on board may not have been the cause of the accident, yet under such circumstances as existed here, it is strongly suggestive of negligence on the part of those managing the float. We are left entirely in the dark as to what occurred after the railroad company's tug, which had towed the float to the place, left, and to consider that the respondent was in any way negligent would be to enter into the realms of conjecture. The float was not in the possession of the respondent.

The libel is dismissed.

BOHEM v. ATLANTIC CITY R. CO.

(Circuit Court, E. D. Pennsylvania. November 27, 1900.)

No. 278.

1. JUDGMENT (§ 198*)—EFFECT OF QUESTION RESERVED—VERDICT.

Where, in accordance with the Pennsylvania practice, the question is reserved whether there is any evidence to go to the jury in support of plaintiff's claim, and verdict is returned for the defendant, he is entitled to the benefit of such verdict if he would have been entitled to judgment on the reserved question notwithstanding a verdict for plaintiff.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 198.*]

2. FERRIES (§ 32*)—INJURY TO PASSENGER—ASSUMED RISK.

Under the law of Pennsylvania a passenger on a ferryboat, having passenger apartments and also a central gangway designed for horses and wagons, who voluntarily, and without necessity takes his place in such gangway, assumes the risk of injury due to such location.

[Ed. Note.—For other cases, see Ferries, Dec. Dig. § 32.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by Mary L. Bohem against the Atlantic City Railroad Company. Motions by plaintiff for new trial, and that additional exceptions be allowed. Motions denied.

Daniel C. Donoghue, for plaintiff.

Wm. Clarke Mason, for defendant.

J. B. McPHERSON, District Judge. At the trial of this case the question was reserved, in accordance with the Pennsylvania practice, whether there was any evidence to go to the jury in support of the plaintiff's claim. If, therefore, the verdict had been in her favor, the defendant would nevertheless have been entitled to judgment, if a review of the testimony (all of which was offered by the plaintiff) had satisfied the court that she had wholly failed to prove the defendant's negligence, or that her contributory negligence was clearly apparent. That the verdict was in favor of the defendant does not essentially change the situation. Obviously, if for either of the two reasons suggested the defendant would have been entitled to judgment notwithstanding the verdict, in case the jury had found for the plaintiff, it may properly claim the benefit of the verdict in its favor and should have judgment thereon. In other words, if it was entitled to binding instructions, it would now be entitled to judgment, and it makes no difference for whom the jury has found.

Laying aside the question whether there was any evidence of the defendant's negligence, and expressing no opinion upon that subject, I feel obliged to hold that the contributory negligence of the plaintiff is a necessary conclusion from a recent decision of the Supreme Court of Pennsylvania. The case to which I refer is *Hopkins v. Railroad Co.*, 225 Pa. 193, 73 Atl. 1104. The facts appear in the following quotation from the opinion of the court:

"The accident out of which this case arises occurred in that part of a ferry-boat specially designed and appointed for the accommodation of horses and wagons in transport. It is located between the passenger apartments at either side of the boat, and is here called the 'horse and wagon gangway.' The plaintiff entered the boat directly upon this gangway. Instead of going into one of the passenger apartments, which were open to him as soon as he had boarded the boat, he attempted to reach the front of the boat by passing between the teams which were standing in the gangway. When he had reached about the middle of the boat, he encountered a coal cart which had been discharging coal into a hole immediately in rear of the engine house. He passed to the right of the cart, and because of other obstructions in his way he concluded to return to the point where he boarded the boat and there enter the left-hand passenger apartment. He pursued his way to the rear of the cart, with a view to passing across to the left side of the boat through the narrow place between the cart and the engine room. While attempting this the driver of the cart started toward the shore, leaving the coal hole exposed, and into this the plaintiff fell and was injured."

Upon these facts the court below directed a nonsuit upon the ground of the plaintiff's contributory negligence, and this direction was sustained; the Supreme Court saying:

"However the defendant company may have tolerated the use of this gangway by passengers impatient to reach the front of the boat, it is so manifest

to ordinary observation that such gangway is intended for a use which makes it dangerous for passengers that, except as safe and suitable accommodations for passengers are shown to have been lacking, the passenger who voluntarily takes his place in it must be held to have assumed the risk of injury. We have said, with respect to street cars, that the proper and assigned place for passengers is inside the car; that, unless he shows some valid reason to excuse, a passenger is bound to put himself in the appointed place, and, if he does not, he takes the risk of his location elsewhere. *Thane v. Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767. There is no reason why this rule should be limited in its application to railroads or street railways. It applies generally. The plaintiff attempted no excuse for pushing his way between the teams occupying the gangway to reach the front part of the boat, except that others were doing the same thing. He admits that when he boarded the boat he could at once have entered either passenger way to the right or left. Through either he could have reached the front, not as soon, perhaps, as by adopting the gangway, but by a way which would have insured to him protection of the highest care possible. By adopting the other, under no necessity for so doing, he took the chances."

The only difference between that case and this is found in the fact that an attempt was made by the present plaintiff to show that safe and suitable accommodations were lacking upon the ferryboat whereon she was a passenger; but, as no testimony whatever was offered to prove that there was no available room in the passenger cabins, and as it appears affirmatively that no effort was made to enter these apartments, it seems to me that the decision in the *Hopkins Case* applies, and that the plaintiff must be held to have taken "the risk of her location elsewhere."

The motion for a new trial is refused. The plaintiff's motion that certain exceptions to the charge be now allowed, although the rule of court which requires them to be asked for at the trial was not obeyed, is also refused.

SCHWAB v. SMUGGLER-UNION MINING CO. et al.†

(Circuit Court of Appeals, Eighth Circuit. November 18, 1909.)

No. 3,092.

1. MORTGAGES (§ 587*)—OPERATION AND EFFECT OF FORECLOSURE DECREE—RIGHTS OF JUNIOR INCUMBRANCERS NOT PARTIES—"PROCEEDING IN REM."

A suit in equity for the foreclosure of a mortgage is not a "proceeding in rem" in such sense that the decree and sale therein can cut off rights of third persons, not parties to the suit, in the property acquired from the mortgagor subsequent to the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1685-1688; Dec. Dig. § 587.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3481-3483; vol. 8, p. 7684.]

2. WATERS AND WATER COURSES (§ 158*)—CONTRACTS CREATING—RIGHT OF FLOWAGE.

Defendants, who were owners of quartz mills on a stream, entered into contracts with the owner of placer mines situated below, which were worked by means of water taken from the stream through flumes and pipes, by which, for a valuable consideration paid and to be paid, they were released for a stated term from any and all claims for damages by reason of injury to the reservoirs or pipes of the lower proprietor caused by the tailings and debris deposited, or which might be deposited, in the stream by defendants from their mills; the contracts to be binding upon the successors and assigns of the parties. *Held*, that such contracts granted an easement to defendants to have the tailings from their mills flow through the reservoirs, sluices, and pipes upon the placer property, which continued during the designated term as against a subsequent purchaser of the property.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 184, 186-188; Dec. Dig. § 158.*]

Appeal from the Circuit Court of the United States for the District of Colorado.

Suit in equity by Gustav H. Schwab, trustee, against the Smuggler-Union Mining Company and others. Decree for defendants, and complainant appeals. Reversed.

Pierpont Fuller and Clarence A. Brandenburg (Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, and George A. H. Fraser, on the brief), for appellant.

Jacob Fillius and Henry F. May (Charles J. Hughes, Jr., and John S. Macbeth, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. In this case complainant filed his bill in the Circuit Court, in which, among other things, it was alleged: That various described placer mining claims in the state of Colorado, aggregating 777.99 acres, commonly known as the "Key-stone claims," were owned by complainant under patents issued by the United States, through and by reason of mesne conveyances from the original locators and patentees, together with certain water rights used in connection with said claims. Said claims were alleged to lie along

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

both sides of, and on both banks of, the North fork of the San Miguel river, and alongside and upon both sides of the San Miguel river at and below the North and South forks thereof. That on June 1, 1904, the Keystone Hydraulic Mining Company, a corporation organized and existing under and by virtue of the laws of the state of Colorado, being then the owner of all of said mining properties, then and there conveyed the same by its certain deed of mortgage, to the Trust Company of America, a corporation organized and existing under and by virtue of the laws of the state of New York, as trustee, for the purpose of securing an indebtedness then existing against said the Keystone Hydraulic Mining Company, evidenced by its certain bonds in the aggregate amount of \$150,000, all of which bonds were then held by complainant as trustee, for his own use and for the use and benefit of other persons owning an interest in said bonds.

On June 15, 1906, in an action brought for that purpose in the Circuit Court of the United States for the District of Colorado, a decree of foreclosure of said mortgage was entered, finding the amount due thereon, and decreeing a sale of the mortgaged premises by a master of the court. On July 23, 1906, the premises were sold under said decree and purchased by complainant as trustee, and on August 6th said sale was confirmed by the court. On May 7, 1907, no redemption from the sale having been made, a master's deed was executed to complainant.

It was further alleged in the bill: That the improvements upon said placer claims consisted, among other things, of two reservoirs, which were placed thereon by the grantors of complainant, situated upon the North fork of the San Miguel river, at the upper part of said placer property and upon a portion of said claims. That said reservoirs were made by means of two dams placed across the river, the upper reservoir having an area of about 160,000 square feet, and the lower reservoir having an area of about 10,000 square feet. That said reservoirs were designed to collect and hold the waters of said river for the use of said Keystone properties. That there were no means whereby the gold in said placer claims could be taken or collected therefrom except by using the water of said North fork of the river in hydraulic mining of said placers. That, in order that said water might be used profitably and successfully, it was necessary that all the water of said stream should be used, and at the point where it was used to be free from tailings and other débris. That the said Keystone properties were so situated as to be of great value for the generating of electric power by means of the waters of the North fork of said river. That such electric power would be readily marketable and the value thereof would greatly exceed the cost of producing and generating. That in order that said water might be profitably and practically utilized for the generation of electric power, it was necessary that the water, where it should flow over the property of complainant, should be so free from tailings and débris that the tailings and débris carried by said water should not fill up or materially decrease the capacity of said reservoirs, or unreasonably to cut or wear out the pipe lines, water wheels, and machinery or other appliances intended and employed in the utilization of such water in the generation of electric power.

The bill alleged: That the defendants and each of them were engaged in mining and milling operations in the county of San Miguel, and each owned and controlled and operated mills for the treatment of ore, located on or about the North fork of said river above the said placer claims of complainant. That the defendants and each of them habitually and constantly discharge and deposit in the North fork of said river, at points above the placer claims of complainant, great quantities of tailings and débris, from their respective mills, which tailings and débris amount in the aggregate to not less than 800 tons per day during the winter of each year and not less than 1,200 tons per day during the remainder of each year. That the tailings and débris so discharged and deposited in said stream by defendants consisted of coarse and sharp quartz sand, commonly called "silica," and finer quartz sand and quartz dust or powder, which, when mingled with said waters, become slime. That said tailings and débris discharged by defendants in said stream were carried by the force of the current along said North fork of said river, where said tailings and débris commingled into one indistinguishable mass before they reached the lands and placer claims of complainant and were carried by said river to the placer claims of complainant and precipitated upon his lands and claims, and his said reservoirs, flumes, pipes, sluices, machinery, and appliances. That the amount of the tailings and débris discharged and deposited in said stream by defendants, and carried to complainant's property and precipitated in complainant's reservoirs, was so great as to be sufficient, in the space of three months, to fill completely said two reservoirs. That while defendants continue discharging said tailings and débris into said stream it will be impossible for complainant to make any practical use of his reservoirs or any of his water rights on the said property. That said tailings and débris so discharged and carried by the waters of said stream to the property of complainant, as aforesaid, were of such a nature that, consisting as they do in a great part of sharp quartz sand, they wear out, and will continue to wear out and destroy, complainant's pipe lines, giants, and other hydraulic machinery and appliances, so completely as to make it impracticable and unprofitable for complainant to use said waters for hydraulic mining or for generating electric power. That complainant's grantors had expended many thousands of dollars constructing and placing upon said property such improvements. That but for the discharging and depositing of tailings and débris by the defendants in said stream the waters thereof, at the point where the river enters complainant's Keystone claims, would be reasonably free from tailings and débris. But that the discharging and depositing of tailings and débris in said stream by said defendants make the waters of said river so polluted and laden with tailings and débris as to be unfit for use by complainant for the purposes aforesaid. It was alleged that the acts of the defendants aforesaid were such as caused complainant great and irreparable damage, such as could not be adequately compensated for in an action at law. The bill prayed that the defendants and each of them be enjoined from discharging and depositing in the North fork of said river, at any point above the point where the said river entered said Keystone properties of complainant, any tailings from their mills or mines, or any débris, or

discharging, depositing, or placing such tailings and débris so near to the banks of said stream that such tailings and débris can fall, flow, or be washed thereinto, so as to be carried by the waters of said river to, upon, or over the land and placer claims of complainant, etc.

To said bill each of the defendants filed an answer, setting up and alleging numerous defenses thereto; but the view which we take of the case renders it unnecessary to refer to but one of such defenses, in which it was alleged that, in August, 1904, the Keystone Hydraulic Mining Company, being then the owner of the properties now claimed to be owned by complainant, entered into an agreement with each of the defendants, whereby defendant was released from all damages, actions, and claims whatsoever, either at law or in equity, which the said Keystone Hydraulic Mining Company, or its successors, might have or or could thereafter have, on account of any tailings which may have been theretofore deposited or which might be thereafter deposited in said river, in consideration of an amount of money paid and agreed to be paid; the agreement with each defendant being in its terms and conditions identical, and in substance as follows:

This agreement made this 26th day of August, A. D. 1904, * * * witnesseth: That, whereas, the said first party is now and for about four years last past has been working and operating a group of placer mining claims known as Keystone, in which mining operations it uses the water of the San Miguel river, by first impounding the same in storage reservoirs, from which it conveys the same through a flume and thence through iron or steel pipe lines to iron or steel giants, through which it is discharged for the purpose of washing down gravel and for other uses in carrying on such placer mining; and, whereas, the said second party, during all of said period of operation of said placer claims by said first party, has been and now is the owner and operator of various quartz mines and quartz mills at points above said works of said first party, from which mills it discharges slimes and tailings made thereat into the San Miguel river or tributaries thereof; and, whereas, said first party claims that such slimes and tailings so deposited in said river and in its tributaries by said second party are carried by the currents of said stream so that the same settle in the impounding reservoirs of the first party and are filling up, and thereby impairing the usefulness of the same, and also claims that such slimes and tailings, when passing with the waters of said river through its said pipe lines and giants, have cut out and thereby greatly injured said pipe lines and giants, and claims that its present pipe line has been injured to such an extent that it is necessary that it purchase and install a new pipe line so that the same may be ready for use and operation by it at the beginning of its next working season, which begins about April 1, 1905, which proposed pipe line is estimated to cost about \$8,400:

Now, therefore, for the purpose of adjusting the damages which it is claimed have been done to said first party by the slimes and tailings heretofore discharged into said San Miguel river and its tributaries by the second party, and for the purpose of adjusting the damages which may hereafter be done to said first party by any slimes or tailings which may be discharged by said second party into said river or its tributaries, during the life of this agreement, it is hereby agreed by and between the parties hereto that said second party shall pay to said first party the sum of \$3,000, of which sum \$333.33 shall be paid upon the execution hereof, \$333.33 shall be paid on or before September 19, 1904, and the balance of which sum, \$2,333.34, shall be paid when the final payment on account of the purchase price of said new pipe line becomes due and payable from said first party to the manufacturers thereof, which is expected to be about November 15, 1904; and the said second party shall further pay to the said first party on or before the 1st day of August each annual season that said new pipe line shall be in actual and active service during three months of such season the sum of \$166.67, providing that said second

party has discharged tailings into said river or any tributary thereof during such season, as its proportion of the expense which may be necessary to repair the giants and the said pipe line on account of the damage which may be done to the same by tailings which may be put into said river or its tributaries by the said second party; and the said first party, in consideration of the agreements hereby made by the said second party, and in consideration of the moneys hereby agreed to be paid to said first party by the said second party, does hereby agree that, when its present pipe line is worn out, it will install a new pipe line at its said claims, which pipe line shall be of a size and quality in its judgment best suited to stand the wear and tear of the water in said river, containing slimes and tailings, and that it will expend in the purchase of material in the actual construction of said pipe line at least the sum of \$8,400, and will furnish to the said second party, upon the completion of such pipe line, statements showing that it has expended at least \$8,400 in said work; and, in the event that a less sum than \$8,400 is so expended, then a rebate of one-third of the deficiency under \$8,400 shall be allowed said second party.

And it is further understood and agreed, in consideration of the said moneys to be paid by said second party to the said first party, that the said first party has released and discharged, and does hereby release and discharge, said second party of and from all manner of actions and causes of actions, either in law or in equity, and all suits, debts, sums of money, covenants, controversies, promises, trespasses, damages, claims, and demands whatsoever, in law or in equity, which it now has or ever did have, or which it or its successors or assigns thereafter can, shall, or may have, on account of any slimes or tailings or other materials which said second party has heretofore discharged into said San Miguel river or into any feeder or tributary thereof; and does further release and discharge said second party, its successors and assigns, of and from all manner of actions and causes of actions, suits, trespasses, damages, claims, and demands whatsoever, in law or in equity, which it, the said first party, its successors and assigns, may now have or hereafter can, shall, or may have, for, upon, or by reason of, any slimes, tailings, or similar substances which the said second party, its successors or assigns, may discharge or allow to be discharged, directly or indirectly, into the said San Miguel river, or any feeder or tributary thereof, during the period beginning from the date hereof and ending four years from April 1, 1905—that is to say, March 31, 1909—four years being the estimated minimum life of said proposed new pipe line, and during such further period beyond March 31, 1909, as such proposed new pipe line may last, and be capable of being used by said first party, its successors and assigns, for the purpose of carrying on placer mining operations at the point where the same are now being carried on by said second party.

It is also understood and agreed that said first party shall keep said pipe line in good repair at its own expense during the life of this agreement, so as to prolong the life and usefulness of the same as long as reasonably possible; and the said first party shall construct two sand boxes in its flume in addition to the one now therein, and shall maintain said two new sand boxes as well as the present one, during the life of this agreement, for the purpose of removing, as far as possible, slimes and tailings from the waters to be conveyed through said flume and pipe line.

It is further understood and agreed between the parties hereto that all of the terms and conditions hereof shall be binding upon, and shall inure to the benefit of, the successors, tenants, and assigns of each of the parties hereto, and are and shall be covenants running with the title, ownership, or right of occupation, of said Keystone group of placer mines.

The usual replications were filed, evidence taken, trial had, a decree entered dismissing the bill, and complainant prosecutes an appeal.

That the agreement set forth in the several answers was duly entered into between the Keystone Hydraulic Mining Company and each of the defendants, and that each defendant had made the payments agreed to be made by it, was not disputed. It is, however, said that, as such

agreement was entered into subsequent to the giving of the mortgage deed of trust, the rights of complainant are not affected thereby. The foreclosure proceedings through which complainant acquired his title were had subsequent to the agreement. The defendants were not parties to that action, and their interest, if any, in the subject-matter of the foreclosure, was not affected by the decree and sale. *Pardee v. Aldridge*, 189 U. S. 429, 23 Sup. Ct. 514, 47 L. Ed. 883; *Weed Sewing Machine Co. v. Baker* (C. C.) 40 Fed. 56.

It then becomes necessary to ascertain whether this agreement of the parties was merely a personal covenant on the part of the Keystone Hydraulic Mining Company, or whether it gave to the defendants an easement or interest in the properties covered by the mortgage. The agreement gave defendants more than the right to simply deposit the slimes and tailings from their mills into the San Miguel river. Such right they possessed without any permission from the Keystone Hydraulic Mining Company, provided they did not thereby pollute the water, diminish the flow, or otherwise injure the property of said Keystone Company. The object and purpose of the agreement was to give to defendants the right to have the slimes and tailings from their mills flow through the flumes, pipes, sluices, and reservoirs of the Keystone Hydraulic Mining Company, and if, in the exercise of such right, and as an incident thereto, such slimes and tailings were precipitated by the waters of the river upon the lands and claims of said company, then that right was also embraced within the privileges given by the agreement. *Scheel v. Alhambra Mining Co.* (C. C.) 79 Fed. 821.

In Black's *Pomeroy on Water Rights*, § 152, it is said:

"It is hardly necessary to state that any private riparian proprietor upon a stream may obtain, as against other proprietors, special rights to use the water in the nature of easements or servitudes farther and greater than those conferred upon him simply as a riparian proprietor. Thus, for example, he may obtain by grant from other proprietors, or by prescription against them, the exclusive right to any portion of the waters of the stream."

In *Jones on Easements*, § 787:

"A perpetual easement to overflow land is an interest in land which requires an instrument in writing to pass the title to it, and an oral consent or license to flow land does not confer any permanent right or interest, but is revocable at any time."

In *Caryon v. Loberling et al.*, 1 Hurlstone & Norman's Reports, 784, the declaration alleged: That the plaintiff was the owner and lawfully possessed of certain lands and premises and of a certain natural stream of water flowing from and through other lands lying near to and above the lands of the plaintiff into the sea; that the defendants were possessed of lands and of a certain tin mine and china clay works situated upon defendants' lands; and that defendants, in working the same, wrongfully threw sand, stone, rubble, and other stuff into such natural stream of water, flowing through the plaintiff's land, whereby the channel was obstructed and the water flowed over and upon the plaintiff's lands and destroyed their produce. To the complaint defendants' plea, among other things, was: That the defendants were the occupiers of lands near to and above the plaintiff's lands, and owners of a tin mine situated within the lands of the defendants; that de-

defendants and all other occupiers of the land and tin mine of the defendants for 20 years next before the commencement of the suit enjoyed as of right and without interruption the right from time to time, as occasion required, to work the tin mine and to win therefrom tin and tin ore, and, in the course of so working and winning the same of washing away by means of the stream of water in the declaration mentioned, where the same flows through the lands and tin mine of the defendants, the sand, stones, rubble, and other stuff which were dislodged or severed in the course of so working the tin mine, and of casting and throwing from and out of the tin mine the sand, stones, rubble, and other stuff into the said stream, where the same flows through the land and tin mine of the defendants, and of having the same washed and carried away by the flow of the stream towards the sea and towards that part of the channel of the stream which is situated within the lands of the plaintiff; that by reason of the premises a small part of the sand, stones, rubble, and other stuff necessarily became and was deposited and accumulated in and upon that part of the bed or channel of the stream which flowed through plaintiff's premises, and said part of said bed or channel necessarily became and was a little obstructed, filled up, and raised above its natural level, and certain small quantities of the waters of the said stream necessarily a little penetrated and burst the banks of said channel and flowed over and upon the said lands of plaintiff. Upon demurrer it was held by the Court of Exchequer that the defendants' plea was good. The court held that the privilege set forth in the plea was the subject-matter of a grant, and, being the subject-matter of a grant, could be acquired by prescription, and the plea showing that the defendants had exercised the right for the full period of 20 years had obtained a prescriptive right to continue said use. See, also, discussion in Washburn's Easements and Servitudes (4th Ed.) § 7, c. 4.

We think the agreement granted to the defendants an easement to have the slimes and tailings from their mills flow through the flumes, pipes, sluices, and reservoirs upon the properties of complainant in question, and, as a natural incident thereto, upon his said lands, and that such interest of the defendants was not affected by the foreclosure decree and sale; they not being parties thereto.

As this action was commenced before the expiration of the grant, it cannot be maintained; but, as the dismissal of the bill by the court below was an adjudication of all the issues, it is reversed, with directions to enter a decree finding that complainant cannot maintain the action during the life of the agreements mentioned, bearing date August 26, 1904, and that the bill be dismissed on that ground alone, without prejudice to the right of the complainant to maintain a new suit in equity after the rights of defendants, acquired under said agreements of August 26, 1904, have expired.

The appellant will recover one-third of his costs in this court.

CONNOLLY v. BOUCK et al.†

(Circuit Court of Appeals, Eighth Circuit. November 18, 1909.)

No. 3,034.

1. CONTRACTS (§ 95*)—VALIDITY OF ASSENT—DURESS.

Threats made by one member of a mining partnership to another that, unless the latter signed a contract presented to him, the former would advance no more money to develop the mine, which should be shut down and rendered worthless, did not constitute duress which would invalidate the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 431-440; Dec. Dig. § 95.*]

2. CONTRACTS (§ 97*)—VALIDITY OF ASSENT—CONTRACT MADE UNDER DURESS—RATIFICATION.

A contract made under duress is not void, but voidable only, and cannot be avoided by a party who, after its execution, has ratified it by accepting its benefits.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 442-446; Dec. Dig. § 97.*]

3. LIENS (§ 7*)—CREATION BY CONTRACT—IMPLIED LIEN.

Complainants and defendant, who were jointly interested in mining property for the development of which complainants had made large advances, entered into a contract giving complainants the right to manage the property and apply the profits, and, in case of a sale, the proceeds of the property, to the repayment of such advances. *Held*, that such contract gave them an equitable lien on the property itself, which they were entitled to foreclose when it had been demonstrated that the operation of the mines was unprofitable.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 26-28; Dec. Dig. § 7.*]

Appeal from the Circuit Court of the United States for the District of Colorado.

Suit in equity by Francis E. Bouck, administrator with the will annexed of Mary Connolly Andrews, and Michael Connolly, against Patrick K. Connolly. Decree for complainants, and defendant appeals. Affirmed.

Hugh Butler, for appellant.

Harvey Riddell, for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. One Patrick K. Connolly was possessed of certain mining claims in the state of Colorado. Having little means, he entered into an arrangement with his brother, Nicholas K. Connolly, in June, 1894, whereby Nicholas K. Connolly was to advance certain moneys for the development of the properties, and said properties should be owned equally, share and share alike, by Patrick K. Connolly and Nicholas K. Connolly. In pursuance of this agreement Nicholas K. Connolly furnished some moneys which Patrick K. Connolly used in developing the mines. In the fall of 1894 Michael Connolly, another brother, visited defendant in Colorado, and it was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 4, 1910.

then agreed that Michael Connolly should also advance moneys for the development of the claims, and that the claims should be owned, one-third by Patrick K. Connolly, one-third by Nicholas K. Connolly, and one-third by Michael Connolly. This arrangement was assented to by Nicholas K. Connolly. There after Nicholas K. Connolly and Michael Connolly advanced moneys for the development of said properties until August, 1900, they had advanced the sum of \$114,513.43. Patrick K. Connolly, however, used some \$7,000 of this money in the purchase of some stock in another mine. In August, 1900, Michael Connolly and Patrick K. Connolly, being together in Leadville, Colo., Michael Connolly representing himself and Nicholas K. Connolly, the following written agreement was executed:

"This agreement, made this 13th day of August, A. D. 1900, by and between Michael Connolly, of the city of Montreal, Canada, and Nicholas K. Connolly, of the town of Boonton, in the state of New Jersey, parties of the first part, and Patrick K. Connolly, of the city of Leadville, county of Lake, and state of Colorado, witnesseth as follows, to wit: That the management of the Dolly B mine and all other properties—mining properties—situate in the county of Lake and state of Colorado, and standing on the record in the name of either of the parties aforesaid, or in the name of either member of the said party of the first part, shall be taken and controlled by the said party of the first part until said party shall have realized the amount said party has contributed and furnished for the development or obtaining title thereto or expense in maintaining such title, either in litigation or otherwise, above and in excess of the proportionate share thereof; that the stock of the Big Six Mining Company, now in the bank to the credit of the said party of the second part, shall be delivered to the said party of the first part, to be managed as the other property of the company is managed; that either of the said parties may at any time obtain a purchaser for any or all of the said property at the best price possible to obtain therefor, which proposition shall be submitted to the other party, who shall have a reasonable time, under the circumstances, to obtain a better price, and, in case no better price can be obtained in such reasonable time, the said party of the second part shall have the preference and be entitled to buy at such price; and that when all of the advances of the said party of the first part as aforesaid shall have been repaid, either from the produce of the said property or from the sales made as aforesaid, as well as fifteen thousand dollars (\$15,000) advanced to the said party of the second part in the year 1875, by the said party of the first part, together with legal interest on both sums, then the said party of the second part shall have the equal undivided one-third of whatever remains, which shall be legally conveyed or assigned to him by the said party of the first part. That the said party of the first part shall, within a reasonable time hereafter, exhibit the books of said party with regard to the said \$15,000 to the said party of the second part, or his authorized agent, and if they demonstrate that a less sum than the said \$15,000 was advanced to the said party of the second part, the said sum of \$15,000 shall be reduced by the difference between the two sums.

"In witness whereof, the said parties have hereunto set their hands and seals in duplicate the day and year first above written."

Nicholas K. Connolly died in February, 1901, leaving as his only heir Mary Connolly Andrews. After the death of Nicholas K. Connolly and the execution of the agreement of August, 1900, Michael Connolly advanced the further sum of \$21,916.18, and Mrs. Andrews advanced \$23,975.25, which was used in developing the mines. No profitable results were obtained by the development. While some \$200,000 was received from ore taken from the mines, that amount was also expended, in addition to the advances before mentioned, in developing the mines. On account of a disagreement between the

parties, and the unprofitable operations, further developments ceased, and in August, 1904, Michael Connolly and Mary Connolly Andrews filed their bill in the Circuit Court for the state and district of Colorado, setting forth said agreement, the advances of money, and other matters unnecessary to be considered, praying that an accounting might be had of the moneys advanced by said Nicholas K. Connolly and Michael Connolly and Mary Connolly Andrews, that the amounts advanced be decreed to be a lien upon said mining properties, and that the same be sold to satisfy said lien. During the progress of the suit Mary Connolly Andrews died, and the action was revived as to her interest in the name of Francis E. Bouck, administrator of her estate.

The defendant, Patrick K. Connolly, in his answer, alleged, among other things, that in June, 1894, he entered into an arrangement with his brother, Nicholas K. Connolly, to furnish him financial aid and assistance in the acquisition and operation of such mining properties, whereby it was agreed that all the properties which Patrick K. Connolly had then located and of which he was the owner, and all properties to which he might thereafter acquire title, should be developed, with the object and intention of uncovering any ore bodies that might be found within said locations, and place the same upon a paying basis, if such were possible, and as a part of such arrangement it was agreed that said properties should be owned equally, share and share alike, by Patrick K. Connolly and Nicholas K. Connolly; that in the fall or winter of 1894 Michael Connolly proposed that he be admitted into the enterprise, offering to contribute one-half of the expenses and to furnish one-half of the sums that might be required from time to time to carry on the enterprise, and that the interests in the property should be changed so that he (Michael Connolly) should receive one-third interest therein, Nicholas K. one-third, and Patrick K. one-third, and that Patrick K. should continue to devote his time and energies and experience in the management and workings of the properties and the proper expenditures of the moneys to bring about the results hoped for. Michael Connolly was admitted into the enterprise in pursuance of such agreement, and thereafter Michael and Nicholas K. Connolly advanced large sums of money. Defendant, however, alleged that the agreement of August, 1900, was obtained from him by Michael Connolly by duress; that Michael Connolly threatened that, unless he executed the contract, neither he (Michael) nor Nicholas K. would advance any farther moneys for the purposes aforesaid, and that Patrick K. would thus lose all his interest in the property. He farther says in his answer that he—

“had been at all times, and was now, willing and anxious to pursue his course and discharge his part of the agreement.”

Upon issues being joined, evidence was taken, and a decree entered for plaintiffs as prayed for, from which Patrick K. Connolly has appealed.

While the evidence is conflicting as to just what took place or was said between Michael Connolly and Patrick K. Connolly at the time the written agreement of August, 1900, was executed, we do not think that the facts in that respect, as testified to by Patrick K. Connolly,

constitute duress. Patrick K. Connolly testified that Michael had the agreement drawn in the office of an attorney before presenting it to him. He then testified:

"Well, I objected to signing it and told Mr. Michael Connolly that it looked to me like a ——— outrage——was the language I used. Michael Connolly came after me, and he says to me, 'If you don't sign that agreement, you lose every ——— thing you have got in this property,' and I says, 'How am I going to lose it?' And he says, 'I will see that the property is shut down before I leave here, and you will be drowned out, and I will never put another dollar into the enterprise, and I will see that Nick don't either.' I became satisfied in my mind that Nick would straighten this matter out as soon as he heard of it."

The agreement was then signed. This version of the transaction, as stated by defendant himself, falls short of establishing the execution of the agreement under duress. *French v. Shoemaker*, 14 Wall. 314, 20 L. Ed. 852; *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502; *Silliman v. U. S.*, 101 U. S. 465, 25 L. Ed. 987; *Wilson S. M. Co. v. Curry*, 126 Ind. 161, 25 N. E. 896; *Whittaker v. Southwest Virginia Improvement Co.*, 34 W. Va. 217, 12 S. E. 507; *Clarke on Contracts*, § 172; *Bishop on Contracts*, c. 25.

If, however, it be admitted that Patrick K. Connolly executed the agreement under duress, such defense would not now be availing to him. The agreement would not be void upon that account, but voidable on the part of Patrick K. Connolly. Instead of taking steps to avoid it, he accepted the advances of money thereafter made for the development of the mine, and alleges, in his answer, that he had been at all times since, and even now, willing and anxious to pursue his course and discharge his part of the contract; so he will not now be heard to say that the agreement is not of binding force because executed under duress.

It is also contended on the part of appellant that, as the agreement itself did not in terms give a lien upon the properties for the moneys advanced, but provided that from the proceeds of the mines derived from their operation, or, in case of private sale, from the proceeds of such sale, the parties were to be reimbursed for their advancements, such fact precludes the idea that there could be a lien upon the property for such advancements which could be enforced by a court of equity. We think, under the facts, that the arrangement and agreement between the parties constituted what is known as a "mining partnership," and in *Duryea v. Burt*, 28 Cal. 569-579, in which the rights of parties under a mining contract were considered, it was said:

"It may be laid down as a general principle that each member of a partnership has a specific lien on the partnership property, not only for the debts and liabilities due to third persons, but also for his own share of the capital stock and funds, and for all moneys advanced by him for the use of the concern."

In *Ex parte Wills*, 2 Cox, 233, it was held that the pledge of the rents and income of real estate to secure an indebtedness constituted the giving of an equitable lien upon such real estate. The same was also held in *Legard v. Hodges*, 1 Ves. Jr. 477.

In *Charter Oak Life Ins. Co. v. Gisborne*, 5 Utah, 319, 15 Pac. 253, certain mining property was conveyed to a trustee. The court said:

"Such conveyance was made and received upon the trusts, nevertheless, and to and for the uses, interests, securities, and purposes hereinafter limited, specified, described, and declared; that is to say, upon trust to receive the rents, issues, and profits of said premises, and to apply the same as received as follows, viz., etc. Then followed in the declaration of trust the requirement to pay, first, the expenses of operating the mine, etc.; second, to pay the \$400,000 back to Stephens, trustee; third, to pay Gisborne a percentage of one-third of the net proceeds of the mine; and, fourth, to pay Gisborne \$275,000. The appellant urged that the foregoing provisions for the trustee to receive the rents, issues, and profits of the mine require these various amounts to be paid out of the product of the ores of the mine, and are a prohibition against the taking of the mine itself to pay them. * * * Primarily, no doubt, the indebtedness was to have been paid out of the ores taken from the mine; but when the mine ceased to be productive this mode of paying the indebtedness failed. If the creditors could resort only to the 'rents, issues, and profits,' and this meant only the ores, and they had ceased, the creditors had exhausted all their security. The meaning of the words 'rents, issues, and profits' has often been before the courts, and by a long line of decisions the courts of chancery have declared that, unless these words be connected with other words which restrain the meaning of the terms to the rents, issues, and profits as they arise (as if the trust is to pay debts out of the annual rents), the courts will give the words a meaning broad enough to include the sale of the property itself. The strict meaning of the words, as opposed to land, is the annual rents, issues, and profits. Yet the courts hold that they should not be confined thereto, but should be taken, in a more enlarged sense, to include every mode by which land may be made to yield profits, out of which money so charged upon it may be taken, and, consequently, to include the sale of the property itself. The doctrine is thus laid down broadly by Judge Story in his work on Equity Jurisprudence. It is likewise laid down in *Perry on Trusts*, in *Hawkins on Wills*, in *Powell on Mortgages*, and in other works, citing an array of authorities. 2 Story, Eq. Jur. § 1064, 1064a; 1 Pow. Mortg. 60-80; Hawk. Wills, 120 et seq.; *New v. Nicoll*, 73 N. Y. 130, 131, 29 Am. Rep. 111; 2 *Perry, Trusts*, pp. 168, 170, § 602g, 602k; *Fletcher. Trustees*, 56 et seq."

This case was affirmed by the Supreme Court in 142 U. S. 326, 12 Sup. Ct. 277, 35 L. Ed. 1029. The same rule was announced in *Gest v. Packwood* (C. C.) 39 Fed. 525-533.

We think these authorities applicable in this case. Not only were the proceeds of the mine pledged to the payment of the advances which had been made by complainants, but it was provided that, in case of a sale of the property, out of the proceeds of such sale, the amount of the advances which they had theretofore made should be refunded. Applying the equitable principles announced in the foregoing authorities, we think it clear that complainants have an equitable lien upon the premises in question, and that the finding of the court below in this respect was proper.

It is said that the court erred in the accounting to the extent of some \$22,000. We have gone carefully over the evidence, and find no reason to disturb the finding of the court in that respect; and the decree is affirmed.

WILSON v. PLUTUS MINING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1909.)

No. 3,066.

1. VENDOR AND PURCHASER (§ 254*)—"VENDOR'S LIEN."

A conveyance of real estate for which the consideration is not paid raises a claim in equity upon the property conveyed, commonly called a "vendor's lien," which courts enforce against the grantee and those claiming under him with notice, on the ground that one who gets the estate of another ought not to be permitted to keep it without paying the agreed consideration for it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 641-651; Dec. Dig. § 254.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7288-7290, 7827.]

2. COURTS (§ 262*)—VENDOR'S LIEN—FEDERAL COURTS ENFORCE UNLESS CONTRARY TO JURISPRUDENCE OF STATE.

The federal courts enforce a vendor's or grantor's lien in pursuance of the general rule in equity, when it is not in contravention of the jurisprudence of the state in which the suit is brought.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

3. EQUITY (§ 231*)—PLEADING—ABSENCE FROM BILL OF PRAYER FOR SPECIAL RELIEF NOT FATAL.

The absence from a bill in equity of a prayer for the special relief, to which the complainant supposes himself entitled, will not sustain a dismissal upon a demurrer which does not specify that defect, where the bill states a good cause of action and contains a prayer for general relief.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 231.*]

4. EQUITY (§ 87*)—LACHES—APPLICATION IN ANALOGY TO STATUTES OF LIMITATION—RULES FOR.

Courts of equity are not bound by, but act in analogy to, the statutes of limitation relating to actions at law of like character.

When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches within that time.

When a suit is brought after the statutory time, the burden is on the complainant to show in his bill and by his proof that it would be inequitable to apply it to his case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244; Dec. Dig. § 87.*]

5. EQUITY (§ 87*)—LACHES—FACTS PLEADED SUFFICIENT TO SUSTAIN SUIT AFTER ANALOGOUS LIMITATION EXPIRED.

The bill of the complainant disclosed these facts: In May, 1898, complainant conveyed his interest in mining claims to one of the defendants for a recited consideration of \$125,000, no part of which has been paid to him. The analogous limitation at law was six years, and this suit was brought in 1908. He was committed to the state mental hospital in August, 1898, was released in November, 1898, and he was told that the condition of his release was that he should leave and stay out of the state. He left, and, with the exception of about 83 days, he stayed out of the state until June 17, 1907, when he returned, was arrested, and on July 23, 1907, was committed to the state mental hospital again as an insane person. There were no innocent purchasers among the defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Held, it would be inequitable to apply to the complainant's case the analogous limitation of an action at law to six years.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 87.*]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Utah.

Bill by William J. Wilson, by Murray M. Kellogg, his next friend, against the Plutus Mining Company and others. From a decree sustaining the demurrer and dismissing the bill, complainant appeals. Reversed and remanded.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

Murray M. Kellogg (Alfred L. Booth, on the brief), for appellant.

C. S. Varian (D. H. Thomas, A. L. Hoppaugh, and Charles C. Dey, on the brief), for appellees.

SANBORN, Circuit Judge. This is an appeal from a decree which sustained a demurrer to and a dismissal of the bill in equity exhibited by William J. Wilson, an insane man, by his next friend, for an adjudication of his claims upon three lode mining claims. The bill is meager, and suggests some inquiries that it does not answer; but it fairly sets forth these alleged facts: The complainant owned and was in the possession of an undivided half of three lode mining claims in the state of Utah, which had not been patented, and one Martin was the owner of the other undivided half thereof. Wilson gave Martin a power of attorney to convey the former's interest in these claims, and Martin agreed that he would not dispose of that interest for less than \$10,000, and that he would deposit \$10,000, in a certain bank to Wilson's credit as soon as he should make a sale. On May 4, 1898, Martin conveyed the three claims to the Juab Mining Company, a corporation, one of the defendants, for a recited consideration of \$250,000, and the Juab Mining Company attempted to issue certain shares of its stock to the complainant in payment of his share of the purchase price; but Wilson never accepted these shares, and no part of the purchase price was ever paid to him. In 1907 the Juab Mining Company conveyed these mining claims to the Plutus Mining Company, a corporation, whose president knew all the facts averred in this bill. In August, 1898, the complainant was adjudged insane and committed to the state mental hospital in the state of Utah. On November 16, 1898, he was released from this hospital and told by the authorities thereat that the condition of his release was that he should leave and should never return to the state of Utah. He immediately went out of the state, and remained beyond its borders, with the exception of two months in 1899 and 33 days in 1900, until June 20, 1907, when he returned, and was at once arrested, and on July 23, 1907, was committed to the state mental hospital again as an insane person.

Because one who gets the estate of another ought not to be allowed to keep it without paying the consideration of its sale to him, an equitable claim in favor of the grantor for the unpaid purchase price, or a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vendor's lien, springs up and attaches to real estate conveyed without a payment of the consideration, which courts of equity have very uniformly enforced against the grantee and those claiming under him with notice that the purchase price is not paid. This is a general rule of equity jurisprudence, which prevails in England and in this country, unless abolished by statute or by an established rule of decision to the contrary by the courts of the local jurisdiction. The courts of the United States enforce such grantor's and vendor's liens when they are not in contravention of the jurisprudence of the state in which the suit is brought. *Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509, 516, 14 Sup. Ct. 842, 38 L. Ed. 802; *Fisher v. Shropshire*, 147 U. S. 133, 139, 140, 13 Sup. Ct. 201, 37 L. Ed. 109. No statute or line of decisions in the state of Utah has been called to our attention which is in conflict with the general rule of equity jurisprudence upon this subject, so that the enforcement of such liens is not out of harmony with the jurisprudence of that state.

A conveyance and a failure to pay the consideration are presumptive proof of a vendor's lien. "Generally speaking, the lien of the vendor exists," says Mr. Justice Story in his work on Equity Jurisprudence, at section 1224, "and the burden of proof is on the purchaser to establish that in the particular case it has been intentionally displaced or waived by the consent of the parties. If under all the circumstances it remains in doubt, then the lien attaches." *Seymour v. Slide & Spur Gold Mines (C. C.)* 42 Fed. 633, 637; *Berger v. Berger*, 104 Wis. 282, 80 N. W. 585, 76 Am. St. Rep. 877. It is possible that the defendants may be able to show that complainant's lien was released, or that for some reason, not apparent on the face of the bill, it never attached. But the facts averred by the complainant and admitted by the demurrer that Wilson, by his attorney in fact, Martin, sold and conveyed to the Juab Mining Company his half interest in the three mining claims for \$125,000, and that no part of this purchase price has ever been paid to him, are clearly sufficient, in the absence of denial and of countervailing evidence, to establish his vendor's lien upon the mining claims for the \$125,000 and interest.

Counsel for the defendants argue that the facts stated in the bill fail to show any lien upon this property as against them, because it contains no averment that they knew, when they respectively acquired the property, that Wilson had or claimed such a lien, and because it contains an allegation that the Juab Mining Company secured a patent to these claims in 1903. But the complainant avers in his bill that the conveyance to the Juab Company was made by him through his attorney in fact, that the Juab Company attempted to issue shares of its stock to him in payment for it, and that its president and the president of the Plutus Company knew all the facts set forth in the bill. The knowledge of the presidents was the knowledge of their respective companies, for these presidents were conducting the negotiations for the sale of the mining claims by the Juab Company to the Plutus Company. The facts that the Juab Company took a deed from the complainant and attempted to pay him for his interest with its stock are ample to show that it knew who the vendor of this interest was, that he had not been paid for it, and hence that he had a vendor's lien

upon it for his purchase price. The Plutus Company knew all these facts before it took this deed, because its president knew them. And as the vendor's lien attached before the patent issued, and the Juab Company procured the latter with knowledge of the lien, and by means of the very deed to secure the payment of the consideration of which the lien attached, the title under the patent inured to the benefit of Wilson, as well as to that of the defendants, and the latter took it subject to his lien.

Counsel suggest that the prayer of the bill fails to ask the special relief to which the complainant supposes himself entitled as required by equity rule 21. But the bill contains a prayer for a discovery, "to the end that your orator may have his rights determined and adjudicated according to the facts hereinbefore set forth," and for general relief. In view of the fact that no objection to this prayer was made in the demurrer, and that the court may lawfully grant other relief under the general prayer, although a complainant is not entitled to the specific relief he asks (*Watts v. Waddle*, 6 Pet. 389, 402, 8 L. Ed. 437; *Sage v. Central Railroad Company*, 99 U. S. 334, 25 L. Ed. 394; *London & San Francisco Bank v. Dexter, Horton & Co.*, 126 Fed. 593, 61 C. C. A. 515, 528; *Moore v. Mitchell*, 17 Fed. Cases, 692, 694 [Case No. 9,770]), there is no merit in this objection.

Another position taken by counsel for the defendants is that the complainant has an adequate remedy at law by an action for damages against his agent Martin. But such an action may be barred by the statute of limitations (*Comp. Laws Utah 1907*, § 2875), and it does not appear that, if maintainable, it would afford a remedy as prompt, adequate, and effective as this suit in equity, because Martin may not be liable for more than the \$10,000 specified in his special agreement with the complainant, while the purchase price of the complainant's half of the property appears to have been many times that amount.

A possible objection to the maintenance of this suit, which was not mentioned in the demurrer or in the brief, has occurred to us, and that is that, while the cause of action on which the bill is based arose in May, 1898, this suit was not commenced until June, 1908. But the general rule is that defendants, by silent acquiescence in the maintenance of a suit against them and by the litigation of its merits, may waive the fact that it was not brought until the limitation prescribed for its commencement had been passed, and courts of equity are not bound by, but act, or refuse to act, in analogy to, the statute of limitations relating to actions at law of like character. Under ordinary circumstances a suit in equity will not be stayed before, and will be stayed after, the time fixed by the analogous limitation at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches, and, when such a suit is

brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case. *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14, 21; *Ide v. Trorlicht, Duncker & Renard Carpet Co.*, 115 Fed. 137, 148, 53 C. C. A. 341, 352; *Boynton v. Haggart*, 120 Fed. 819, 830, 57 C. C. A. 301, 312; *Williams v. Neely*, 134 Fed. 1, 13, 67 C. C. A. 171, 183, 69 L. R. A. 232; *Brun v. Mann*, 151 Fed. 145, 154, 80 C. C. A. 513, 522, 12 L. R. A. (N. S.) 154. The limitation prescribed by the statute of Utah for an analogous action at law was six years (*Comp. Laws Utah 1907*, § 2875); but the facts alleged in the bill, that the defendants have the property of the complainant, for which he has received no part of the consideration of his conveyance, that there is no innocent purchaser among them, that the complainant is an insane man, that he was committed to the state mental hospital in August, 1898, about three months after his cause of action accrued, that when he was released in November of that year he was told by the authorities at the hospital that his release was on condition that he should leave the state of Utah and never return to it, that he left the state to avoid confinement, and remained beyond its borders, except for about 83 days, until June 17, 1907, that he was arrested the very day in 1907 that he returned to the state, and was committed to the hospital again on July 23, 1907, present a case so extraordinary that, in the absence of denial or evidence to the contrary, it would be inequitable to apply the analogous limitation at law to this suit (*Stevens v. Grand Central Min. Co.*, 133 Fed. 28, 32, 67 C. C. A. 284, 288).

For these reasons, the decree below must be reversed, and the case must be remanded to the Circuit Court, with directions to permit the defendants to answer and to take further proceedings in accord with the views expressed in this opinion; and it is so ordered.

GREAT NORTHERN RY. CO. v. WESTERN UNION TELEGRAPH CO. et al.
WESTERN UNION TELEGRAPH CO. v. GREAT NORTHERN RY. CO.
et al. NORTHWESTERN TELEGRAPH CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1909.)

Nos. 2,870-2,872.

1. APPEAL AND ERROR (§ 1097*)—PROCEEDINGS ON MANDATE IN LOWER COURT
—SECOND APPEAL.

When an appellate court definitely describes the decree to be entered in the court below, there is no discretion in the latter court, but its duty is to obey the mandate and enter the decree accordingly, and when so entered it is the decree of the appellate court, and an appeal from it will be dismissed; but if the mandate does not cover the entire case, but leaves something undetermined, and to be inquired into and adjudicated, or if the court below misconstrues the decree of the appellate court, and does not give full effect to its mandate, a new appeal is an appropriate remedy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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2. TELEGRAPHS AND TELEPHONES (§ 20*)—CROSS-BILL—PLEADING AND ISSUES—SET-OFF.

In a suit in equity by a railroad company to determine the ownership of telegraph lines built and operated on its right of way by defendant under a contract which has expired, where it was determined that defendant still owned such lines and had the right to operate the same, subject to the payment of a reasonable rental for the use of complainant's right of way, a claim set up by defendant by cross-bill for telegraphic service furnished complainant, in excess of free service contracted for, was germane to the subject-matter of the suit, and might properly be determined, and the amount found due set off against the rental.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 20.*]

3. APPEAL AND ERROR (§ 1097*)—DECISION AS LAW OF CASE—SECOND APPEAL.

When a case comes the second time before an appellate court by appeal upon the same facts, what was decided at the first appeal constitutes the law of the case, and will not be again examined.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

Appeals from the Circuit Court of the United States for the District of Minnesota.

Suit in equity by the St. Paul, Minneapolis & Manitoba Railway Company, and the Great Northern Railway Company, as its successor, against the Western Union Telegraph Company and the Northwestern Telegraph Company. From the decree, all parties appeal. Modified and affirmed.

See, also, 118 Fed. 497, 55 C. C. A. 263.

William R. Begg, for Great Northern Ry. Co.

Rush Taggart, for Western Union Telegraph Co.

George C. Ripley, for Northwestern Telegraph Co.

Before HOOK, Circuit Judge, and RINER and AMIDON, District Judges.

HOOK, Circuit Judge. This was a suit to determine the respective rights and interests of the parties in telegraph lines on the right of way of what is now known as the Great Northern System of railroads, extending from the state of Minnesota to the Pacific Ocean. The bill was filed in 1893 by a predecessor of the present appellant, the Great Northern Railway Company, and it asserted the telegraph lines had been built under contracts which had expired, and that as the lines were affixed to the soil of the right of way they consequently became its property. The position of the telegraph company was that it was the owner of the lines and had a perpetual easement over the right of way, but that, if for any reason it was obligated to the railway company for compensation in respect of the use of any part of the right of way, it asked that an accounting be had and the amount of its obligation be ascertained. This in a very general way, but sufficiently, expresses the nature of the controversy. The case was here once before on an appeal from the first decree of the Circuit Court, and the elaborate recital of the facts accompanying the opinion makes it unnecessary to repeat them. *St. Paul, M. & M. Ry. Co. v. Western*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Union Tel. Co., 118 Fed. 497, 55 C. C. A. 263. The mandate of this court on that appeal directed the vacation of the decree of the Circuit Court and the entry of one in conformity with the opinion, and that if further proceedings were had, and it was recognized they might be necessary, they should be in accord with the principles announced by this court. The Circuit Court entered a new decree, which the telegraph company claims is in exact accord with the mandate of this court, and it therefore moves that the present appeal taken from that decree be dismissed.

The rules of law applicable to the situation are as follows: When an appellate court definitely describes the decree to be entered in the court below, there is no discretion in the latter court; but its duty is to obey the mandate and enter the decree accordingly. The decree, when entered in the court below according to the mandate, is the decree of the appellate court, and an appeal from it will be dismissed, for it would be in effect an appeal to the appellate court from its own decree. *Illinois v. Railroad Company*, 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440; *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986. On the other hand, if the mandate of the appellate court does not cover the entire case, but leaves something undetermined, something to be inquired into and adjudicated, the action of the court below in respect thereof may be reviewed on a second appeal. Also, if the court below misconstrues the decree of the appellate court, and does not give full effect to its mandate, a new appeal is an appropriate remedy. *Ex parte Union Steamboat Company*, 178 U. S. 317, 20 Sup. Ct. 904, 44 L. Ed. 1084; *In re Sanford Fork & Tool Company*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414.

It is quite apparent from the former opinion, to which the mandate referred, that this court did not attempt to settle on the first appeal all the matters in controversy. At least one of those now presented to us by the appellant was involved in the pleadings, but was left untouched by our former decree; and even though it may be found that the trial court was entirely right in its disposition of it, the appeal should not be dismissed. The present decree of the court below affirms the right of the telegraph company to compensation for telegraphic services rendered the railway company in excess of the amount provided by contract to be rendered free of charge, and holds that the excess amount should be credited upon or set off against the amount found due the railway company for its transportation and distribution of materials for the telegraph lines and for use of its right of way. This matter was not determined on the first appeal, and we think the trial court was right in its decision upon it. The claim for the services in excess of the free amount was distinctly made in the cross-bill of the telegraph company. It grows out of the contract between the parties and is germane to the litigation. If the railway company should be justly indebted to the telegraph company on this account, there is no reason in equity why the amount should not be definitely ascertained and applied in reduction of an indebtedness of the latter arising out of the relations between the parties which make the subject-matter of the main litigation.

Complaint is made of the recital in the decree now before us of a contract made September 21, 1863, between predecessors of the present parties to the suit, as though it were one of the muniments of a right of the telegraph company in the railroad right of way. The contract, which is known in the litigation as the "Smith and Simmons contract," was held by this court to have been entirely superseded by later agreements, and to constitute no support for any claim of the telegraph company. It may be that the recital of the contract in the decree was intended as merely historical; but, if it is referred to at all, we think there should be an affirmative declaration that it was superseded, and no right or title is maintainable under it.

It was held on the first appeal that all lines of telegraph erected on the railroad right of way prior to July 1, 1882, belonged equally and jointly to the railway company and the telegraph company, and that all lines thereafter erected on the right of way were the sole property of the telegraph company, subject, however, to the duty to pay the railway company for transportation and distribution of materials, and also to pay a just compensation for the use of the right of way. It was also said that, if the parties could not agree, the trial court was authorized to proceed with a master and commissioners to make inquiry and fix the compensation to be paid. The present decree of the Circuit Court was accordingly so framed, and the railway company now complains that its right to compensation for use of its right of way was restricted to the use by telegraph lines erected since July 1, 1882. It says, if the telegraph company is the owner of a half interest in the lines built prior to the date mentioned, it should be justly held to pay half of the value of their use of the right of way.

The difficulty with this contention is that it was determined adversely to the railway company on the first appeal. It clearly appears, from the prior opinion, the court was of the view that the right to compensation for use of the right of way was limited to the use by lines owned wholly by the telegraph company in which the railway company had no proprietary interest. In speaking of this very right to compensation, it was expressly said the lines owned jointly by the parties did not stand on the same footing. The matter, therefore, is not open to re-examination. It is the established rule in the courts of the United States that when a case comes the second time before an appellate court, by appeal upon the same facts, what was decided at the first appeal constitutes the law of the case, and will not be again examined touching its soundness. *Mutual Reserve Fund Life Ass'n v. Ferrenbach*, 144 Fed. 342, 75 C. C. A. 304, 7 L. R. A. (N. S.) 1163; *Guarantee Co. v. Phenix Ins. Co.*, 124 Fed. 170, 59 C. C. A. 376. "An actual decision of any question settles the law in respect thereto for future action in the case." *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, 554, 24 Sup. Ct. 538, 48 L. Ed. 788. The object of the rule is that there may be an end to litigation, and that speculation on changes in the membership of the court may be prevented.

Exhaustive briefs have been presented, in which are discussed the questions whether the railway company became the owner of the telegraph lines on the expiration of the contracts, and, if not, then whether the telegraph company has under the acts of Congress, or can ac-

quire in this suit by the judicial action of the court, an easement for its lines over the railroad right of way. But these questions were determined upon full consideration in the former opinion of this court, and the trial court was directed to enter a decree and proceed accordingly. We cannot again go into them. A second appeal to the same court cannot be made to perform the office of a petition for rehearing or a bill of review; and that is so here, even if it be true, as claimed, that the conclusions reached on the first appeal are, in part, at least, contrary to views more recently announced by the Supreme Court in other, but similar, cases. *Western Union Telegraph Company v. Pennsylvania Railroad Company*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312; *Western Union Telegraph Company v. Pennsylvania Railroad Company*, 195 U. S. 594, 25 Sup. Ct. 150, 49 L. Ed. 332. That the Supreme Court might, if its jurisdiction could be invoked, reach a different result in the case in hand, does not open it up for re-examination by us.

For the sake of brevity we have referred to the appellant the Great Northern Railway Company as though it were a party to the contracts concerning the telegraph lines, instead of the railroad companies it succeeded. By doing so, however, we do not intend to affect any independent rights it may have, not involved in such succession. Nor do we determine anything as between the Western Union Telegraph Company and the Northwestern Telegraph Company.

The motion to dismiss the appeal is denied. The decree of the Circuit Court is modified, by the insertion of a provision that the contract of September 21, 1863, between A. B. Smith and Z. G. Simmons of the one part and the St. Paul & Pacific Railroad Company of the other, was wholly superseded by later contracts, and constitutes no basis of any present right or title in the telegraph companies; and, as so modified, the decree is affirmed.

The costs in this court will be equally divided between the railway company and the telegraph company.

UNITED STATES v. SEVEN HUNDRED AND SEVENTY-NINE CASES OF MOLASSES (two cases).

(Circuit Court of Appeals, Eighth Circuit. November 5, 1909.)

Nos. 3,030, 3,024.

1. APPEAL AND ERROR (§ 5*)—PROCEEDINGS FOR FORFEITURE UNDER FOOD AND DRUGS ACT—MODE OF REVIEW.

A proceeding by the United States under Food and Drugs Act June 30, 1906, c. 3915, § 10, 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1193), for the condemnation and forfeiture of an article alleged to be adulterated or misbranded, in which either party is given the right to demand a trial by jury of any issue of fact, where such trial is demanded and had, is reviewable only on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. § 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. FOOD (§ 7*)—FOOD AND DRUGS ACT—ADULTERATION AND MISBRANDING.

An article of food, put up and sold in cases bearing principal labels, describing the contents as a particular brand of molasses, but plainly stating in three separate places that the product is a compound of molasses and corn syrup, and also containing all the other information required by Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), and the regulations thereunder, and which article is in fact a compound of molasses and commercial glucose, is not adulterated nor misbranded, within the meaning of such act; it being shown that it contains nothing deleterious to health, and that under the rulings of the department it is permissible to describe commercial glucose on labels or brands as made from corn syrup.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 7.*]

In Error to and Appeal from the District Court of United States for the Eastern District of Arkansas.

Proceeding by the United States for the forfeiture of seven hundred and seventy-nine cases of molasses; C. E. Coe, claimant. Judgment for claimant on directed verdict, and the United States brings error and appeals. Affirmed.

William G. Whipple, U. S. Atty., and Powell Clayton, Asst. U. S. Atty.

R. G. Brown (H. B. Anderson, on the brief), for defendant in error and appellee.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge. This is a libel of condemnation arising under the provisions of the pure food and drug law, enacted by Congress June 30, 1906 (34 Stat. 768, c. 3915 [U. S. Comp. St. Supp. 1909, p. 1188]), and the regulations of the Secretaries promulgated October 20, 1906, in pursuance of power conferred on them by section 3 of the act. The facts are:

One C. E. Coe, a merchant of the city of Memphis, Tenn., at various dates between March 18 and August 1, 1908, sold and shipped the 779 cases of molasses in controversy to certain wholesale jobbing houses in the city of Little Rock, Ark. Thereafter, on August 19th, the district attorney for the district of Arkansas filed his libel of condemnation, in which it was charged the molasses was both adulterated and misbranded in violation of the provisions of the act. A writ of seizure was issued and executed by the marshal, seizing, as shown by his return, 685 cases of the molasses in question. Of the cases seized, as shown by his return, 464 were what is labeled "sugar glen" molasses, and 221 cases as "bur-ro" molasses. Thereafter on September 21, 1908, by leave of court, an amended libel of condemnation was filed, in which it was charged the molasses contained in the cases was adulterated by the use of commercial glucose, mixed and packed with the molasses to such extent as to injuriously affect the quality and strength in violation of the law; and it was further charged, in substance, the cases were so labeled and misbranded as to convey the impression the contents of the cases were pure sugar house molasses, whereas, in truth, they were a compound of sugar molasses and corn syrup. Thereafter Coe filed his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

affidavit as claimant of the molasses and answered, setting up his guaranty to the purchasers under the terms of the act, denied the charges of adulteration and misbranding, attached as exhibit to his answer a copy of the label of each brand of molasses sold and delivered by him, and demanded a trial by jury, as provided by section 10 of the act, and gave a bond as provided in the act to secure possession of the molasses. A trial by jury was had, at which, by direction of the court, the jury returned a verdict in favor of the claimant, on which a judgment was entered in his favor. From this judgment the government, being uncertain as to its rights, prosecutes its appeal in case No. 3,024 and also prosecutes error in case No. 3,030.

From the statement made it would seem quite plain the proceedings on the trial cannot be re-examined by this court on the appeal taken. Section 10 of the act, among other matters, provides as follows:

"That any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district or insular possession to another for sale, or having been transported, remains unloaded, unsold or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. * * * The proceedings of such libel shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States."

The right to trial by jury granted by this act on demand of either party is absolute, and means a trial by jury according to the established practice in courts of common law. *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200; *Insurance Company v. Comstock*, 16 Wall. 258, 21 L. Ed. 493; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *Bower v. Holzworth et al.*, 138 Fed. 28, 70 C. C. A. 396; *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666. By article 7 of the Constitution it is provided:

"No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Mr. Justice Clifford, delivering the opinion of the court in *Insurance Company v. Comstock*, supra, in commenting on this provision of the Constitution, said:

"Two modes only were known to the common law to re-examine such facts, to wit: The granting of a new trial by the court where the issue was tried, or to which the record was returnable; or, secondly, by the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode, in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted."

As a jury trial was demanded by the claimant in this case, and as such trial was had, the appeal taken in case No. 3,024 must be dis-

missed, because such method is inappropriate to review the proceedings had. It is so ordered.

At the trial the charge of adulteration was abandoned by the government, and it relied solely and alone on the charge of misbranding. As has been seen, at the conclusion of the evidence the court charged the jury neither of the labels under which the cases of molasses were sold and shipped from Memphis to Little Rock was misleading, nor constituted a misbranding, as that term is employed in the act, nor in regulation 17 promulgated by the Secretaries under authority of the act. This action of the court constitutes the sole ground of error relied upon to work a reversal of the judgment rendered in the case.

The only evidence adduced on the trial was that of the marshal who executed the writ of seizure and that of Geo. B. Spencer, a government chemist from the Department of Agriculture. The marshal testified the cases of molasses seized by him bore labels identical with those attached to and made part of the answer of claimant, which labels were offered and received in evidence at the trial, as Exhibits A and B, and are in the form annexed.

The witness Spencer testified he made a chemical analysis of the brands of molasses seized in this case; that the sugar glen brand contained 30 per cent. and the burro brand 40 per cent. of commercial glucose; that pure molasses contains no commercial glucose, but does contain natural glucose; that neither natural nor commercial glucose is injurious or deleterious to health; that a large number of syrups on the market contain as high as 80 per cent. or 90 per cent. commercial glucose; that according to the practice and rulings of the Bureau of Chemistry of the Department of Agriculture the labeling or branding of commercial glucose as "made from corn syrup" is permissible.

The provisions of the act prescribing what shall constitute a misbranding, within its meaning as applied to food products, are as follows:

"If it be labeled or branded so as to deceive or mislead the purchaser.
* * * If the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular; provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word 'compound,' 'imitation' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale."

Regulation 17 of the Secretaries (which has the effect of law), on the subject of misbranding, in so far as here thought applicable, provides:

SUGAR GLEN MOLASSES
AND
CORN SYRUP


IS COMPOSED OF THE FOLLOWING
INGREDIENTS ONLY:
COMPOUND
SUGAR HOUSE MOLASSES AND CORN SYRUP

CANNED BY
C. E. COE
MEMPHIS, TENN.


CONTAINS SULPHUR DIOXIDE
GUARANTEED UNDER THE FOOD
AND DRUGS ACT, JUNE 30, 1906
U. S. SERIAL NUMBER 13,905

Sugar Glen

COMPOUND
MOLASSES AND CORN SYRUP



OPEN SUGAR HOUSE KETTLE MOLASSES



THIS
HIGH GRADE
SUGAR HOUSE MOLASSES
IS CAREFULLY SELECTED DURING
GRINDING SEASON AND COMBINED
WITH ABSOLUTE PERFECTION IN
CANNING RETAINS ITS NATURAL
FLAVOR.
NOURISHING, DELICIOUS
AND
EASILY DIGESTED.

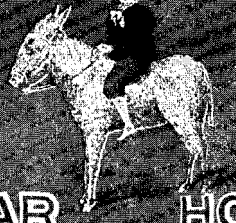
Burro Brand

MOLASSES AND CORN SYRUP
is composed of the following
ingredients only:
COMPOUND
Louisiana Molasses and
Corn Syrup

Refined and
Canned by **O. E. COE** MEMPHIS, TENN.

GUARANTEED UNDER THE FOOD AND DRUGS
ACT, JUNE 30, 1906 UNITED STATES
SERIAL NUMBER 13905

BURRO
BRAND
RIBBON CANE



Compound
Molasses
and
Corn Syrup

SUGAR HOUSE MOLASSES

IT HAS
A
DELICIOUS
FLAVOR
AND IS A
SWEEET
WHOLESONE
TABLE DELICACY.
CANNED
ESPECIALLY
FOR
FAMILY USE.

LABEL PROTECTED

"(a) The term 'label' applies to any printed, pictorial, or other matter upon or attached to any package of a food or drug product, or any container thereof subject to the provisions of this act.

"(b) The principal label shall consist, first, of all information which the food and drugs act of June 30, 1906, specifically requires, to wit, the name of the place of manufacture in the case of food compounds or mixtures sold under a distinctive name; statements which show that the articles are compounds, mixtures, or blends; the words 'compound,' 'mixture,' or 'blend,' and words designating substances or their derivatives and proportions required to be named in the case of foods and drugs. All this information shall appear upon the principal label, and should have no intervening descriptive or explanatory reading matter. Second, if the name of the manufacturer and place of manufacture are given, they should also appear upon the principal label. Third, preferably upon the principal label, in conjunction with the name of the substance, such phrases as 'artificially colored,' 'colored with sulphate of copper,' or any other such descriptive phrases necessary to be announced should be conspicuously displayed. Fourth, elsewhere upon the principal label other matter may appear in the discretion of the manufacturer. If the contents are stated in terms of weight or measure, such statement should appear upon the principal label and must be couched in plain terms, as required by regulation 29.

"(c) If the principal label is in a foreign language, all information required by law and such other information as indicated above in (b) shall appear upon it in English. Besides the principal label in the language of the country of production, there may be also one or more other labels, if desired, in other languages, but none of them more prominent than the principal label, and these other labels must bear the information required by law, but not necessarily in English. The size of the type used to declare the information required by the act shall not be smaller than 8-point (brevier) capitals: Provided, that in case the size of the package will not permit the use of 8-point type, the size of the type may be reduced proportionately.

"(d) Descriptive matter upon the label shall be free from any statement, design, or device regarding the article or the ingredients or substances contained therein, or quality thereof, or place of origin, which is false or misleading in any particular. The term 'design' or 'device' applies to pictorial matter of every description, and to abbreviations, characters, or signs for weights, measures, or names of substances."

If the labels in question be now compared with the provisions of the law above quoted, we find the first panel of each, and that contended by the claimant to be the principal label, to contain, first, the name of the substance or product; second, the place where manufactured or canned; third, words showing the article to be a compound; fourth, the words "compound and ingredients"; fifth, the name of the manufacturer or canner of the product; sixth, that it contains sulphur dioxide; seventh, that it is guaranteed under the pure food act, serial No. 13,905, all as required by clause "b" of regulation 17 above quoted. From a further examination of the labels, it is found each in three places distinctly states the product to be a compound of molasses and corn syrup.

As shown from the evidence, this compound contains no substance deleterious or injurious to the health; and, as it further appears from the evidence, under the practice of the department, commercial glucose may be properly labeled and sold under the name of "corn syrup," we are of the opinion there is nothing in the manner in which the cases of molasses involved in this controversy were labeled that is false or untrue, or which would tend to mislead or deceive a purchaser of ordi-

nary prudence, and there is no evidence found in the record tending to show any one was so deceived or misled by the labels employed.

The authorities relied upon by the government to make out the charge of false branding, as shown by an examination, are cases in which it was determined the labels contained false statements as to the contents of the receptacle labeled. Such cases, for the reasons given, are not applicable to the facts in the case at bar.

The direction of the court to return a verdict in favor of the claimant was right, and must be affirmed.

It is so ordered.

In re STAVRAHN.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 42.

1. **BANKRUPTCY (§ 136*)—PROCEEDINGS AGAINST BANKRUPT FOR CONTEMPT—PLEADING.**

The petition of a trustee in bankruptcy, asking that the bankrupt be adjudged in contempt for failing to obey an order to pay over money or turn over property, is not required to allege affirmatively that he was able to comply with the order; but when the record and moving papers show that the bankrupt has been adjudged after a full hearing to have concealed specific property, and has been ordered to turn it over, sufficient is charged to put him on his defense.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

2. **BANKRUPTCY (§ 136*)—PROCEEDINGS AGAINST BANKRUPT FOR CONTEMPT—SUFFICIENCY OF SHOWING.**

Where a bankrupt has been adjudged after repeated hearings to have in his possession a sum of money received from a particular source, which he has not turned over to his trustee, and he is ordered to turn it over, which order he neither obeys nor seeks to have reviewed, a sufficient prima facie case is made to warrant his commitment for contempt, unless he gives an adequate explanation of what has become of the money.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of Bernard Stavrahn, bankrupt. On petition to review order of District Court. Order affirmed.

This cause comes here upon a petition to revise an order which adjudged the bankrupt to be in contempt of that court, ordered him to pay within five days to the trustee in bankruptcy the sum of \$5,000, and in case of his failure so to do directed that he should forthwith be committed to jail for a period of six months.

John C. Tomlinson, Millard F. Tompkins, and John C. Tomlinson, Jr., for petitioner.

Clarence R. Freeman, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. In the petition it is alleged that the District Judge refused to read or consider two affidavits which the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankrupt submitted in opposition to the motion to punish him for contempt. The record does not support any such contention. The order, on the contrary, recites the "reading and filing" of the "affidavits of H. T. Galpin and Bernard Stavrahn, each verified the 5th day of February, 1909, submitted in opposition to said motion."

The proceedings in this case, as disclosed by the record, were as follows: Upon a voluntary petition Stavrahn was adjudged a bankrupt on September 15, 1906. Some time prior to August 5, 1908—exactly when does not appear—the bankrupt applied for his discharge in bankruptcy. Specifications were filed in opposition, charging that he had "intentionally and fraudulently concealed, while bankrupt, from his trustee, property belonging to his estate in bankruptcy, consisting of money, the proceeds of the sale of certain real estate situated in the borough of Manhattan, city of New York." Evidence offered by all parties was taken, the bankrupt himself testifying, and the referee reached the conclusion that:

"Amella Stavrahn (the wife of bankrupt's brother) was a dummy in all these real estate transactions, and that the real owner of the property was the bankrupt, and that the bankrupt received the profits and has concealed them from the trustee."

Upon the report of the referee the discharge of the bankrupt was denied by the District Court. From that denial he took no appeal, although the bankruptcy act expressly accords the right of appeal in such cases. Act July 1, 1898, c. 541, § 25, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

Thereafter the trustee obtained an order to show cause why the bankrupt should not be required to turn over to his trustee the sum of \$6,000, which it was alleged he had fraudulently concealed from said trustee. The matter was fully inquired into before the referee, who had before him, not only the testimony taken on the former hearing, but also several witnesses, including the bankrupt, who was examined at great length. The subject of investigation was the same real estate transaction in which his sister-in-law had participated. The referee found and reported that:

"The evidence and circumstances surrounding this case establish beyond a reasonable doubt the receipt by the bankrupt of the proceeds of the sale of said real estate in the sum of at least \$5,000, and that he has concealed said money, to wit, said \$5,000, and that such concealment was fraudulent on his part."

The referee thereupon, August 5, 1908, made an order directing the bankrupt to pay over to his trustee, within 30 days from the service of the order upon him, the sum of \$5,000 so fraudulently concealed. This order was served upon the bankrupt on August 7, 1908. The record does not show that the bankrupt sought to review this order of the referee by petition as provided for in general order 27 (89 Fed. xi, 32 C. C. A. xxvii).

On December 31, 1908, an order to show cause why the bankrupt should not be compelled forthwith to pay over the \$5,000, or in case of failure so to do be adjudged in contempt and punished accordingly was served upon him. This was accompanied by the referee's certificate of disobedience of the order, and the record book, comprising the

evidence, and all other papers, were handed up for the information of the judge. Hearing thereon and on the two affidavits then submitted by the bankrupt was had on February 8, 1909, resulting in the entry of the order now sought to be reviewed.

On this review three contentions are made on behalf of the bankrupt: (1) That the petition of the trustee is defective, in that it contains no allegation that the bankrupt was able to comply with the order of the referee after it was served upon him. (2) The court erred in holding that it was bound by the order and certificate of the referee, and therefore could not consider the affidavits submitted on behalf of the bankrupt. (3) That it nowhere appears in the moving papers, and does not plainly and affirmatively appear from the record, that the bankrupt's failure to obey was willful and not caused by mere inability.

1. We do not find in the statute, the general orders, or in any decision which has been called to our attention, any authority for the proposition that the petition should contain an affirmative allegation of the bankrupt's present ability to comply with the order requiring him to turn over property. That is more properly a matter of defense. When the moving papers indicate that it has been determined after a full hearing that the bankrupt has concealed some specific piece of property, that he has been ordered to turn it over to the trustee, that he has been duly served with such order, and that he has failed to comply with such order, sufficient is charged to put him upon his defense. Of course, he should have notice of the motion to punish him for such disobedience and have his "day in court," when he may present what he may have to urge against such motion and an opportunity to be heard. All these the petitioner had in this case.

2. We do not find in the record sufficient to support the allegation that the District Court held that it could not consider the affidavits submitted on behalf of the bankrupt. We infer from the papers before us that the District Judge after reading the affidavits which were submitted on behalf of the bankrupt, reached the conclusion that they did not meet the case presented in the moving papers. It is not surprising that he reached such a conclusion.

3. Petitioner relies principally on the decisions of the Courts of Appeals in the First Circuit (*In re Cole*, 144 Fed. 392, 75 C. C. A. 330; *First Nat. Bank v. Cole*, 163 Fed. 180, 90 C. C. A. 50) and in the Fifth Circuit (*Samel v. Dodd*, 142 Fed. 68, 73 C. C. A. 254). The facts in this case differ so much from those in the authorities relied upon that the conclusions reached therein are inapplicable. When the matter was before the District Court in February, 1909, on the final application to punish the bankrupt for a willful and contumacious disobedience of the order of August 5, 1908, directing him to pay over, it appeared that before the last-named order was made there had been two adjudications, after full hearings whereat the bankrupt testified and had the right to produce witnesses, both finding that the bankrupt had fraudulently concealed at least \$5,000, the profits of a certain real estate transaction which he should have turned over with the rest of his estate. It further appeared that the bankrupt had not taken any steps to review either of these adjudications. Certainly this was sufficient, *prima facie*, to establish the proposition that at some time sub-

sequent to the bankruptcy and prior to August 5, 1908, he was in the actual possession of that particular sum of money. In the face of such a finding it was incumbent on the bankrupt to give some reasonable explanation as to why it was that he did not turn it over in compliance with the order requiring him so to do. It was for him to explain how and why it was that this particular sum, in his possession a few months before, had disappeared, so that he no longer "had the ability to turn it over in compliance with the order." This he wholly failed to do. His affidavit in opposition to the motion goes at great length into certain transactions, subsequent to the bankruptcy, relating to the leasing of a building, the purchase of its equipment, and the establishing therein of a restaurant business with himself as manager—all with funds advanced by his father-in-law. As to what became of the real estate profits—the \$5,000, which it had been held he concealed—nothing is said. The sole averment is:

"That the reason your deponent has not turned over said sum is because he has no such sum in his possession or under his control, directly or indirectly, and has no means whatsoever of obtaining said sum of money."

In view of the case made out by the moving papers, this averment is too bald and indefinite to have any persuasive force, and we think the order of commitment was warranted by the record before the District Judge.

Order affirmed.

In re WHITE.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 19.

1. BANKRUPTCY (§ 143*)—PROPERTY PASSING TO TRUSTEE—LIFE INSURANCE POLICY.

A policy of insurance on the life of a bankrupt, payable to his wife if she survives him, but, if not, to his estate or designated beneficiary, and which he has the right to surrender at any time for paid-up insurance "or other value," is not the property of the wife, but of the bankrupt, during his lifetime, and passes to his trustee, where the company is willing to pay a cash surrender value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. § 143.*]

2. BANKRUPTCY (§ 143*)—PROPERTY PASSING TO TRUSTEE—LIFE INSURANCE POLICY.

Domestic Relations Law N. Y. (Consol. Laws N. Y. c. 14) § 52, which authorizes a wife to cause the life of her husband to be insured for her benefit, applies only to policies which are her own absolute property, payable to her estate, and which she may dispose of by will, and in any event cannot be invoked to prevent a policy on the life of a bankrupt, which does not contain such provisions, from passing to his trustee, where the wife is not a party to the proceedings, nor asserting any claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. § 143.*]

Coxe, Circuit Judge, dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition to Review Order of the District Court of the United States for the Southern District of New York, in Bankruptcy.

In the matter of Frederick R. White, bankrupt. Petition by Alfred Yankauer, trustee, to review order of District Court. Order reversed.

Yankauer & Davidson (M. P. Davidson and Bernard Naumburg, of counsel), for petitioner.

L. E. Warren (J. M. Grossman, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a petition to review an order of the District Court denying the application of the trustee for authority to surrender an ordinary policy of insurance on the bankrupt's life and collect the surrender value thereof. The policy is dated January 8, 1889, in the Penn Mutual Life Insurance Company of Philadelphia, described as a trust certificate, whereby the company agrees to pay \$5,000 to the wife of the insured, if she survive him, in ten annual payments of \$500 each. If she predecease him, the policy is payable to his estate, or to any beneficiary named by him. If, after payment of two annual payments, the policy lapses for nonpayment of premiums, the company will, on the decease of the insured, issue a policy of paid-up insurance for a certain amount to the beneficiary. It is provided, however, that the insured himself may at any time surrender the policy for "paid-up insurance or other value."

The District Judge was of opinion that the wife of the bankrupt was the legal owner of the policy; that it was her property, and, if the insured had the option of terminating her ownership, he had not exercised it. But we think the policy is the property of the husband, that the contract is made with him, and that the wife's interest depends on the contingency of her surviving him. If the property in the policy were absolutely the wife's, the insurance would be payable upon her death to her estate. Certainly the bankrupt has an interest in the policy. If he survive his wife, the insurance will be payable, not to her estate, but to him, or to his estate, or to a beneficiary designated by him. This is a vested future interest. Besides this, though not obliged by the contract to do so, the company is willing, apparently, under the option given the insured to surrender the policy for paid-up insurance or other value, to pay the sum of \$1,804.23 upon its surrender. The situation is exactly the same as if the policy contained a stipulation for a cash surrender value. *Hiscock v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, affirming this court in *Re Mertens*, 142 Fed. 445, 73 C. C. A. 561. These are clearly interests of the bankrupt which go to the trustee under section 70a (5) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), subject, of course, to the privilege therein reserved to the bankrupt to keep the policy free from the claims of his creditors participating in the distribution of his estate by paying its value, \$1,804.23, to the trustees. In *re Coleman*, 136 Fed. 818, 69 C. C. A. 496.

But it is contended that, irrespective of the foregoing considerations, the policy is exempt under section 6 of the bankruptcy act by virtue of section 52 of the domestic relations law of the state of New

York (Consol. Laws N. Y. c. 14), where the bankrupt resided for six months before the adjudication. It reads as follows:

"A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts. The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband or to his, her or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendants surviving. After the will or the assignment takes effect, the legatee or assignee takes such policy absolutely. A policy of insurance on the life of any person for the benefit of a married woman is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured."

It is quite plain that the policies referred to are such as are the absolute property of a married woman or her children; that is, which are payable to her, or her children, or her estate. They may be taken out by the husband, and the premiums up to \$500 per annum paid by him. Still the policy must be one which the married woman may dispose of by will, or may, with the written consent of her husband, assign or surrender to the company. This requirement of the husband's assent is not because he is the owner of the policy, but is to protect widows and orphans in respect to such insurance. The general legislation enlarging the powers of married women does not affect the special legislation restricting their powers as to insurance policies. *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259. It is not necessary for us to consider what, if any, rights the wife has in this policy, because she is not a party to these proceedings, and our order will not prevent her from asserting her claim in any way she may be advised. *Whitehead v. N. Y. Life Ins. Co.*, 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787.

The order of the District Court is reversed.

COXE, Circuit Judge, dissents.

In re GEORGE W. SHIEBLER & CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 76.

BANKRUPTCY (§ 368*)—COMPENSATION OF TRUSTEES—CONDUCTING BUSINESS OF BANKRUPT.

Under Bankr. Act July 1, 1898, c. 541, § 2 (5), 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3421), as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1308]), providing that the court may "authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, * * * and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services," such additional compensation rests in the discretion of the court, having regard to the nature of the service rendered, and is not limited to the allowance of commissions on money disbursed in the conduct of the business at the rate fixed for trustees by section 48a, as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1909, p. 1313]), which cannot be made applicable to such services.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 368.*]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of New York, in Bankruptcy.

In the matter of George W. Shiebler & Co., bankrupts. David C. Bennett, Jr., trustee, petitions for revision of an order (165 Fed. 360) fixing his compensation. Order reversed.

D. C. Bennett, Jr., for petitioner.

Thompson, Vanderpoel & Freedman (Henry Thompson and C. S. Cooke, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. In this case the trustee seeks to revise an order of the District Judge, confirming the report of a special master, allowing the trustee only the statutory rate of commissions on moneys disbursed by him in carrying on the business of the bankrupts. Both the master and the court found that this compensation was inadequate, but were of opinion that the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) permits no more to be given. Section 2, subd. 5, as amended in 1903 (Act Feb. 5, 1903, c. 487, § 1, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1308]), empowers the District Courts to—

"authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals or trustees, if necessary, in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services."

Section 48, subd. "a" as amended in 1903, provides that trustees shall receive for their services, among other things—

"from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts not to exceed six per centum on the first \$500 or less, four per centum on moneys in excess of \$500

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.

and less than \$1,500, two per centum on moneys in excess of \$1,500 and less than \$10,000, and one per centum on moneys in excess of \$10,000."

It seems to us that the carrying on of a bankrupt's business is not a part of the general services of trustees, but is extraordinary, and that Congress for this reason allowed additional compensation. No such service is contemplated in section 48, subd. "a," and therefore the rate of compensation therein provided does not apply.

That part of the service which involves merely the collecting of bills and disbursing of expenses is similar to the ordinary administration in bankruptcy and should be compensated (once only) at the rate fixed in section 48, subd. "a." But the other features of continuing a business are not similar to closing it out. They necessitate supervision, replenishment of stock, and intelligent business judgment in continuing a going concern. The value of the service will vary in different cases, according to the success of the trustee, and the compensation for it, we think, is in the sound discretion of the court, having regard to all the circumstances, inasmuch as the act prescribes no compensation for any similar service.

We are aware that there has been considerable diversity of opinion as to the proper construction of the bankruptcy act in respect of compensation of receivers and trustees. In *re Hart* (D. C.) 17 Am. Bankr. Rep. 480; *Matter of Pequod Co.* (D. C.) 18 Am. Bankr. Rep. 352; *Re Cambridge Lumber Co.* (D. C.) 136 Fed. 983; *Re Kirkpatrick*, 148 Fed. 811, 78 C. C. A. 501. But we prefer to take the law as it was enacted, without searching for an intent that has not been expressed.

As the order is founded on an erroneous construction of the law, it is reversed, with direction to the District Judge to allow the trustee such additional compensation for the service of continuing the business as he thinks proper.

MILLSPAUGH v. ERIE R. CO.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 46.

MASTER AND SERVANT (§ 279*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ACTION—SUFFICIENCY OF EVIDENCE.

Evidence held to wholly fail to sustain the allegation of a railroad fireman that a collision in which he was injured was due to the incompetency of another employé, but, on the contrary, to show affirmatively that such employé possessed the required competency for the duties of his position.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.*]

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Action by Bert M. Millspaugh against the Erie Railroad Company. From a judgment of compulsory nonsuit, plaintiff brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
174 F.—22

W. D. B. Ainey, for plaintiff in error.

Everett Warren, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Bert M. Millspaugh sued the Erie Railroad Company for damages for personal injury. At the close of the testimony on his behalf the court entered a compulsory nonsuit, and on its refusal to take it off he sued out this writ of error.

Millspaugh was a fireman in defendant's employ, and was injured on the night of September 24, 1905, when his engine with a through train collided with two engines that were being shifted across the main line where it passed through the defendant's Susquehanna engine yard. On the evening of the accident the switches and signals controlling the two engines were in charge of Howard Butts, the switchman, and the two coupled engines were in charge of George Barrows, the engine hostler, who was moving them under signals from Butts from the roundhouse on the south side of the yard to the ash pits on the north side, and thence back to the coal pockets on the south side. The proofs show that either through the negligence of Butts in giving wrong signals to Barrows, or the negligence of Barrows in disregarding proper signals given by Butts, the two engines improperly got on the main track and in the right of way of Millspaugh's train, with the resultant collision. Now the sole ground on which Millspaugh based recovery was that the railroad employed an incompetent man as engine hostler in George Barrows, whose incompetency, it was alleged, caused the accident. The alleged incompetency of Barrows consisted in his lack of knowledge both of the time-tables and of the rules governing the running of trains.

From the proofs it is clear that the entire movement of engines in this yard was in charge of Butts, the switchman. The engine hostler had nothing to do with the control of engine movement. His duty was to move on, and only on, signals from the switchman. The requirements of competency on the hostler's part, therefore, consisted of knowledge of signals and capability to run his engine in answer thereto. These requirements he had. He was familiar with railroads. He had served more than two years on defendant's road as a brakeman, and during that time had familiarized himself with signals, and from riding on the engine had learned how the engineer ran the engine and answered them. He had worked as a roundhouse man for more than a year and a half and for several months later in firing engines at a roundhouse. From this he went to engine hostling at the Susquehanna yards, where he had been employed for two months when the accident occurred. Indeed, the proofs, which, it will be observed, were adduced by the plaintiff, not only failed to show incompetence on the part of Barrows in the line of the capacity required, viz., familiarity with signals and capacity to run an engine, but such affirmative evidence of the absence of negligence of the railroad in employing Barrows that the court was not only justified, but constrained, to hold

there was no evidence to warrant a jury in holding the defendant guilty of negligence in employing him.

Such being the case, the misfortune of the plaintiff's accident could not be justly charged to the railroad, and the court's action in so holding must be affirmed.

In re BROWN et al.

(Circuit Court of Appeals, Second Circuit. October 12, 1909.)

No. 112.

BANKRUPTCY (§ 444*)—REVISION OF PROCEEDINGS—TIME FOR FILING PETITION—RULE OF COURT.

Under rule 38 of the Circuit Court of Appeals for the Second Circuit (150 Fed. liv, 79 C. C. A. liv), which provides that petitions to review orders in bankruptcy under the provision of Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), "must be filed and served within 10 days after the entry of the order sought to be reviewed, and a transcript of the record * * * filed and the cause docketed within 30 days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time, * * * the order of enlargement to be made and filed with the clerk of this court before the times hereby limited for filing the petition and record, respectively," stipulations by the parties cannot take the place of the discretionary order of enlargement by the bankruptcy court, made and filed within the time required by the rule, nor, except under unusual circumstances, will a nunc pro tunc order of said court, made after the time limited has expired, be effective.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 444.*]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of A. O. Brown and others, bankrupts. On motion to dismiss petition for review, filed by Charles E. Littlefield, trustee. Motion granted.

J. S. Buhler, for the motion.

Ralph Wolf, opposed.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. On June 7, 1909, an order was made and entered in the District Court, Southern District of New York, directing the trustee in bankruptcy to pay a certain sum of money to the petitioners. A petition to review such order was filed by the trustee on June 30th, and motion is now made to dismiss said petition, on the ground that it was not filed in time.

Orders and decrees in bankruptcy are reviewable in this court by appeal or by petition to revise. The bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) enumerates what orders or decrees may be appealed from, and expressly provides that such appeal must be taken within 10 days. Section 25. It is well-settled that this statutory limitation cannot be enlarged either by the bankruptcy or by the appellate court. In the case of a petition to re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wise the act provides that the power of revision "shall be exercised on due notice." Section 24b. In order that this "due notice" should not be a matter of entire uncertainty, and to conform the practice in review by petition to review by appeal, rule 38 of the Circuit Court of Appeals (150 Fed. liv, 79 C. C. A. liv) was adopted. It reads:

"38. Petitions to review orders in bankruptcy filed under the provisions of section 24b of the bankruptcy act must be filed and served within 10 days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the bankruptcy court of the matter to be reviewed must be filed and the cause docketed within 30 days thereafter; but the judge of the bankruptcy court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this court before the expiration of the times hereby limited for filing the petition and record, respectively."

In the case now before us the 10-day limitation prescribed in the rule expired on June 17th. On June 16th a written consent to extend the time for 7 days was signed by attorneys for petitioner. Subsequent similar written consents to an extension of such time until June 28th were signed, and on June 29th an oral consent was given to extend the time to June 30th, on which day the petition to review was filed. It is contended that the oral consent was given under some misapprehension; but that is immaterial. It may be treated as if it were a written stipulation signed with full knowledge of all existing facts.

None of these consents operated to enlarge the time, because no order was entered on them. It was the manifest object of the rule (38) to keep this important matter of enlargement of time to seek a review by the appellate court within the control of the court, and to prevent indefinite extension by mere agreement of counsel. The rule expressly provides that the enlargement of time for filing the petition shall be by "the judge of the bankruptcy court for good cause shown." The petition being filed 12 days after the time prescribed by the rule was manifestly too late to be effective.

On July 17th an order was entered in the bankruptcy court providing that "the time for filing and serving the petition for review herein on the part of the trustee be extended to June 30, 1909, and that this order be entered nunc pro tunc as of June 17, 1909." We are of the opinion that this order did not operate to enlarge the time, because the rule expressly provides that an order enlarging the time to file the petition must be made and filed with the clerk of the Circuit Court of Appeals before the expiration of time limited by the rule for such filing.

It should be understood that this decision is based solely on the facts of the case now at bar. What construction might or might not be given to the rule, when the sudden illness of a judge or other untoward occurrence prevented a party, who has been himself careful and diligent to conform to the rule, from securing an order in time, we do not now determine. Here, in the face of a rule which provides that there shall be no enlargement of time unless a judge of the bankruptcy court has good cause shown to him for allowing such enlargement, the dissatisfied party has been content to rely upon agreements of counsel to secure such enlargement.

The motion to dismiss is granted.

In re LIGHT.

(Circuit Court of Appeals, Second Circuit. November 22, 1909.)

No. 160.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of Benjamin Light, bankrupt. On petition to review order of the District Court. Petition dismissed.

R. P. Levis, for the motion.

J. O. Weinberg, opposed.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The motion to dismiss petition to review, because same was not filed within 10 days after entry of the order sought to be reviewed, is granted. See our opinion in the Matter of Brown (October 12, 1909) 174 Fed. 339.

CASEIN CO. of AMERICA v. A. M. COLLINS MFG. CO.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 25.

1. PATENTS (§ 328*)—PRIOR PUBLIC USE—ENAMELING COMPOUND FOR PAPER.

The Hall patent, No. 626,537, for an enameling compound for sizing paper, and method of producing the same, is void for prior public use of the enamel for more than two years before the application.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Priority and continuance of public use of invention as affecting patentability, see note to Eastman v. City of New York, 69 C. C. A. 646.]

2. PATENTS (§ 328*)—REISSUE—ENAMELING COMPOUND FOR PAPER.

The Hall reissue patent, No. 11,811 (original No. 609,200), for a water-proofing compound for sizing paper, is void, as broadening the patent to cover an original ingredient of the compound which was disclaimed in the original.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by the Casein Company of America against the A. M. Collins Manufacturing Company. Decree for defendant (172 Fed. 237), and complainant appeals. Affirmed.

Edmund Wetmore, for appellant.

Horace Pettit, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the appellant, the Casein Company, charged the A. M. Collins Manufacturing Company, the appellee, with infringement of two patents. One of them, No. 626,537, known herein as the "free acid patent," issued June 6, 1899, to William A. Hall, was for an enameling compound and a method of producing the same. The other, reissue No. 11,811, of No.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

609,200, known herein as the "formaldehyde patent," issued originally August 16, 1898, and reissued March 6, 1900, to said William A. Hall, for a water-proofing compound. On final hearing the court below, in an opinion reported at 172 Fed. 237, found the patents void and dismissed the bill. Thereupon the Casein Company appealed to this court.

These patents concern the use of casein or the common curd of milk. The use of modern separators in creameries has resulted in more thorough extraction, and a corresponding impoverishment of curd, than under old practices. Applied science, however, has developed the possibility of wide use of curd in other spheres, one of which is involved in the present case, namely, as an insoluble coating or sizing of paper.

Turning, first, to the free acid patent, we find it is for—

"the production of a coating or enamel for finishing and surfacing paper and which is of such a character that while it gives a smooth and finished surface to the paper treated with it, and one which is well adapted to receive the printing ink, it produces a surface which will resist the attacks of moisture and prevent the disintegration of the paper and the disfiguration of the matter printed thereon."

The specification shows that clay was the basis of the coating and casein the adhesive agent in its application. Thus the patentee states:

"The composition which I have produced belongs to that class of clay coatings in which a mineral base—such as clay, blanc fixe, or a similar ingredient—is used to give body to the composition. The adhesive ingredient of the enamel, which is necessary to fix it to the paper or article coated, is casein or milk albumen; the casein being precipitated from the milk by the use of any suitable acid which will throw down the curd, preferably H_2SO_4 or HCl ."

Preferably some acid is left in the curd. Thus:

"I preferably leave a small portion of the acid in the curd or casein, as I find that the effect of this acid is to render the curd insoluble after the composition has been applied and has become seasoned, and, furthermore, it leaves the curd in a wholesome and clean condition, without imparting to it the 'cheesy' odor resulting from rennet curdling or natural souring, which, it is apparent, would be objectionable in a coating or enamel of this kind."

Any suitable acid may be used to precipitate the curd; any suitable alkali to cut the casein and reduce to solution. Thus:

"Any suitable acid may be used to precipitate the curd from the milk, such as sulphuric, acetic, or muriatic acid. To cut the casein and reduce it to a solution, a small amount of alkali, about 3 per cent. of the composition, is used, and any suitable alkali, such as borax, ammonia, or carbonate of soda, will be suitable."

In the mixture the mineral clay forms about 80 per cent. and the casein about 17 per cent. The process is thus described:

"In making the composition I preferably take the dry curd, which contains a small amount of free acid, as stated hereinbefore, the curd after precipitation having been slightly washed, so as to remove only a portion of the acid used in precipitating it, and said dry curd is either mixed with an alkali and the mixture then dissolved in water, or an alkaline solution may be made in which the curd is then dissolved. To the casein solution thus obtained the clay or mineral base, worked up smoothly in water, is added until the desired consistency is obtained. If preferred, however, the dry curd, containing the free acid, the alkali, and the clay, may all be worked up in water at the same time. The coating thus produced is, as stated above, water-resisting and practically insoluble, and is well adapted to preserve the paper coated with

it from the attacks of moisture, this being due to the fact that the effect of the free acid, which forms an ingredient of the composition, is to render the casein practically insoluble in water."

Upon this composition and process three claims were granted, and the broad monopoly of the use of curd here involved is seen when we note that curd or casein containing free acid is the only element in the claim, viz.:

"An insoluble coating or enamel for paper composed of casein containing free acid, in substantially the proportions specified."

The court below found, that, for more than two years prior to the application of the patent, Hall, the patentee, had had on public sale considerable amounts of the composition covered by the patent and produced by its process. An examination of the proofs satisfies us of the correctness of this finding. Without referring in detail to the testimony, it is clear to us that more than two years before Hall had produced and thereafter sold acid-precipitated curd; that the process followed under his instructions produced dry curds containing acid; that the dryness of the curd and the presence of the acid required the use of about 15 per cent. of borax as a solvent; that these elements, proportions of ingredients, and the use of his process, etc., are all clearly shown to have been in public use more than two years prior to this application. Indeed, this two years prior practice and its results were embodied by Hall in his patent application filed over two years later, wherein he said:

"It is well known that pure casein, or casein from which the acid has been completely removed by washing, does not dry readily, but remains in a soft and friable condition, and possesses but little toughness or tenacity. It is readily dissolved in a very weak alkaline solution, and a coating formed from this solution is weak, and easily attacked and destroyed by moisture. In the course of my experiments I have discovered that, when a percentage of the mineral acid used in precipitating the curd is left in the casein, a greater amount of alkali is required to reduce the acid curd, which is in a hard condition, to a solution, than when no acid is present and the casein has been thoroughly washed, as stated above. For example, if the acid be removed by washing, about 7 per cent. of borax will be sufficient to dissolve the comparatively soft and friable curd; but, when about 1 per cent. of acid is left in the curd, from 10 to 15 per cent. of borax is necessary to properly reduce this hard acid to curd."

We are therefore of opinion the free acid patent was void.

We next turn to the formaldehyde reissue patent. This was a further improvement on the compound of the free acid patent, and in a general way consisted of adding formaldehyde thereto. The object of adding the formaldehyde, as stated by the patentee, is:

"The effect of the formaldehyde used in this casein composition is to render the same, when fully dried out, insoluble in or insensible to the action of water, either at normal or at high temperatures."

An examination of the file wrapper shows that, when Hall originally applied for his patent, he made a broad claim for a composition of casein and formaldehyde. This was rejected on Zimmerman's English patent, No. 23,585. He then narrowed his claims by introducing the element of a mineral base; but the office held that the use of a filler was a mere mechanical addition to the Zimmerman patent. We may

add here that, had the prior public use above referred to of clay as a filler with casein containing free acid, been known to the office in addition to Zimmerman's use of casein and formaldehyde, there would have been added support to its action. The patentee having failed to get claims by the addition of clay as a base or filler, he then introduced the contention that the use of clay involved two functions in the combination: (1) That it caused porosity to the compound, so as to absorb printing colors and ink; and (2) that it acted as a precipitant retardant. An examination of the proofs shows the very decided burden of proof to be that clay does not act as a retardant. The evidence of Dr. Chandler, complainant's expert, is in effect noncommittal; while that of Dr. Sadtler, respondent's expert, and his reasons in support of it, are convincing that it does not. Indeed, it is clear to us that, when Hall applied for his patent, he neither conceived nor disclosed any such retardant action of clay, or, indeed, made clay an element in any claim, and that the subsequent introduction thereof into the patent was suggested as a mere theory to overcome valid objections to the grant of the patent. We are satisfied that this theory was neither based on prior experience nor proved by subsequent development. We therefore think the position of the office in rejecting the application was well taken.

After Hall's substituted application was rejected, he amended by adding a disclaimer in reference to the use of soda alkali, which was embraced in the specification of his patent as originally granted as follows:

"I find that a soda alkali will not serve as an ingredient of the composition, for the reason that, if a soda alkali be used as a solvent for the casein, the introduction of the formaldehyde will cause immediate precipitation, for the reason that CH_2O has an acid reaction and will not work with a soda alkali. In the use of the other class of alkalis, however, such as ammonia, etc., as a solvent, the objectionable precipitation incident to the use of soda alkali is avoided. In fact, a sufficient quantity of CH_2O can be added to throw the casein solution on an acid, and said solution will still remain perfectly smooth and limpid."

This disclaimer of a soda alkali was probably made in view of the use of certain alkalis in Zimmerman's patent; but, for whatever purposes it was made, it became part of his patent, and to that extent narrowed the scope of his claims. Now it seems he subsequently found his process could be used in connection with soda alkali. It was in fact so used by the respondent, and in view of the disclaimer they had a right to use it. Thereupon Hall sought by a reissue to eliminate such disclaimer and correspondingly broaden the monopoly of his patent. It is clear to us that, the presence of this disclaimer having been made for the purpose of avoiding references, and such disclaimer having been acted upon by the public, a reissue whereby the effect of this disclaimer was avoided and his patent broadened was void.

The decree of the court below will therefore be affirmed.

FORREST v. SAFETY BANKING & TRUST CO.

(Circuit Court, E. D. Pennsylvania. December 1, 1909.)

No. 636.

1. COURTS (§ 372*)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.

Whether or not a certificate of deposit is a negotiable instrument, when not controlled by statute, is a question of general commercial law, upon which a federal court is not concluded by state decisions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 979; Dec. Dig. § 372.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 24 C. C. A. 553.]

2. BILLS AND NOTES (§§ 151, 443*)—CERTIFICATES OF DEPOSIT—NEGOTIABLE CHARACTER—RIGHTS OF INDORSEE.

A certificate of deposit in the usual form, payable to the depositor, with interest, at a stated time, in current funds, on its return properly indorsed, is a negotiable instrument having the qualities of a negotiable promissory note, and an indorsee may sue thereon in his own name.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 380, 1380; Dec. Dig. §§ 151, 443.*]

3. BILLS AND NOTES (§ 151*)—CERTIFICATES OF DEPOSIT—"NEGOTIABLE INSTRUMENT"—PENNSYLVANIA STATUTE.

A certificate of deposit in ordinary form is a "negotiable instrument," within the provisions of the Pennsylvania negotiable instrument act of 1901 (F. L. 194).

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 380; Dec. Dig. § 151.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4767-4770; vol. 8, p. 7731.]

At Law. Action by William S. Forrest against the Safety Banking & Trust Company. On motions by defendant for new trial and for judgment notwithstanding the verdict. Motions denied.

Joseph W. Moses and Samuel K. Louchheim, for plaintiff.

John C. Gilpin, for defendant.

J. B. McPHERSON, District Judge. This suit is brought upon a certificate of deposit issued by the defendant in the following words:

No. 1853.

Philadelphia, Janry. 2nd, 1909. \$3,000.00.

Peter F. Fallon has deposited in the Safety Banking & Trust Company three thousand dollars to the credit of himself payable in current funds on return of this certificate properly indorsed on July 1, 1909. Interest 3½ per cent. per annum.

H. J. Colver, Cashier.

H. L. Rock, Secty.

This certificate of deposit is not subject to check and is only payable at maturity."

The certificate was properly indorsed in blank by Fallon, and passed into the possession and apparent ownership of J. J. West not long after its date. In March, 1909, West transferred it by delivery to the plaintiff, William S. Forrest, for a valuable consideration and (as the jury has specifically found) in payment of his own debt. Payment having been refused at maturity, Forrest sued in his own name, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

principal question for decision is whether the action is properly brought in that form.

The answer must be in the affirmative if the certificate is a negotiable instrument, and to this point, therefore, the inquiry should be directed. It is undoubtedly true that, if the decisions in Pennsylvania are to govern, this court must hold that the plaintiff cannot sue in his own name. In *Patterson v. Poindexter*, 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554, it was decided (as the syllabus states), that

"An instrument in writing issued by a bank, signed by the assistant cashier, 'I hereby certify that C. T. has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, per ann., \$3,691.63, for the use of R. P. & Co., and payable only to their order upon the return of this certificate,' is not a promissory note within the statute of Anne, but a certificate of deposit on special terms."

This instrument was held to be negotiable for the purpose of transfer only, but not so far negotiable as to charge R. P. & Co. on their indorsement to the holder. This case was cited with approval in *Charnley v. Dulles*, 8 Watts & S. (Pa.) 353, and in *Gillespie v. Mather*, 10 Pa. 31. In *Lebanon Bank v. Mangan*, 28 Pa. 452, an instrument declaring, that

"Mr. Jacob Miller has deposited in this bank \$440, subject to his order and payable only on the turn of this certificate"

—was held to be non-negotiable; and in *Loudon, etc., Society v. Hagerstown Bank*, 36 Pa. 498, 78 Am. Dec. 390, it was said of a similar certificate that it was not a negotiable instrument, and that a transferee thereof could only sue on it in the name of the depositor to the use of the transferee. If, therefore, I am bound by the Pennsylvania decisions, it must be decided that *Forrest* cannot maintain this suit in his own name and that he is not entitled to judgment upon the record as it now stands.

The question, however, may for the moment be considered as one of general commercial law, and in that region, as is well known, a federal court is not bound by the decisions of a particular state, but may follow its own opinion, or an adverse current of authority elsewhere. *Swift v. Tyson*, 41 U. S. 1, 10 L. Ed. 865. Such a current may be discovered without difficulty. In the *American & English Encyclopedia of Law* (2d Ed.) vol. 5, at page 803, the following statement in the text is fully borne out by the citations in the accompanying notes:

"A certificate of deposit drawn in the usual form seems to fulfill in every particular the definition of a promissory note, viz., an unconditional promise in writing for the payment of a certain sum of money absolutely and at all events. It is therefore held in all of the states of the Union, except Pennsylvania, that the instrument is in substance and in legal effect a promissory note and governed in most respects by the same general rules."

And in 5 Cyc., at page 520, the result of the authorities (note 79) is summarized as follows:

"Whether a certificate of deposit is a note or merely a receipt for money has long puzzled the courts. Such certificate, however, if containing proper words to express that intention, is negotiable in the usual manner by indorsement, and although not negotiable in fact, if negotiable in form, it may be assigned. Moreover, where they are negotiable, their transfer is governed by

the rules that apply to promissory notes, as is also the liability of the parties thereon."

Among these authorities is *Miller v. Austen*, 54 U. S. 218, 14 L. Ed. 119, where the precise question now under consideration was decided by the Supreme Court. The instrument sued upon in that case was in the following language:

"I hereby certify that Hugh Short has deposited in this bank, payable twelve months from the 1st of May, 1839, with 5% interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order upon the return of this certificate."

This was held to be a promissory note within the statute of Ohio, which made such a note, drawn for a sum certain and payable to any person or his assigns, negotiable by indorsement. The certificate was indorsed successively by Miller and by Lockwood, and suit was brought against Miller by Austen, who was Lockwood's indorsee. The trial court refused to charge "that the paper offered in evidence is not a negotiable instrument under the laws of Ohio, and cannot be sued on by the plaintiffs in the cause," or that it was not a promissory note or a bill of exchange. Upon exceptions to these rulings the case went to the Supreme Court, where the judgment was affirmed in a brief opinion by Mr. Justice Catron. This decision has been frequently followed. In *Bull v. Bank of Kasson*, 123 U. S. 105, 112, 8 Sup. Ct. 62, 64, 31 L. Ed. 97, where the negotiability of a check was attacked because it was drawn payable "in current funds," the court said:

"The certificate of division of opinion presents to us only one question, and yet, to answer that correctly, we must consider whether the negotiability of the instruments in suit was affected by the fact that they were payable 'in current funds.' Undoubtedly it is the law that, to be negotiable, a bill, promissory note, or check must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. *Irvine v. Lowry*, 14 Pet. 293, 10 L. Ed. 462; *Miller v. Austen*, 13 How. 218, 228, 14 L. Ed. 119. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes, and the term 'current funds' has been used to designate any of these; all being current and declared by positive enactment to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words."

See, also, *Armstrong v. American Exchange Bank*, 133 U. S. 460, 10 Sup. Ct. 450, 33 L. Ed. 747, and *Bank of Saginaw v. Title, etc., Co.* (C. C. 1900) 105 Fed. 491. In the last-named case Judge Acheson considered the subject, and decided, that

"A certificate of deposit in the ordinary form, payable to the order of the depositor, is a negotiable instrument possessing the qualities of a negotiable promissory note."

Other decisions are referred to in the note to 5 Rose's Decisions, p. 160. The present certificate is in effect payable to Fallon or his order, for this is necessarily implied by the phrase "properly indorsed."

As it seems to me, these authorities conclusively establish the right of the plaintiff to maintain this suit in his own name, if the question is to be decided as one of general commercial law. The defendant contends, however that the Negotiable Instruments Act of Pennsylvania, passed in 1901 (P. L. 194), decides the point against such right, and that this court is bound to follow the statute. Certificates of deposit are not referred to in the act by name, and I have been referred to no decision of the Supreme Court of Pennsylvania that construes the statute upon any question now relevant. If, therefore, the act applies to the present controversy, I think that the defendant's position may be disposed of in a few words. Since the question whether such a certificate is embraced within the description of a negotiable instrument contained in the first 10 sections of the act has not yet been considered by the Pennsylvania tribunal, it follows that a federal court is at liberty to construe the statute for itself. Believing, therefore, that the Negotiable Instruments Act, which is intended to bring about the uniform treatment of legal questions in a most important branch of commercial law, should receive a construction that is in harmony with a widely prevailing view (where such a construction is possible), and having been pointed to nothing in the statute that requires me to hold that certificates of deposit are not included within its description of negotiable instruments, I conclude that the instrument sued on is negotiable under the act, and that the action was properly brought in the name of the holder. How far a federal court would be bound by the decision of a state court that construed a statute occupying the peculiar position of the Negotiable Instruments Act—that is to say, attempting to codify and make uniform the rules that govern an important topic of general commercial law—presents an interesting question, upon which no opinion need now be expressed.

The defendant's motion for judgment notwithstanding the verdict is refused, and to this refusal an exception is sealed. Its motion for a new trial is also overruled, and judgment on the verdict may be entered in favor of the plaintiff. But, inasmuch as the plaintiff conceded at the trial that he is only entitled to retain \$2,000, with interest, out of the proceeds of the certificate, the court will at the proper time entertain any appropriate motion in behalf of the person who may be entitled to the other \$1,000, looking toward the distribution of whatever sum may be realized from the judgment.

C. H. VENNER CO. v. URBANA WATERWORKS.

KIRBY v. CITY OF URBANA.

(Circuit Court, S. D. Ohio, W. D. November 6, 1909.)

Nos. 5,773, 5,805.

1. WATERS AND WATER COURSES (§ 200*)—WATER COMPANIES—FURNISHING WATER TO CITY—CONTRACT—SUBSTANTIAL PERFORMANCE.

Under a contract between a water company and a city for the furnishing of water to the city for fire purposes, which required the company to maintain a certain pressure at the hydrants, and provided that in case

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it failed to comply with the contract it should be served with notice, "and from and after service of such notice" rental should cease and not again begin to accrue until the deficiency was remedied, the city cannot avoid the payment of rental on the ground that a test made by it within three months before the expiration of the contract showed that the pressure was not up to its requirements, where no notice of the fact was served on the company, and especially where, at prior tests, the pressure had also been below that required, but the city had continued to accept the service without objection, and it was also shown that to maintain the full pressure required would seriously injure the private water service, which was dependent on the same pumps.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 274; Dec. Dig. § 200.*]

2. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—FURNISHING WATER TO CITY—COMPENSATION.

The receiver of a water company furnishing water to a city for fire purposes without contract as to price is entitled to recover, as a fair compensation for the service, a just proportion of the operating expenses, taxes, and cost of administration paid by the company, and of a just and reasonable return on the cost of reproducing its plant and its going value.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 290-299; Dec. Dig. § 203.*]

3. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—REASONABLE RATES.

The receiver for a water company authorized to increase the rates to be charged to private consumers for water furnished.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 290, 292; Dec. Dig. § 203.*]

In Equity. Suits by the C. H. Venner Company against the Urbana Waterworks, and by Robert W. Kirby, receiver, against the City of Urbana. Decree for complainants.

Thos. J. Frank and Thornton M. Hinkle, for complainants.

George Waite, L. D. Johnson, and C. B. Heiserman, for defendants.

THOMPSON, District Judge. The bill filed August 21, 1903, in case No. 5,773, is in the nature of a creditor's bill. The complainant recovered a judgment against the defendant, and execution was issued thereon and returned unsatisfied for reasons stated in the bill, and thereupon this suit was brought, on behalf of the complainant, and all creditors and stockholders of the defendant who may choose to become parties thereto, invoking the court to administer as a trust fund the property rights and franchises of the defendant, the Urbana Waterworks, a corporation, for the benefit of its creditors and stockholders, and for that purpose to appoint a receiver with full power and authority under the direction of the court to manage and operate and continue said business, and to adjust all disputes and controversies, settle, sue for, and collect all indebtedness for rentals or otherwise, and to recover all property of the defendant, take an account of the assets and liabilities, and sell the assets and distribute the proceeds thereof among those entitled thereto in their proper order, and thereupon Robert W. Kirby was appointed such receiver, and has since continued the business, supplying the city of Urbana and its inhabitants with water for public, municipal, and domestic use.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The defendant, the Urbana Waterworks Company, entered into a written contract with the city of Urbana, by which the water rates for public and private consumption were determined. The contract continued in force 10 years and at its expiration another contract covering the same ground was entered into for a further period of 10 years, which expired August 6, 1899, and since then there has been no contract schedule fixing rates to the city or to private consumers.

December 12, 1903, the receiver brought suit (\$5,805) against the city of Urbana to recover compensation for services rendered by the waterworks company from April 1 to August 6, 1899, under the last contract, and reasonable compensation for services rendered by the waterworks company and the receiver since the expiration of that contract. The amount claimed under the last contract is \$2,632, with interest from August 6, 1899, which the city of Urbana refuses to pay, upon the alleged ground that the waterworks company neglected and failed, as required by the contract, to furnish water under given pressure for the extinguishment of fires. Of the large number of fires during the time of the last contract, but few have been brought to the attention of the court, and of these only four or five failed to receive water with sufficient pressure, and whether the insufficiency at any time was due to the negligence of the waterworks company or its receiver, or the incapacity of the works, is not satisfactorily shown. The city firemen were few in number, and there is evidence tending to show that the water supply was at times hindered by the manner in which the hose was laid and the way in which hydrants were sometimes opened by inexperienced men—spectators.

However, it is urged that tests were made which show that the forcing capacity of the pumps was insufficient to comply with the requirements of the contract, and that therefore the complainant is not entitled to the compensation claimed for services rendered from April 1 to August 6, 1899. But there is testimony showing that the water supply, carried to the extreme of the forcing capacity provided in the contract, would seriously injure the private water service. This question was presented to the Circuit Court of Appeals of the Eighth Circuit, and that court held:

"That the trial court was right in holding the evidence showed that the maintenance of the pressure sought by the city would be injurious to the service pipes and the plumbing in the buildings of the city, and that, as private consumers were furnished through the same mains that afforded fire protection, it could not have been contemplated that a pressure should be maintained for one which would be destructive of the other, and this notwithstanding there was language in the contract and ordinances tending to the contrary." *Omaha Water Company v. City of Omaha*, 156 Fed. 925, 85 C. C. A. 54.

Among others, Mr. Hill, an expert witness called by the city of Urbana, testified upon this point as follows:

"Q. I will ask you to tell the court, take a pressure of 160 to 200 pounds, applied at the domestic service and to the fixtures in various parts of the city—would not that be dangerous to the fixtures and to the domestic service?

"A. Not dangerous in the sense that it would do any damage to life. It might do some damage to property if the fittings were blown off and the water allowed to flow.

"Q. In other words, such a pressure as that would show a rather reckless disregard for the private service: There would be, besides, an expense to property?"

"A. That is true, and that is one of the conditions incident to direct service work—one of the objections.

"Q. What do you mean by 'direct service' work?"

"A. That is one in which the water is pumped from the source of supply directly into the distribution system, without the intervention of a reservoir, or standpipe. In cases of direct pressure—direct service, I mean—the pressure is fixed throughout the system by the pressure maintained at the pumping station. If the pressure declines at the pumping station, then it declines correspondingly throughout the system; if it is raised, it is raised correspondingly. But that is a feature incidental to pumping directly into the main to supply consumers.

* * * * *

"Q. The direct systems of hydrant service are intended to supply the pressure without the intervention of a fire engine?"

"A. Exactly; to take the place of a fire engine.

"Q. Where there is direct pressure, it obviates the necessity for a fire engine, if the pressure is sufficient?"

"A. That is the intention."

(Record of Testimony, 321, 322.)

It is also urged by counsel for the complainant that the city of Urbana was estopped from making the defense in view of the fact that the test was not applied until about two months before the termination of the contract, when, as suggested by counsel for the complainant, the defendant might get rid of payment for water service thereafter until August 6, 1899. The evidence shows that tests were made in 1895 and in 1896 which the complainant failed to meet, yet the city continued to accept the water service until May 15, 1899, showing that until then the city accepted the service as a substantial compliance with the contract, and the change of front so short a time before the expiration of the contract was not inspired by a desire to make a material change of the service so long acquiesced in, and the evidence fails to show that there was any substantial change in the character of the service thereafter.

The claim made by the city of Urbana that the failure of the waterworks company in May, 1899, to meet the test subjected it to a forfeiture of the rental pending compliance with the contract, is not supported by the requirement of section 12 of the ordinance of the city of Urbana of July, 1888, which provides that if on test—

"It be found that * * * said company is not substantially complying with the terms and provisions of this contract, notice to that effect shall forthwith be served by the city council upon the president, secretary or managing agent of said company, and from and after service of such notice rental shall cease and not again begin to accrue until said system has been, in respect to such deficiency, brought up to the standard herein required; and all rental for the intervening period shall be forfeited to the city."

It is not shown either by the answer or the evidence that the notice required by the ordinance was ever served upon the president, secretary, or managing agent of the waterworks company and the rental only ceases and is forfeited to the city after service of such notice. The court finds that there is justly due to the receiver for service rendered by the waterworks company from April 1 to August 8, 1899, \$2,632, with interest thereon from August 8, 1899.

The compensation claimed in the bill for services rendered to the city of Urbana from August 8, 1899, to February 22, 1904, is reasonable, and will be allowed, with interest, subject to the payments made from time to time as shown by the exhibits attached to the bill.

The next question for consideration is: What would be fair compensation for the water service rendered to the city of Urbana since February 22, 1904, and what rates should be charged for the service in the future?

It is well established that fair compensation for such service includes operating expenses, taxes, cost of administration, and a fair yearly allowance for the maintenance of the plant and such return on the value of the capital and property employed as is just and reasonable. Upon consideration of the testimony of the experts, Hays, Williams, Mead, and Hill, I am of the opinion that the fair reproduction value of the property is \$155,000, to which should be added \$25,000, as the "going value" of the property, the definition of which is given by Justice Brewer as follows:

"That fact that it is a system in operation, not only with capacity to supply the city, but actually supplying many buildings in the city, not only with a capacity to earn, but actually earning, makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction. * * * It should pay therefore not merely the value of a system which might be made to earn, but that of a system which does earn." *National Waterworks Co. v. Kansas City*, 62 Fed. 865, 10 C. C. A. 665, 27 L. R. A. 827.

The total value therefore is \$180,000.

The yearly income to which the waterworks is entitled for services rendered and expenses incurred from February 22, 1904, to the present time is itemized as follows:

Taxes and operating expenses.....	\$11,556 00
Maintenance fund.....	1,800 00
Administration fund.....	2,000 00
6% on \$180,000.00.....	10,800 00
Total	\$26,156 00

And it is fairly shown in the apportionment of the cost of the hydrant service and of the private service 45 per cent. should be paid by the city, and 55 per cent. by the private consumers, and 45 per cent. of \$26,156 is \$11,770.20, being the amount due and to become due, from the city to the waterworks each year, from February 22, 1904, until the close of the receivership, unless changed by order of the court; each installment to bear interest from maturity. The water furnished in the public buildings, watering troughs, drinking fountains, etc., to be paid for by the city at the rates to private consumers for similar service.

The proposed increase of rates to private consumers is reasonable, and the receiver is authorized by the court to promulgate the new schedule prepared by him and which was temporarily withheld by the order of the court.

Decree will be entered in accordance with these rulings.

CHICAGO, R. I. & P. RY. CO. v. SHIP.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1909.)

No. 3,002.

1. MASTER AND SERVANT (§ 243*)—INJURIES TO SERVANT—RAILROADS—VIOLATION OF RULES—NEGLIGENCE.

Railroad rules provided that extra trains within yard limits must protect themselves, and that trains passing through station yards must be under control, expecting to find the main track occupied. Plaintiff, the engineer of an extra freight, after coming within the yard limits at a terminal, saw a dark streak from 200 to 250 feet ahead of him, which he took to be a shadow caused by a car standing on a side track. When he approached within 60 feet, he saw that one of a string of freight cars which had been on the side track was on the main track ahead of him, whereupon he shoved down the brake valve into the emergency and jumped, and sustained injuries. As a result of the collision, a box car was torn up, several of the cars on the side track were derailed, the engine jumped the track after running two or three car lengths and turned sideways, three cars behind the engine were derailed and torn from their trucks, and one of them was so badly broken that it had to be burned. *Held*, that plaintiff had violated the rules specified, and was therefore guilty of negligence as a matter of law, precluding a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—INTERPRETATION—QUESTION FOR COURT.

Railroad rules, governing the operation of trains, claimed to have been violated by a servant, suing for injuries resulting from a collision, are to be interpreted by the court, and not by the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1127; Dec. Dig. § 289.*]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by John T. Ship against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Thomas S. Buzbee, for plaintiff in error.

Ulysses S. Bratton, for defendant in error.

Before SANBORN, Circuit Judge, and CARLAND and POLLOCK, District Judges.

CARLAND, District Judge. On September 13, 1907, at about half-past 8 o'clock in the evening, Ship was in the employ of the railway company as a locomotive engineer, in charge of engine No. 1838, which was hauling an extra freight train of loaded and empty cars in the yards of the company at Argenta, Ark. While thus employed he saw ahead of him, about 200 or 250 feet, a dark streak, which he then supposed was caused by cars standing upon a side track. When he had approached within 60 feet of what had appeared to him as a dark streak, he discovered that one of a string of freight cars which were on a side track was on the main track ahead of him. He immediately

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shoved the brake valve into the emergency and jumped from the engine. In so doing he received personal injuries, for which he recovered a judgment in the trial court.

In his petition he specified two grounds of negligence: A defective and insufficient headlight on the engine, and a failure on the part of the railway company to properly protect the box car on the main track with proper lights. After Ship had jumped from the engine, a collision occurred by the engine and train coming in contact with the box car. As a result of this collision, the box car, which was loaded with lumber, was badly torn up, and part of the lumber thrown into the next car behind it. Several of the cars on the side track were derailed. The engine ran two or three car lengths after it struck the box car, then jumped the track, and turned sideways. Three cars behind the engine were derailed and torn from their trucks. One car behind the engine and one in front were broken up so badly that they had to be burned. The rules governing the movement of trains, under which Ship was working, were contained in a book of rules and a time-card. Rule 97 in the book of rules reads as follows:

"Yard limits will be indicated by yard limit boards. Within these yard limits, yard engines may occupy main tracks protecting themselves against overdue trains. Extra trains must protect themselves within yard limits."

Rule No. 16 of the time-card reads as follows:

"Trains must be under control when passing through station yards, where engines are employed expecting to find main track occupied."

Ship knew he was within the limits of a yard of the company in which engines were employed, Argenta being a division point in reference to freight traffic, and he also knew of the above rules. Upon these undisputed facts, counsel for the railway company requested the court to direct a verdict in its favor. The refusal of the court so to do is now assigned as error. We think the court ought to have granted the request. The facts stated clearly show that Ship violated both of the foregoing rules made for his benefit, and therefore was guilty of negligence which directly contributed to his injuries. The nonobservance of these rules was negligence as a matter of law. *Great Northern Ry. Co. v. Hooker* (C. C. A.) 170 Fed. 154; *Kansas, etc., v. Dye*, 70 Fed. 24, 16 C. C. A. 604; *St. Louis & S. F. Ry. Co. v. Dewees*, 153 Fed. 56, 82 C. C. A. 190; *Missouri, K. & T. Ry. Co. v. Collier*, 157 Fed. 347, 88 C. C. A. 127; *Nordquist v. Great Northern Ry. Co.*, 89 Minn. 485, 95 N. W. 322; *Scott v. Eastern Ry. Co.*, 90 Minn. 135, 95 N. W. 892; *Brown v. Northern Pacific Ry. Co.*, 44 Wash. 1, 86 Pac. 1053.

Rule 97 provided that extra trains within yard limits must protect themselves. Rule 16 provided that trains, when passing through station yards, must be under control expecting to find main track occupied. The physical facts that appeared as a result of the collision clearly show that the extra train did not protect itself, nor was it under control, expecting to find main track occupied. As in the case of *Great Northern Ry. Co. v. Hooker*, supra, decided by this court, so in this case, the trial court seemed to leave the interpretation of the rules above mentioned to the jury as matter of fact. In reference to

this practice the language used by Judge Van Devanter in the case last cited, is pertinent.

"The trial court treated the interpretation of the rules prescribing the plaintiff's duty in the premises as a question of fact to be determined by the jury. But we are of opinion that it was a question of law to be determined by the court. Not only were the rules in the nature of a written instrument, but they contain no terms the meaning of which was not made plain by them; and, this being so, effect should have been given to the general rule that the interpretation of a written instrument rests with the court, and not with the jury. *Bell v. Bruen*, 1 How. 169, 183 [11 L. Ed. 89]; *Goddard v. Foster*, 17 Wall. 123, 143 [21 L. Ed. 589]; *Higgins v. McCrea*, 116 U. S. 671, 682 [6 Sup. Ct. 557, 29 L. Ed. 764]; *Scanlan v. Hodges*, 52 Fed. 354, 3 O. C. A. 113; *Bowes v. Shand*, L. R. 2 App. Cas. 455; 1 *Labatt, Master and Servant*, § 215. Moreover, it is held by this court that the reasonableness of such rules is to be determined by the court as a question of law, and not by the jury as a question of fact. *Kansas, etc., Co. v. Dye*, 70 Fed. 24, 18 C. C. A. 604; *Little Rock, etc., v. Barry*, 84 Fed. 944, 28 C. C. A. 644 [43 L. R. A. 349]. See, also, *Scott v. Eastern Ry. Co.*, 90 Minn. 135, 140, 95 N. W. 892; *Bailey's Personal Injuries*, § 3325. And it would seem that by analogy a like holding should be made when the question is one of interpretation."

Judgment reversed and new trial ordered.

ILLINOIS LIFE INS. CO. v. TULLY, State Treasurer, et al.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1909.)

No. 2,744.

1. INSURANCE (§ 4*)—INSURANCE COMPANIES—SPECIAL DEPOSITS—KANSAS STATUTES.

Laws Kan. 1871, p. 214, c. 93, regulating insurance companies, as amended by Laws Kan. 1879, p. 225, c. 115, did not require insurance companies organized or doing business in the state to deposit \$100,000 of securities with the State Treasurer as a condition to the doing of such business; section 49 of the original act, which alone required such deposit, being expressly repealed by the amendatory act.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 4*]

2. INSURANCE (§ 4*)—CONTROL AND REGULATION—MUTUAL COMPANIES—KANSAS STATUTES.

Laws Kan. 1879, p. 225, c. 115, relating to insurance companies, and entitled "An act supplemental to and amendatory of chapter 93 of the Laws of 1871," must be construed in connection with the unrepealed portion of the act of which it was amendatory, and, as so construed, neither act applied to mutual or co-operative life insurance companies having no capital stock.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 4*]

3. INSURANCE (§ 4*)—CONTROL AND REGULATION—SPECIAL DEPOSITS—KANSAS STATUTES.

Gen. St. Kan. 1901, § 3424, which was an embodiment of section 1 of the insurance act of 1879 (Laws Kan. 1879, p. 225, c. 115), and the only statute of the state requiring insurance companies to deposit securities with the State Treasurer, was expressly repealed by Laws Kan. 1903, p. 511, c. 330, § 2, and under article 12, § 1, of the state Constitution, which provides that "corporations may be created under the general laws, but all such laws may be amended or repealed," such repeal was effective and operative as to any insurance company organized under the laws of the state and also as to their stockholders and policy holders, and such com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

panies were no longer required to make such deposits or to maintain deposits previously made under the repealed provision.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 4.*]

4. INSURANCE (§ 679*)—REINSURANCE OF LIFE POLICIES—CONSTRUCTION OF CONTRACTS.

A Kansas mutual life insurance company, then in the hands of trustees appointed by a court, under authority of Laws Kan. 1903, p. 520, c. 336, and by a vote of its policy holders, accepted a proposition made by complainant, an Illinois stock company, to reinsure its policies, and in accordance therewith a contract was entered into and embodied in a decree of the court for such reinsurance, and which provided as a condition thereof that the trustees should assign and transfer to complainant all the assets, securities, and property of every kind of the Kansas company; the decree also authorizing complainant to bring any suits necessary to reduce such assets to its possession. At that time the Kansas company had a large amount in securities on deposit with the State Treasurer, but was not required by the laws of the state to maintain such deposit. *Held*, that there was nothing in the contract which obligated complainant to maintain such deposit; but, on the contrary, it was entitled to recover the securities from the treasurer, who had no authority of law to hold them.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 679.*]

5. INSURANCE (§ 679*)—REINSURANCE OF LIFE POLICIES—CONSTRUCTION OF CONTRACT.

Complainant life insurance company reinsured the policies of a Kansas company which went into liquidation, and by the contract became entitled to possession of all the assets of such company, including a large amount in securities then on deposit with the State Treasurer of Kansas, but without authority of law. Complainant wrote a letter to each policy holder, in which, among other representations, it stated that such deposit would be maintained. *Held*, that such statement did not estop it from afterward withdrawing the securities whether made before or after the contract, since, if before, it was superseded by the contract which contained no such provision, and, if after, it was merely promissory or the statement of an intention.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 679.*]

Appeal from the Circuit Court of the United States for the District of Kansas.

Ancillary bill by the Illinois Life Insurance Company against Mark Tully, State Treasurer of the State of Kansas, and another. Decree for complainant.

Henry W. Price and N. H. Loomis (Charles E. Gault, on the brief), for appellant.

F. S. Jackson (C. C. Coleman, on the brief), for appellees.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. In 1903 the Illinois Life Insurance Company, a corporation organized under the laws of that state, reinsured the policies of the Kansas Mutual Life Insurance Company, a corporation organized under the laws of Kansas, and became the purchaser at a judicial sale, made in a suit to wind up the affairs of the latter company, of all its assets. By the decree confirming the sale the assets were required to be turned over and delivered to the purchasing com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany, which was authorized and empowered to institute further proceedings if necessary to secure possession of them. The total value of the assets purchased was \$775,085.01 as then ascertained and determined. Among and included in them were notes secured by mortgage on real estate and otherwise, amounting to \$552,824.46, which had been before then deposited by the Kansas Company with the State Treasurer of that state under a claim that they were lawfully required to be kept there.

In 1905 the Illinois Company, being advised that the claim for the retention of those assets, which the treasurer continued to assert, was unwarranted, obtained leave of court in the main case to file this ancillary bill against the State Treasurer and the State Superintendent of Insurance to secure their possession, and also the possession of about \$27,000 more of securities which had been deposited with the treasurer after the purchase was made.

The case was submitted to the trial court on the facts disclosed by the bill and answer, and a decree was entered dismissing the bill on the merits. From this decree complainant appeals.

Presumptively the owner of personal property is entitled to its possession, and, as it is conceded that the Illinois Company acquired title to the securities in question as a part of the assets purchased by it, the burden is on the treasurer to make good his claim to their possession. In the assertion of his claim he contends: First, that the Kansas Company was required by the laws of Kansas to make and maintain the deposits, and that the purchasing company took title thereto subject to that requirement; second, that irrespective of any legal liability the Illinois Company by the provisions of its contract of purchase undertook to maintain the deposits; and, third, that by reason of a circular issued by it to induce the policy holders of the Kansas Company to accept the provisions of the reinsuring contract the Illinois Company is estopped from denying its duty to maintain the deposits.

The Kansas Company was originally organized as a mutual or co-operative insurance company under and pursuant to the laws of that state. On June 25, 1891, it deposited securities of the value of \$100,000 with the State Treasurer under the supposed requirement of an act entitled "An act to establish an insurance department in the state of Kansas, and to regulate the companies doing business therein," approved March 1, 1871, and known as chapter 93 of the Laws of 1871 (Laws Kan. 1871, p. 214, c. 93). Afterwards the Kansas Company continued to deposit securities from time to time with the treasurer in amount equal to the net present value of the policies issued by it pursuant to the supposed requirement of section 1 of "An act supplemental to and amendatory of chapter 93 of the Laws of 1871," approved March 11, 1879 (Laws Kan. 1879, p. 225, c. 115). The amount so deposited, together with the first-mentioned sum, makes the aggregate of \$552,824.46 which had been deposited before the reinsurance contract was executed.

A most casual reading of section 48 of the act of 1871, relied upon as authority for the first-mentioned deposit, discloses that it required no deposit whatever of any securities with the State Treasurer. It

dealt exclusively with the amount of capital and the character of investments which an insurance company was required to have before engaging in business. The next section (49) did require the deposit of \$100,000 of securities with the State Treasurer as a condition to doing business in the state; but that section was expressly repealed by section 4 of the act of 1879. There was therefore no law requiring either the original deposit or retention of \$100,000 of the securities in question.

The treasurer's right to retain possession of the balance of the securities is predicated upon the act of 1879. Does that act justify his claim? It was, as stated in its title, "An act supplemental to and amendatory of chapter 93 of the Laws of 1871," and its provisions must therefore be read and interpreted in the light of all the unrepealed provisions of that act. The act of 1871 was a general law creating an insurance department and regulating all insurance companies, life and fire, doing business in the state. It does not seem to have contemplated or provided for the organization or regulation of mutual or co-operative life insurance companies. The act concerned corporations with capital stock only. This is apparent by the provisions of its sections 45, 46, 48, and 78. Section 45 prescribes that life insurance companies organized under the act shall open their books for subscription to their capital stock. Section 46 provides what shall be done after the capital stock has been subscribed. Section 48 provides that no life insurance company shall be formed or continue in business without a capital of at least \$100,000 and unless the full amount of its capital stock shall have been in good faith subscribed, and by section 78 it is expressly enacted that:

"The provisions of this act shall not apply to life insurance companies organized on the co-operative plan."

It being conceded by the pleadings that the Kansas Company was a mutual or co-operative company, it was therefore presumptively not subject to the provisions of the act of 1871, as amended by the act of 1879, requiring the deposit of securities with the State Treasurer.

But if, by the true interpretation of those statutes, the company was required to make the deposits of securities in question with the State Treasurer, we think that requirement was superseded in 1903 by the adoption of the act relating to insurance, approved March 6th of that year. Laws Kan. 1903, p. 511, c. 330. By section 2 of that act, section 3424, amongst others of the General Statutes of 1901, was expressly repealed. The last-mentioned section was word for word the same as section 1 of the act of 1879, which alone provided for the deposit of any securities with the State Treasurer. It was a mere embodiment of that act in the General Statutes.

The result is that the act of 1879, which required not only the depositing of the securities, but imposed the duty upon the treasurer to hold them, was repealed before the contract of reinsurance involved in this case was made. It would unnecessarily prolong this opinion to enter into a discussion of the statutory provisions made for the security of policy holders existing at the time of the repeal of section 3424. It answers our present purpose to observe that the repeal manifests a

clear legislative purpose to change the former policy of the state and to discontinue the requirement for a deposit of securities with the State Treasurer whether that requirement concerned stock companies or mutual companies or any other kind of company whatsoever.

But it is contended that, notwithstanding the repeal of this law, the policy holders existing at the time had acquired a vested interest in the securities being held by the treasurer which could not be affected by the repeal.

Whatever their right in this regard may have been, it was conferred by the statute and by it alone. The Constitution of the state in force at and before the passage of the act of 1879 provided (article 12, § 1) that:

"Corporations may be created under the general laws; but all such laws may be amended or repealed."

Policy holders of a mutual insurance company stand in relation to it much like the stockholders of a stock company to their corporation. They are its members. They are not an independent third party, but are its living and acting members by and through whom the corporate entity acts, and it is only in an academic and technical sense that they are differentiated in theory from the corporation itself. To hold that a legislative regulation of insurance companies, which the exigency of a given time or condition of things requires should be changed, cannot be modified or changed without the consent of their members, would practically defeat all such legislation. The state which gives them being would become powerless to regulate them.

The constitutional power of the Legislature to repeal the law in question must, in our opinion, be held to constitute a condition subject to which not only the Kansas Company accepted its corporate existence, but also subject to which its members entered into relations with it. The latter must have contemplated the possibility of an amendment or repeal of any law affecting their rights when they accepted their policies just as much as the former did when it accepted its life from the state. The following cases are determinative or illustrative of this proposition: *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; *Venner v. United States Steel Corp. (C. C.)* 166 Fed. 1012; *Rosenplaenter v. Providence Sav. Life Assur. Soc. (C. C.)* 91 Fed. 728; *Life Assurance Society v. Welch*, 26 Kan. 632; *People v. New England Mutual Life Ins. Co.*, 26 N. Y. 303; *Boswell v. Security Mut. Life Ins. Co.*, 119 App. Div. 723, 104 N. Y. Supp. 130.

Our conclusion therefore is that, whatever be the true interpretation of the prior laws with respect to mutual insurance companies, the obligation to make or maintain the deposits was effectually superseded by the act of 1903, and as a result there was no statutory obligation in force at the time the reinsurance contract was made requiring either the making or retention of the deposits in question obligatory either upon the Kansas Company or upon the Treasurer of the State of Kansas.

But it is contended that the charter of the Kansas Company was amended in 1882 pursuant to the provisions of section 72 of the act of

1871, and that it was thereby brought within and made subject to all the provisions of that act including the amendment of 1879, requiring the deposit of securities with the treasurer. That section is as follows:

"Any life insurance company formed under any law of this state, may amend its charter or articles of incorporation * * * so as to be entitled to all the privileges and subject to all the regulations of this act."

As already observed, the distinguishing feature of insurance companies organized or operated under the provisions of that act was that they should have a capital stock. In order therefore to come within the purview of the enabling statute, the amendment of the charter should have provided, among other things, for the creation of capital stock.

Certainly no express provision of that kind is found in the amended charter before us, and there are many indications that it was never intended by its framers that their company should have any capital stock, or that its members should incur any of the liabilities incident to its possession.

The Constitution of the state of Kansas (article 12, § 2) provides that:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder," etc.

Article 8 of the amended charter provides that:

"No member of this corporation, except the officers and agents thereof, shall be held personally liable for the losses of or claims against the corporation, and such officers and agents shall be severally liable only for losses arising by reason of their own respective neglect or misconduct."

Here is a distinct and unqualified disclaimer of a liability imposed by the Constitution of the state upon stockholders or corporations having capital stock.

Again, article 2 of the amended charter provides that:

"This corporation shall possess and enjoy all powers, privileges and franchises belonging to, and shall be subject to all restrictions, regulations and obligations resting upon corporations, organized or existing under the act passed by the legislature of the state of Kansas entitled 'An act to establish an insurance department in the state of Kansas, and to regulate the companies doing business therein,' which act took effect March 24, 1871, and all acts passed or to be passed, in amendment thereof or supplemental thereto, so far as applicable to the organization and nature of a mutual life insurance association."

Here is found a clear and distinct disavowal of any purpose to change from a mutual to a stock company.

The Kansas Company, after the adoption of its amended charter, still remained a mutual or co-operative insurance company as before, and as such was by the express provisions of the law, as well as by its necessary implications, not subject to the requirement to deposit any securities with the state treasurer.

Did the contract of reinsurance obligate the Illinois Company to maintain the deposits with the treasurer?

We must approach a discussion of this question in view of the law

as already declared; that there was no legal liability on the part of the reinsured company to make or maintain the deposits, and in determining the force and meaning of the contract the decree of court authorizing and confirming it, as well as the written document itself, should be considered.

At the time of negotiating the contract, the Kansas Company was in the hands of trustees appointed by the court below in a proceeding instituted for the purpose of annulling a former reinsurance contract, made between it and the Kansas Union Life Insurance Company and to secure a reorganization of the first-mentioned company; and the proceedings, resulting in the contract of reinsurance now under consideration, were had in that case.

By section 3 of an act of the Kansas Legislature entitled "An act relating to mutual or co-operative life insurance companies," approved March 10, 1903 (Laws Kan. 1903, p. 521, c. 336), it was provided that:

"Whenever the directors of any mutual or co-operative life insurance company or association organized under the laws of the state of Kansas shall deem it to the best interests of the policy holders to suspend business, it may secure propositions from other solvent life insurance corporations authorized to do business in the state of Kansas, whether foreign or domestic, and whether companies possessing a capital stock or organized on the mutual plan, to reinsure its policies, that upon securing such proposition or propositions the same shall be formulated and the substance transmitted by mail to each policy holder, and a regular or special meeting of the policy holders shall be called for the purpose of determining whether said company shall go into liquidation, and also of voting upon said proposition of reinsurance. If at such meeting two-thirds of the number of the holders of outstanding policies of such company or association shall vote, either in person or by proxy, to go into liquidation and to accept any one of said propositions for reinsurance, the board of directors may make a contract in accordance therewith, and upon due execution thereof transfer and turn over to the said reinsuring corporation so much of the assets of said mutual or co-operative insurance company or corporation as are embraced in said proposal or contract as consideration therefor; provided, that any dissenting policy holder may withdraw his equitable share of the assets of said corporation in lieu of accepting said reinsurance contract. * * *

By section 4 of that act it was provided:

"That if any mutual or co-operative life insurance company or association is now or shall hereafter be in the hands of receivers or trustees appointed by any court of competent jurisdiction, the said receivers or trustees shall exercise the functions and perform the duties of directors as prescribed by section 3 of this act and execute the contract therein referred to."

The parties to that suit invoked the provisions of this law to bring about a liquidation of the Kansas Company and a reinsurance of its policies. The trustees exercising the function of directors, as authorized by section 4, invited and received propositions from other companies, including the Illinois Company, which was an old line stock company. The substance of these propositions was transmitted by mail to each policy holder, and afterwards at a meeting duly called and held it was resolved, by a vote of more than two-thirds of all of them, to go into liquidation and accept the reinsurance proposition of the Illinois Company. The equitable share of the assets belonging to the different policy holders was ascertained by actuaries appointed for that purpose, and the contract was duly executed and delivered. Any

dissenting policy holder had the right to and did withdraw his equitable share of the assets instead of accepting the reinsurance provided by the contract.

Acting on the assumption that it had lawfully amended its charter in 1882, the Kansas Company thereafter ceased to do business on the assessment plan as it had done before and undertook to convert its policies into fixed or level premium policies with participation in surplus earnings, and the practice of assessing premium notes given by the members to meet death losses, which before then had prevailed, was abandoned. An organization without capital stock unwarranted by law, as already seen, resulted; but, whether warranted or unwarranted, it, acting as a de facto corporation, issued certain classes of policies and undertook in consideration of the receipt of certain premiums in cash to insure the lives of individuals.

It was in view of this condition of things, doubtless, that the following covenant was inserted in the reinsurance contract:

"And it is further understood and agreed that the Illinois Life Insurance Company shall not interpose any defense to any policies issued by the Kansas Mutual Life Insurance Company, commonly known as the Old Line Level Premium Legal Reserve policies, or policies of any other kind or class, which are not within the terms of chapter 131 of the Laws of 1885 upon the ground of the lack of power of the Kansas Mutual Life Insurance Company to issue the same."

For the purposes of this case we find it unnecessary to give special attention to the different classes of policies or the peculiar rights and privileges accorded to each class. They were all reinsured by the Illinois Company, and the payment of them, whether issued lawfully or unlawfully, was the consideration for the transfer of the assets to the Illinois Company. The obligation of the latter company with respect to maintaining the deposits in question with the treasurer depends, not upon the rights of individual policy holders, but upon what it agreed to do in that respect in and by the reinsuring contract.

The deposits then amounted to about five-sevenths of all the assets sold to the Illinois Company, and it would seem, if such a substantial part of them were not to be actually delivered to the purchaser, but were to be detained in the custody of an officer not authorized by law to hold them as we have already determined, and therefore not responsible on his official bond for them, that it was such an important feature of the transaction as naturally would be specifically provided for in the contract. But the contract is silent on this subject. That is not all. In explicit language it requires the trustees of the Kansas Company "to transfer to said Illinois Life Insurance Company, immediately, by delivery thereof and by proper deeds of assignment and transfer, all the assets, money, notes, bonds, mortgages, stocks, securities, judgments, choses in action, real property and property of every kind and character and wheresoever situated, belonging to said the Kansas Mutual Life Insurance Company on the day this contract goes into effect." Again, it provides that it shall go into effect and be binding "only when all the transfers, assignments, and deliveries herein mentioned shall have been duly made, and not before." Again, the decree in which the contract is bodily incorporated authorized the

purchaser to bring suit or suits for the collection of claims due to the Kansas Company "and to take any lawful action whatever to realize upon or to reduce to its control or possession, the assets transferred to it, as aforesaid."

Applying all the tests known to the law for ascertaining the intention of contracting parties, which is the final and conclusive criterion for determining the true construction of a contract, it cannot be doubted that the true intent and meaning of the reinsuring contract was to give the right of immediate possession of the deposits in question to the Illinois Company.

As a step in the reinsuring process marked out by the provisions of section 3 of the act of 1903, *supra*, to which resort was had in this case, the Kansas Company was liquidated. Its obligations under the law ceased. The Illinois Company not only assumed the obligations and duties specified in the reinsuring contract, but all other obligations and duties imposed upon foreign corporations by the laws of the state of Kansas as well as those incumbent upon it incident to its own creation and existence under the laws of the state of Illinois.

It was an old line stock company, and as such afforded a security for its policy holders different but no less effectual than the mutual company was required to do by the laws of Kansas. Its capital and surplus, the deposit of \$100,000 which the law of Illinois required to be kept intact with the State Treasurer of that state, and other statutory provisions for the security of its policy holders, together with the visitatorial and corrective subjection of the company to the commissioner of insurance of the state of Kansas, all furnished such protection to its policy holders as rendered unreasonable the requirement that a large part of its assets should be sequestered in a foreign state and made subject to the burden of its taxation and control. In view of this ample provision for their security, the policy holders of the Kansas Company with great unanimity devoted the equitable value of their share of the assets belonging to their own discredited company to the purchase of new insurance in the solvent and reliable Illinois Company. This was done according to a scheme which their officers had devised and which they had approved. The transaction amounted to a complete novation of the obligations of the Kansas Company. It was released from liability, and the Illinois Company assumed that liability on terms proposed to and accepted by the policy holders. Neither the law of Kansas nor the contract in any rational interpretation of it required the retention of the deposits in question, and they afford no authority for the treasurer's present contention.

This brings us to the last proposition of the treasurer, namely, that the Illinois Company is estopped from denying its obligation to maintain the deposits with him by reason of a certain circular letter alleged to have been "made and prepared" by the Illinois Company. That letter is as follows:

"Chicago, June 26, 1903.

"Dear Sir: The Illinois Life Insurance Company begs to announce that in pursuance of the acceptance of its proposition to assume and reinsure the policies of the Kansas Mutual Life Insurance Company by the unanimous vote of a meeting of the policy holders held on the 17th day of June, 1903, the reinsurance of the Kansas Mutual Life Insurance Company by the Illinois Life

Insurance Company was perfected, and you are therefore now a policy holder of the Illinois Life Insurance Company. Under the terms of the contract of reinsurance, your policy is assumed by the Illinois Life Insurance Company and will be carried out as provided in said contract of reinsurance without subjecting you to any medical examination and without change of your policy. In other words, you retain your old policy. The Illinois Life will increase the importance of the Topeka office, and will make it the medium of loaning largely of the company's assets upon Kansas farm mortgages. The present Kansas mortgage loans will be continued, and they, together with the additional loans contemplated, will make the Topeka office the most important office of the company in point of mortgage investments. The assets now on deposit with the Treasurer of the State of Kansas for the protection of the reserve on outstanding policies will be continued, and the amount of this deposit will be increased from time to time, so that the entire reserve on registered policies may be maintained intact. The sworn statement of the Illinois Life to the various insurance departments shows its net admitted assets on December 31st last were over \$4,000,000, and its insurance in force over \$30,000,000. In April, 1903, this company was examined by the Kansas insurance department, and its statements verified and approved. By the reinsurance of the Kansas Mutual, its policy holders are given the additional security of the entire assets and surplus of the Illinois Life, thus securing their policy contracts beyond all peradventure. The consolidation of the business of the two companies will result in saving in salaries, state license fees, taxes and other expenses, amounting to many thousands of dollars per year. So that the consolidation of the two companies will greatly redound to the advantage of all the policy holders. It will be the aim and desire of the management of the Illinois Life Insurance Company to please its policy holders, because its primary purpose is their protection and welfare, and the management will always deem it a pleasure to receive such suggestions for the benefit of the company as may be presented by its policy holders. As an evidence of the reinsurance which has been effected, we beg to inclose herewith our formal certificate of reinsurance, which you will please attach to your policy and sign and return to this office, in the inclosed stamped envelope, and receipt therefor.

"Respectfully yours,

Illinois Life Insurance Company."

It must be assumed from the undisputed allegations of the answer that this letter was distributed to the policy holders of the Kansas Company; but when it was so distributed, with reference to the time of complete novation of liability from the Kansas Company to the Illinois Company on the policies of the former company, does not appear.

As far as this record discloses, the letter was not sent to or did not reach any of the policy holders before they had irretrievably surrendered their claim against the Kansas Company and accepted the obligation of the Illinois Company. They therefore could not have changed their position in reliance upon it.

The law is well settled that a party, in order to invoke an estoppel by reason of the conduct of another, must have acted upon material representations made by the latter at a time and under circumstances when he had a right to rely upon them, and must have been injured as a consequence of such innocent and justifiable reliance. The treasurer, assuming to act in the interest of the policy holders, invokes such an estoppel to protect himself in the retention of the deposits. The affirmative therefore was on him to establish all the facts entitling him to the protection of this principle. He does not seem to have done it.

But passing this somewhat technical aspect of the subject, and conceding, but not finding, that the circular was distributed amongst the policy holders dum fervet opus, and that they had the circular before them while considering the proposition of the Illinois Company (and this is as broad an assumption as the facts of the case under any aspect could warrant), would the dissemination of such a circular under such circumstances estop the Illinois Company from now taking possession of the deposits in question?

We think not for two reasons: First, because the representations contained in the circular were not representations of fact, but were expressions of intention concerning the future policy of the Company. The circular first assumed a complete and finished novation by the policy holders. It says:

"You are therefore now a policy holder of the Illinois Life Insurance Company. * * * Your policy is assumed. * * * As an evidence of the reinsurance which has been effected, we beg to inclose herewith our formal certificate of reinsurance, which you will please attach to your policy and sign and return to this office. * * *"

It then proceeds to state what the company expects to do. It says:

"It will be the aim and desire of the management of the Illinois Life Insurance Company to please its policy holders. * * * The consolidation of the business of the two companies will result in saving in salaries, state license fees, taxes and other expenses, amounting to many thousands of dollars per year. * * * The Illinois Life will increase the importance of the Topeka office, and will make it the medium of loaning largely of the company's assets upon Kansas farm mortgages. The present Kansas mortgage loans will be continued, and they, together with the additional loans contemplated, will make the Topeka office the most important office of the company in point of mortgage investments."

In the midst of such promissory statements as these is found the one relied upon by the treasurer, as follows:

"The assets now on deposit with the Treasurer of the State of Kansas for the protection of the reserve on outstanding policies will be continued, and the amount of this deposit will be increased from time to time, so that the entire reserve on registered policies may be maintained intact."

It cannot be doubted that all the other representations are so clearly of future intentions and purposes as to form no basis for the doctrine of estoppel. The promise to "aim to please" the stockholders and to "increase the importance of the Topeka office," and other like things, formed a species of innocent buncombe and pretension upon which no right of action could be predicated, and we think the representation relied upon is of the same general character, and in its interpretation the maxim *noscitur a sociis* ought to apply. It was only the expression of a present intention liable to be changed as circumstances and the future interests of the company might from time to time require.

Estoppel cannot be predicated upon mere promises, expressions of intention, expectation, hope, or belief.

In the case of *Farwell v. Colonial Trust Co.*, 147 Fed. 480, 78 C. C. A. 22, this court had under consideration the rescission of a contract based on alleged false representations. In other words, a right

was there asserted of kindred nature to that which is now invoked. We there, speaking by Judge Sanborn, said:

"The subject of such misrepresentations must be the existence or nonexistence of facts at the time the statements were made. Neither promises, nor prophecies, nor expressed opinions or beliefs, concerning future events or conditions, will sustain a rescission of a contract or a sale."

In *Jackson v. Allen*, 120 Mass. 64, 79, Mr. Justice Gray, then Chief Justice of the Supreme Judicial Court of Massachusetts, speaking for that court, said:

"To constitute an estoppel in pais, it is essential that the defendant should, by word or act, have represented the fact to be different from what he now attempts to show it to have been. Mere disappointment in expectation, or breach of promise or covenant relating to the future, cannot constitute an estoppel in pais."

In *Insurance Company v. Mowry*, 96 U. S. 547, 24 L. Ed. 674, Mr. Justice Field, speaking for the Supreme Court, said:

"An estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact—to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act."

In *Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105, it is said:

"It is difficult to see how an action or a defense can be based upon promissory representations of the character we have considered, and we are of the opinion that they were the expressions of hopes, expectations, and beliefs, and that neither party understood, or had the right to understand, that they were to be received as statements of facts which any one was bound to make good, or upon which the validity of the subscription should depend."

Bigelow, in his work on Estoppel ([5th Ed.] p. 574), says:

"The representation or concealment must, in the second place, like a recital, in all ordinary cases have reference to a present or past state of things; for, if a party make a representation concerning something in the future, it must generally be either a mere statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract."

The "peculiar consequences" just referred to undoubtedly mean that the contract, if made, would merge the representations which might have induced its execution.

The second reason why the dissemination of the circular cannot sustain the treasurer's contention is this: On the assumption, which we are now indulging, that the circulars were distributed before the policy holders had finally determined to accept the reinsurance and while the negotiations to that end were pending, we are confronted with the well-established legal principle that the contracts as finally concluded superseded all the former representations on the subject.

Mr. Justice Field, in *Insurance Company v. Mowry*, *supra*, made the following observation:

"But the doctrine (of estoppel) has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the

person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent."

We think the doctrine of that case has pertinent application to this. Whether the deposits amounting to nearly all the assets of the Kansas Company should be retained in the possession of the treasurer as security for the policy holders of that state was, as now appears in this case, a matter of grave concern and importance to them. Yet when two-thirds of the policy holders approved the reinsurance contract as proposed by the Illinois Company, and when the balance of them accepted a novation of the old company's obligation and took their insurance from the Illinois Company pursuant to the terms of the contract, instead of taking (as they might have done) their equitable share of the assets of the Kansas Company, they thereby determined that, notwithstanding the want of any provision in the contract of reinsurance for the treasurer's retention of the deposits, they would avail themselves of the reinsurance as proposed by the Illinois Company. They had opportunity to determine their action in view of the fact that there was no provision requiring the retention of the deposits by the treasurer and did so. To hold that they can now avail themselves of the representations contained in the circular, to enforce an obligation which in their final contract they made no provision for and were content without, would destroy the sanctity and conclusiveness of the written contract and open it to considerations which were the subject of negotiation, but which were not deemed important enough to embody in the concluded contract. This cannot be done.

We have assumed, as was apparently done below, that the treasurer was the trustee for or stood in such privity with the policy holders as to be entitled to make any defense to this action which they might have made had they been made parties to it. But in view of the conclusions already reached that he is a mere volunteer, a bailee assuming to act without authority of law or contract, it is questionable if he can invoke for his justification in this case any of the rights of the policy holders. But as it is unnecessary to decide this we refrain from expressing any opinion concerning it.

The decree of the Circuit Court must be reversed, and the cause remanded, with directions to enter one in favor of the complainant as prayed for.

BEISEKER et al. v. MOORE.†

(Circuit Court of Appeals, Eighth Circuit. November 13, 1909.)

No. 2,862.

1. APPEAL AND ERROR (§ 1097*)—REVIEW—SUBSEQUENT APPEALS—FORMER DECISION AS LAW OF CASE.

Where a case has been once taken to the Circuit Court of Appeals on a writ of error and determined, and remanded for a new trial, the decision of such court on all questions of law becomes the law of the case, and a second writ of error brings up for review nothing but the proceedings had on the second trial, requiring a consideration of new evidence or a different state of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

2. APPEAL AND ERROR (§ 274*)—REVIEW—INSTRUCTIONS.

An exception to an instruction based on a specific ground does not present for review by an appellate court the question whether the instruction was erroneous for a different specific and separate reason.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.*]

3. TENDER (§ 29*)—QUESTION FOR JURY.

In an action for breach of a contract for purchase of land by plaintiff from defendants, where plaintiff made a tender of performance which was not accepted, but defendants refused to say that it was rejected, and the evidence was conflicting as to whether they afterward offered to accept it, the question whether plaintiff kept the tender good for a reasonable time was one for the jury.

[Ed. Note.—For other cases, see Tender, Dec. Dig. § 29.*]

4. TENDER (§ 14*)—SUFFICIENCY—CONDITIONS.

Under an executory contract for the purchase of land by plaintiff from defendants, an offer by plaintiff to perform by tendering the cash and notes called for by the contract in payment for the land, coupled with a demand for a conveyance and a statement that, unless the deeds were then delivered, plaintiff would consider the tender refused, was not such a conditional tender as to be ineffective.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 33-38; Dec. Dig. § 14.*]

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of North Dakota.

Action by Charles E. Moore against Thomas L. Beiseker and Charles H. Davidson, Jr. Judgment for plaintiff, and defendants bring error. Affirmed.

This was an action at law brought by Moore, defendant in error, against Beiseker and Davidson, to recover damages for a breach of a contract to convey land, situated in McLean county, N. D. The complaint set forth, in *hæc verba*, the contract sued on, together with the facts and correspondence in great detail relied upon by the plaintiff in support of his cause of action. A demurrer was interposed to it by the defendants and sustained by the Circuit Court, and, from the judgment rendered in favor of the defendants thereon, the plaintiff took his writ of error. After a patient examination of the com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied December 23, 1909.

plex facts presented and legal principles invoked, we reversed the judgment and directed a new trial of the action. *Moore v. Beiseker*, 147 Fed. 367, 77 C. C. A. 545. Subsequently an answer was filed, the case went to trial before a jury, and a judgment resulted in favor of the plaintiff for \$6,754.50. To reverse this judgment, the present writ of error is prosecuted.

Guy C. H. Corliss (Robert G. Morrison, on the brief), for plaintiffs in error.

A. R. Molyneux and E. C. Herrick (Maher & Herrick, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). It was settled by the judgment in the former case as elucidated by the opinion rendered that, by reason of the peculiar facts and circumstances surrounding the parties at the time the contract was made and the action of the parties then and subsequently taken in the way of performance, the limit of 30 days fixed for such performance by the contract was waived.

According to its provisions, which are set forth at length in the former opinion, the defendants were first required to deliver to the purchaser complete abstracts of title to the lands, and the purchaser, after taking 10 days to examine the same, was required to take the next step towards performance by tendering the cash payment which was to be one-third and notes secured by mortgage on the land conveyed for the balance or two-thirds of the purchase price. Acting on the construction of the contract which they had adopted, abstracts were from time to time furnished by the vendors, dissatisfaction of one kind or another was found with them, and corrections were made until the latter part of August, 1902, when satisfactory abstracts of title to 8,829.08 acres were furnished to the purchaser. The parties then agreed to close the deal so far as these lands were concerned, and proceeded to do so. While arranging to consummate their conveyance, a controversy arose with respect to the time when interest should begin to run on the notes to be given for the deferred portion of the purchase price. The vendors claimed that it should run from December 21, 1901, because the contract provided that the notes should each be dated December 21, 1901, and all should draw interest at the rate of six per cent. per annum until paid. The vendee contended that, in view of the waiver of the time limit and the delays in furnishing satisfactory abstracts of title, interest should run only from the time of actual performance, and that the earliest possible date, fixed by the standard he suggested, was September 1, 1902.

Whether it was the fault of the plaintiff or not which occasioned the delay in furnishing the abstracts and whether the defects in them complained of by plaintiff from time to time were defects in ownership, title or otherwise, within the exact purview of the stipulation of the contract in that regard, or whether the contract was indivisible so as to require a purchase of all the lands described in them,

if any (questions learnedly argued by defendant's counsel), are quite immaterial in view of the fact that the parties did away with all these questions when they proceeded to the execution of their contract as practically construed by them. As said in the former opinion, they then treated it as "a recognized, subsisting contract obligatory upon both, whereby the one-third of the purchase money for the acres thus accepted was to be paid and deeds and mortgages exchanged." Abstracts of title were furnished, and they treated them as delivered to the plaintiff in execution of the contract obligation in that respect, and proceeded to close the deal so far as those lands were concerned. Many of the contentions of defendants' learned counsel are in manifest disregard of the contemporaneous construction which the parties placed upon the contract, and fall well within the general denunciation of such things expressed by Judge Philips in the opinion in the former case. As the parties brushed many of the questions now minutely argued by defendants' learned counsel away, so will we; and, as many of those now argued were settled by the former judgment and have become the settled law of the case, we will come directly to the new things involved in this writ of error about which there was a real controversy.

There do not seem to have been any very serious differences between the parties until September, 1902. The defendants had then furnished, as already stated, satisfactory abstracts of title for 8,829 acres of land, and the parties had agreed to proceed immediately to the execution of their contract so far as those lands were concerned, leaving the balance in abeyance to be dealt with as fast as abstracts of title could be perfected. Between August 29th and September 18th some correspondence and personal interviews were had by the parties concerning the time when interest should begin to run on the deferred payments; but they failed to agree. The plaintiff finally determined that the notes evidencing the deferred payments should bear interest only from the time defendants were ready to, and did, convey the lands to him, and proceeded to act accordingly. He was required to take the next step in the way of performance of the contract in order to put the defendants in default (*Michigan Home Colony Co. v. Tabor*, 141 Fed. 332, 72 C. C. A. 480), and on September 18th made a tender of the cash payment due on the lands and also of notes bearing interest from September 1, 1902, secured by mortgage to evidence the deferred payments, and demanded a conveyance of legal title by the defendants which was refused. If plaintiff was right in his general contention about interest, the date of September 1st fixed by him from which interest should run is probably as liberal to the defendants as the facts in the case warrant.

It is conceded by the defendants that upon the theory that plaintiff was bound to pay interest only from the 1st of September, 1902, and on the theory that the number of acres tendered for, to wit, 8,829, was correct, a sufficient amount of cash and sufficient notes for the deferred payments were tendered by him.

Four objections, however, are made to the tender: First, that the notes should have borne interest from December 21, 1901, instead

of September 1, 1902; second, that the tender was insufficient, in that it did not embrace cash or notes for about 136 acres of land which were found on that date not to have been included within the aggregate of 8,829 acres, reported by defendants to be ready for conveyance; third, that plaintiff nullified the tender of performance after it was made by failing to keep it good a reasonable length of time for the defendants to accept; and, fourth that the tender was a conditional one, conditioned upon the surrender to the plaintiff of defendants' claim to interest upon the deferred payments.

We will take up these objections in the order stated; but, before doing so, we should remember that this is not a case of tender to extinguish a debt or stop interest, but is rather an offer of performance by one party to a contract containing mutual and dependent covenants, requisite to put the other party in default.

Were the defendants entitled to the interest demanded? This very question framed in the same words precedes its careful discussion in the former opinion. It was then answered in the negative, and that would seem to be conclusive of the present inquiry. But learned counsel for defendants say it was not conclusive, because, using his own language, "the decision proceeded upon the theory of default of the defendants and not upon any consideration of the contract itself."

We do not construe the opinion as adjudicating merely that by reason of defendants' wrongful default in the matter of furnishing abstracts of title interest could not be exacted. That is quite too narrow and constricted a view of the opinion taken as a whole. Whatever was said in the discussion of the subject of interest was said after we had determined the true meaning of the contract not only in the light of its own terms, but in the light of the contemporaneous construction put upon it by the parties themselves. It was in view of the contract so construed by the parties, and not as a penalty for a default, that we held that no interest accrued to the defendants until actual performance by them in the way of transferring the title.

It is also suggested that the proof taken at the trial below disclosed a state of facts different from that disclosed in the complaint which was alone before the court in the former case and that this fact impairs or destroys the force and effect of that judgment as the law of the case. We find nothing, however, to justify such contention. A careful comparison of the proof found in this record with the showing made by the complaint and exhibits in the former case convinces us that no new fact of any substance or materiality is now presented for our consideration.

The rule is firmly settled that, after a case has been once brought here and decided and remanded for a new trial, a second writ of error brings up for review nothing but the proceedings had on the second trial. All questions of law determined on the first writ of error become the law of the case both for the trial court and for this court on the second writ of error. *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969; *Panama Railroad v. Napier Shipping Co.*, 166 U. S. 280, 284, 17 Sup. Ct. 572;¹ *Illinois v. Illinois Cent. R. Co.*, 184 U. S. 77, 22 Sup.

¹ 41 L. Ed. 1004.

Ct. 300, 46 L. Ed. 440; Guaranty Co. of North America v. Phenix Ins. Co., 124 Fed. 170, 174, 59 C. C. A. 376; Montana Min. Co. v. St. Louis Min. & Mill. Co., 147 Fed. 897, 78 C. C. A. 33. This rule, it is true, prevails only when the second record presents substantially the same facts as the first. Inasmuch as the purpose of remanding a cause for a new trial is to enable parties to produce further competent testimony, it is manifest that, when new and material evidence is presented on the second trial, the law applicable to the new state of facts must be decided. 1 Herman on Estoppel and Res Judicata, § 115; Elston v. Kennicott, 52 Ill. 272; Crotty v. Chicago G. W. Ry. Co. (C. C. A.) 169 Fed. 593.

But this rule cannot be employed as a pretext to secure a re-examination of the questions actually settled before. As said by Mr. Justice Grier, in *Roberts v. Cooper*, supra:

"To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. * * * There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members."

Our conclusion is that we are foreclosed by the law of the case from opening anew the question when interest began to run on the deferred payments. We held on the first writ of error that a tender by plaintiff of notes bearing interest from September 1, 1902, was all that was required of the vendee; and to that we now adhere.

Did the tender or offer to perform by plaintiff fail to put defendants in default because it did not include cash and notes for 136 acres of land? It is conceded that plaintiff was in no way at fault in this matter. Through error of defendants' agents employed to prepare the abstracts the number of acres in a certain section was incorrectly stated. It having been the duty of defendants to first present abstracts to plaintiff, showing title to lands which they could convey, he had a right to act upon the showing made by the abstracts as furnished. He did so, and made his tender of performance for the full number of acres shown by the abstracts presented to him. No objection was made to the tender on the ground of discrepancy in acreage. In fact, no such discrepancy was known to either party until after the tender of performance by plaintiff. A suggestion of it was made by a third person later in the day, and learned counsel for defendants admit that, as plaintiff acted in good faith and was misled by the mistake of the abstractor, defendants could take no advantage of that mistake; but they insist that the duty rested on plaintiff as soon as a discrepancy was suggested to make a reasonable effort to ascertain the amount of it and to renew his tender of performance later. The only way this question is brought to our attention as a matter of law is by an exception to a refusal of the court to instruct a verdict in favor of the defendants, based in part on the alleged ground that plaintiff failed to offer performance as to those 136 acres. The evidence that the tender was for a less number of acres than it ought to have been, and that the same was known, or could have been known, to the plaintiff before he proceeded to put defendants in default, was vague and uncertain, and not

sufficiently specific or clear to justify the court to pass on its effect as a question of law. It presented a question of fact to be determined by the jury under proper instructions. The court therefore committed no error in not peremptorily instructing a verdict as requested. It is again contended that the court erred in charging the jury as follows:

"To summarize the case, gentlemen, I charge you as a matter of law that Mr. Moore tendered to the defendants on the 18th of September all that they were entitled to receive under the contract, and that if his tender was made in good faith and he continued for a reasonable time ready and able and willing to deliver to the defendants that which he tendered, and the defendants failed to come forward with an offer to accept the same, and to perform the contract on their part, then the defendants have violated their contract, and the plaintiff is entitled to recover."

Counsel for the defendants interposed the following exception:

"We except to that portion of the charge that charged the jury that the tender was sufficient, and in that connection insist that the question should be submitted to the jury as far as the interest is concerned as a question of fact as to whether the defendants exercised reasonable diligence in getting out abstracts and perfecting titles."

This charge and exception had manifest reference to the disputed question of interest, which had always been the chief bone of contention between the parties, and, if they had any reference to the deficiency of acreage, they were so obscure as not to afford the basis for review. They at best for the defendants contained two subjects—one interest and the other discrepancy of acreage. "When an exception is reserved to a charge which contains two or more disputed or separable propositions, it is the duty of counsel to direct the attention of the court to the precise point of objection." "The rule is that the matter of exception shall be so brought to the attention of the court before the retirement of the jury to make their verdict as to enable the judge to correct any error if there be any in his instructions to them." *Mobile & Montgomery R. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527. The rigid enforcement of this rule, not only conduces to the orderly administration of justice, but is a consideration specially due to trial judges who have no other opportunity for correcting an inadvertent remark or erroneous statement of law, without granting a new trial and incurring the delays and expenses incident thereto.

The exception under discussion did not comply with this rule. The court's attention was not called to the effect of any discrepancy in acreage in any such clear and distinct way as to enable it to correct its charge in that particular, if it had seen fit to do so.

Did the plaintiff nullify his tender of performance after it was made by failing to keep it good a reasonable length of time for defendants to accept? The answer to this question depends upon the proof. One important matter of difference and only one had up to that time arisen between the parties, and that related to the time interest should begin to run on the note. The parties apparently had become irreconcilable on this question. Defendants had expressed themselves ready and willing to perform if interest should be allowed from December 21, 1901, and not otherwise; and the plaintiff had offered to perform if interest

should run only from September 1, 1902, and not otherwise. This contention had been fought to a finish. Neither was willing to yield an inch, and the plaintiff was about to take the requisite legal steps to put defendants in default. It is therefore, in view of this crucial and well-understood difference, that we must approach a consideration of the present question. The evidence is in narrow compass. Plaintiff testified that he said to Beiseker, when he offered the money and notes, "I demand my deed. This money is yours. Here are the notes and mortgage. I have complied with my contract, and I demand my deed for these lands"; that Beiseker did not reply, and that he said, "You refuse do you to give me my deed"; that Beiseker said, "I do not refuse to do anything"; that he, Moore, then said, "You don't give me my deed and by your not giving me the deed when I tender you what is yours you do refuse to give the deed"; that Beiseker said nothing more, but walked away; that Moore then gathered up the money and the notes and left the room; that, after he had reached the door of the room where the tender was made, he again called Beiseker and again tendered him the money and demanded his deed; that Beiseker said nothing, but walked away and left him. The foregoing is the substance of Moore's testimony on the subject. Beiseker did not contradict this testimony in any material respect, but testified that towards the evening of that day, after he and Moore had been in conference for two or three hours discussing the subject, he told Moore he was willing to waive his legal rights as he understood them, and to accept the tender made in the morning and asked Moore to stay over another day and close the deal. This is flatly denied by Moore, who testified that Beiseker made no such proposition, but only asked him the question whether he would close on the terms of the tender, if he, Beiseker, would telephone to one Ross who represented Davidson, his co-owner, and see if Ross would guarantee that his client Davidson would consent to the closing on the terms of the tender.

This testimony, taken with all the other evidence on the subject which we have carefully considered, is not so conclusive as to justify us in declaring as a matter of law that the offer to perform was not rejected by the defendants or was not held open long enough by plaintiff to enable them to determine their course in view of it. The evidence was contradictory in itself and susceptible of diverse inferences, which well justified its submission to the jury under proper instructions. This was done, the court saying, in substance, that the plaintiff could not make a captious tender to the defendants for the mere purpose of casting them in a suit for damages; that he was bound to keep his offer good for a reasonable length of time in order that the defendants might make whatever examinations and calculations were necessary to determine its sufficiency, and enable them to offer to perform the contract on their part; that, if the defendants by what they said or did signified to plaintiff as a reasonable man that they rejected the tender, that would constitute a breach of contract on their part. The court then told the jury in view of what took place in the afternoon that if Beiseker then offered to waive his legal rights and accept the tender and to telephone to Ross and have him come up and close the deal,

and, if plaintiff declined to accept that offer, such fact, if it be a fact, destroyed and nullified his former offer of performance. The court summarized this charge as follows:

"To summarize the case, gentlemen, I charge you as a matter of law that Mr. Moore tendered to the defendants on the 18th day of September all that they were entitled to receive under the contract, and if his tender was made in good faith, and he continued for a reasonable time ready, able, and willing to deliver to the defendants that which he tendered, and the defendants failed to come forward with an offer to accept the same, and to perform the contract on their part, then the defendants have violated their contract and the plaintiff is entitled to recover. On the other hand, if the plaintiff's tender was not made in good faith, or if the plaintiff withdrew from the tender or failed to stand ready, able, and willing for a reasonable time to deliver the things tendered to the defendants upon their delivering to him a deed, then this tender was insufficient and he is not entitled to recover."

This was a fair presentation of the issue to the jury, so fair even that there was no exception taken to it by either party and it became the law of the case. The finding of the jury in favor of the plaintiff in the light of this charge conclusively answered the question we are now discussing, in the negative, that the plaintiff did not nullify his tender of performance by failure to keep it good a reasonable length of time for defendants to accept.

Was the tender of performance by the plaintiff so conditioned as to render it ineffectual to put defendants in default? It must be and is conceded that, as this was an executory contract containing mutual and dependent covenants to be simultaneously performed, the plaintiff had a right to demand a conveyance of the land as a condition on which alone he would pay the cash and deliver the notes. *Michigan Home Colony Co. v. Tabor*, 141 Fed. 332, 336, 72 C. C. A. 480, and cases cited. And we think this was in effect all that was done by him.

The tender of performance after specifying the cash, notes, and mortgages, which were offered, proceeds as follows:

"That said cash, notes, and mortgage are hereby tendered to you in payment of the amount due for the said lands * * * under the said contract and in accordance with the terms thereof, and I hereby demand of you the delivery to me of a deed of conveyance of all said lands * * * as provided for in said contract. You are further hereby notified that unless you now deliver to me said deeds for said lands and carry out said contract therefore, as herein required, I shall consider said tender as refused by you and shall proceed accordingly. The said cash, notes, and mortgage being tendered to you herewith subject to said conditions."

It is contended that the tender was accompanied by a fatal condition that the defendants should yield or abandon their right to later litigate the disputed question of interest. Even if such was the true import of the tender, why was it bad? It was not, as already observed, a tender of money to extinguish a debt or stop the running of interest where the strict rule of unconditionality applies; but it was an offer of performance by one party, when both were bound to perform mutual covenant obligations simultaneously. In such cases either party may tender performance on condition that the other will perform his covenant obligation and do that which he is legally obligated to do. Such a condition does not vitiate the tender. *Kennedy v. Moore*, 91 Iowa, 39, 43, 58 N. W. 1066; *Johnson v. Cranage*, 45 Mich. 14, 7

N. W. 188; *Frenser v. Dufrene*, 58 Neb. 432, 78 N. W. 719; *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189, and cases cited. Therefore, if the tender was made conditional upon defendants surrendering their claim of interest, the condition was one which the plaintiff had a right to make. It called upon the defendants to do their reciprocal duty, and perform the legal obligation resting upon them under a true interpretation of the contract.

We conclude that plaintiff's offer of performance was sufficient to put the defendants in default notwithstanding any or all of the objections made to it. Other questions are argued by defendants' learned counsel to which we have given careful consideration, but their solution cannot affect the proper determination of this case, and we therefore refrain from discussing them.

The learned trial judge followed closely in the track laid down in our former opinion, and, treating that as the law of the case, we find no reversible error.

The judgment is therefore affirmed.

SANBORN, Circuit Judge (dissenting). I am unable to agree to the result in this case, but, as I concur in the statements of the law in the opinion of the majority and my dissent results from a different view of the pleadings and the evidence, it will be unprofitable to enter upon any discussion of the case or to do more than to state the conclusions, which the record has forced upon my mind.

1. The contract provided for the sale of 14,250 acres of land for \$76,180, one-third cash and two-thirds in notes and mortgages, which should be dated and should draw interest from December 21, 1900, and that the vendors might substitute other lands in lieu of any of those described in the contract to which the title failed. The vendee, Moore, claimed and alleged in his complaint that in August, 1901, the parties agreed that the contract should be so changed that it should stipulate (1) that 8,029.08 acres of the land should be conveyed forthwith, that the vendors should perfect title to and convey the remainder of the lands described in the contract subsequently; and (2) that the notes and mortgages for the 8,029.08 acres should be dated and should draw interest from September, 1901, instead of from December 21, 1900. And he also alleged that the vendee tendered payment for the 8,029.08 acres according to these alleged modified terms of the contract. The former opinion of this court was rendered on a demurrer to this complaint which admitted these modifications of the agreement and this court held that the pleading stated a good cause of action. But since that decision and opinion an answer has been interposed which denied that the original contract was ever so modified that the parties agreed that any of the notes and mortgages should be dated or should draw interest from any date subsequent to December 21, 1900, or that the vendor should perfect title to the remainder of the lands described in the complaint instead of substituting others when titles failed, or that a divided execution of the contract should be made on these modified terms. Writings were introduced in evidence which in my judgment conclusively proved, when taken in connection with

all the other evidence in the case, that the vendors never agreed to any such modifications. And because when this case was formerly before this court there seems to me to have been an admission that the modifications of the contract claimed were made, while now that averment is denied, and all the evidence to my mind conclusively establishes that those modifications were not made, the former opinion is not in my view the law of the case as it now stands.

2. Because the record has forced my mind to the conclusion that it contains no substantial evidence that the agreement that the notes and mortgages should be dated and should draw interest from December 21, 1900, has ever been changed, because no tender of such notes or mortgages was ever made, because the evidence seems to me to establish conclusively that in addition to the 8,029.08 and the 136 acres mentioned in the opinion of the majority, there were 640 acres to which the vendors had shown abstracts of title, because the tender was suddenly made to one of the vendors in the city of Minneapolis while the other was out of that city, its acceptance involved the release of substantial and beneficial terms of the contract and the vendee refused to keep the tender good for a time sufficient to enable the vendor in Minneapolis to confer with his co-owner and get his consent to such a release, the tender was in my opinion captious, inadequate, and futile.

These are the reasons why I have been unable to bring my mind to a concurrence in the result in this suit.

MISSOURI, K. & T. RY. CO. v. FOREMAN et al.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1909.)

No. 2,904.

1. DEATH (§ 41*)—ACTION FOR WRONGFUL DEATH—PARTIES—ARKANSAS STATUTE.

Mansf. Dig. Ark. 1884, § 5226 (Ind. T. Ann. St. 1899, § 3431), in force in Indian Territory prior to its admission as a state, gives a right of action for wrongful death where there are no personal representations to the heirs at law of the deceased person, and provides that the amount recovered shall be for the exclusive benefit of the widow and next of kin, "and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person." *Held*, that while, under such statute, there can be no recovery unless pecuniary loss is shown to the widow or next of kin, where a person killed left as his only heirs at law under the statute his wife and mother, the mother was a necessary party plaintiff, even though she may not have individually sustained any pecuniary loss through his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 56-58; Dec. Dig. § 41.*]

2. MASTER AND SERVANT (§ 265*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—EVIDENCE OF NEGLIGENCE.

The fact of an accident in which a railroad employé is injured carries with it no presumption of negligence on the part of the company; but, in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

order to render it liable, some specific act of negligence must be affirmatively shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 881; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 278*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE RAILROAD CARS.

A freight train on defendant's railroad broke in two by the pulling out of a drawhead of the car next the engine, which was stopped about ten feet from the car while the engineer, plaintiff's intestate, who was conductor, and a brakeman, were making a temporary attachment. While so at work, the engine moved back, and deceased was caught between it and the car and killed. Plaintiffs alleged two acts of negligence on the part of defendant: A defective air brake, which permitted the engine to move; and a leaky throttle. But it appeared that the engine moved up-grade, and it was not shown that the lever was so set that it would move backward if started by the steam. The fireman was on the engine. *Held*, that in the absence of some evidence to show what in fact caused the engine to move, and that it was due to some act of negligence on the part of defendant, it could not be held liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma.

Action by Mary K. Foreman and Mary E. Foreman against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Clifford L. Jackson, for plaintiff in error.

D. H. Wilson and A. A. Osgood, for defendants in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge. This action was brought to recover damages for a death alleged to have occurred by reason of the negligent, wrongful acts of the railway company. The facts are:

Deceased was a freight conductor in the employ of defendant, engaged in running a freight train south on defendant's line of road from Parsons, Kan., to Muskogee, Okl. On the 5th day of August, 1903, when the train, composed of 12 to 15 ballast cars, had passed Russell Creek station, and when about seven telegraph poles north of milepost No. 419 on defendant's line of road, the drawhead in the car next to the engine pulled out. At this time the crew in charge of the train consisted of deceased, as conductor, Miller, as engineer, Searcy, fireman, Wyman, head, and Denham, rear brakemen. Passenger train No. 4 was about due at this place, as was a freight train against which this train had a time order, which facts rendered it necessary for the crew in charge of the train to act quickly and promptly in moving the train. When the drawhead pulled out, the engineer applied the brakes, stopped the engine, threw the reverse lever in the center of the quadrant as nearly as possible, got down from the engine, leaving it standing some eight or ten feet in front of the car from which the drawhead had been pulled out, and leaving the fireman in the cab on the engine. After ascertaining in what the trouble consisted, the engineer went back to

*For other cases see same topic & § NUMBER in Dec. & An. Digs. 1907 to date, & Rep'r Indexes

the engine, procured a chain with which to fasten the train to the engine in place of the broken drawhead. As deceased, engineer Miller, and front brakeman Wyman, were working between the rails chaining the car and engine together, the deceased being at the time on his knees assisting in passing the chain around the front axle of the car, from some cause the engine backed up, catching the deceased between the drawbar of the engine and the deadwood timbers of the car, from the effect of which his head was crushed, resulting in immediate death.

To recover damages for loss so sustained, this action was brought by the widow and next of kin, and the mother of deceased, jointly, against the railway company. The specific grounds of negligence charged in the petition are these:

"That the backing of said engine was the result of its being out of repair and in an unsafe and dangerous condition, in this, that the air brake and appliances controlling the same were out of order and leaky so that after being set the air brake would leak off and allow said engine to start and move; and in this, that the throttle of said engine was out of order and leaked steam to such an extent as to cause the engine to move after the steam valve had been closed so far as it could be closed in the condition it then was in, by reason whereof said engine No. 490 was, and for several days before that had been, unsafe and dangerous to use in and about the handling and operating of a train of cars—all to the knowledge of said defendant."

While many errors are assigned and discussed, in the view we have taken of the case, we deem it necessary to notice but two: (1) The action of the trial court in denying the request made by defendant for an instructed verdict in favor of defendant and against the mother, Mary E. Foreman; (2) the refusal of the trial court to direct the jury, on the entire case, to return a verdict in favor of the defendant. And of these in their order. Was the mother of deceased a proper or necessary party plaintiff to this action?

It being the insistence of plaintiff in error in this regard, as deceased was contributing nothing toward the support of his mother at the date of his death, and had contributed nothing for 15 years last past, she had no reasonable prospect of receiving any aid or support from deceased in the future, therefore she suffered no pecuniary loss by reason of his death, and no recovery can be had in her behalf and the request to so charge the jury should have been sustained.

The solution of this question depends upon a consideration of the act creating the cause of action. That act is section 5226, Mansf. Dig. Laws Ark. 1884 (Ind. T. Ann. St. 1899, § 3431), extended over the Indian country by Act Cong. May 2, 1890, c. 182, 26 Stat. 81, and reads as follows:

"Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. Provided, that every such action shall be commenced within two years after the death of such person."

At the common law no right of action accrued to any one for an injury resulting in death. It was therefore the province of the legislative branch of the government, state or national, to create such right of action, to confer it on such persons, to limit the recovery to such amount, and to distribute it to such persons under such limitations as in its wisdom seemed proper. The right of action created by this statute is conferred first on the personal representatives of the deceased. If, as in this case, there were no personal representatives in existence, then the right of action may be exercised "by the heirs at law of such deceased person for the exclusive benefit of the widow and next of kin." There is in this statute no thought of punishment of the wrongdoer, and the recovery is limited to a just compensation for loss sustained by those for whose benefit the action is brought, and is to be distributed to the widow and next of kin in the same proportion and the same manner as the law distributes personal property left by the deceased. Therefore, in order to ascertain on whom the law casts the right of action so created, we have only to determine who the heirs at law of the deceased were at the date of his death, and, in order to determine the amount of recovery, to ascertain what the pecuniary loss to the widow and next of kin was by reason of the death. For, if no such loss was sustained by those to whom the law would distribute the recovery when had, it is clear, in such case, there could be no recovery. *Swift & Co. v. Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; *Little Rock & Ft. Smith Ry. v. Townsend*, 41 Ark. 382; *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. 694, 4 L. R. A. 296, 14 Am. St. Rep. 69; *St. Louis, M. & S. E. Ry. Co. v. Garner*, 76 Ark. 555, 89 S. W. 550; *Atchison, etc., Co. v. Brown*, 26 Kan. 443.

Section 2592, Mansf. Dig. Laws Ark. 1884 (Ind. T. Ann. St. 1899, § 1880), in force in the Indian country when this death occurred, provides as follows:

"If a husband die leaving a widow and no children, such widow shall be endowed of one-half of the real estate of which said husband died seised, and one-half of the personal estate, absolutely and in her own right."

Section 2522 of the same laws (Ind. T. Ann. St. 1899, § 1820), in force, reads as follows:

"When any person shall die having title to any real estate of inheritance or personal estate not disposed of nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner: First, to children or their descendants in equal parts. Second, if there be no children, then to the father, then to the mother; if there be no mother, then to the brothers and sisters or their descendants in equal parts."

From which it becomes apparent in this instance both the widow and the mother of the deceased, who died without children or father living, were his heirs at law; and as the right of action here created, in the absence of personal representatives, is cast upon the heirs at law of the deceased, no others can exercise such right. The right of action so created must be exercised by those on whom it is conferred, the heirs at law; the amount recovered to be distributed when recovered to those for whose benefit the cause of action was created, the widow and

next of kin. As the mother is one of the heirs at law of deceased, and as the heirs at law alone, in the absence of personal representatives, may exercise the right to prosecute this action, the mother is a necessary party plaintiff, notwithstanding she may in her individual capacity have suffered no pecuniary loss by reason of the death of her son, and may in her individual capacity receive no part of any recovery that may be had. She acts here in the capacity of plaintiff in the exercise of this right created by statute, not in her individual capacity as mother of deceased, but in her representative capacity as one of his heirs at law. And she acts not for her individual benefit, but for the benefit of the widow and next of kin. In other words, the right to prosecute the action created by this statute, where none existed at the common law, is conferred upon and must be exercised by those acting in a representative, and not in an individual, capacity, and presumably to the end that the cause of action created might not fail for want of those in esse qualified to prosecute.

In refusing the request preferred by defendant to instruct a verdict against the mother, Mary E. Foreman, and in favor of the defendant, there was no error, if there was evidence sufficient to warrant the jury in returning a verdict against the defendant in favor of plaintiffs.

We shall therefore proceed to a consideration of the remaining question.

This being an action to recover damages for a loss sustained by the death of deceased, husband and son, by reason of the alleged wrongful and negligent acts of defendant, it was incumbent upon plaintiffs, before such recovery could be had, to both allege and prove, not only the cause which operated to produce the death, but, also, that such cause had its origin in some specific and particular negligent act of the defendant, for the result of which it was legally liable.

As said by Mr. Justice Brewer, delivering the opinion of the court in *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361:

"First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (*Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *Railroad Company v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson v. Virginia Midland Railroad*, 140 U. S. 435, 443, 11 Sup. Ct. 859, 35 L. Ed. 458), a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. *Texas & Pacific Railway v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. Second. That in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sym-

pathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In this case the fact that the engine, left by the engineer standing some eight or ten feet in front of the car from which the drawhead had been pulled out, did back up quietly while deceased and others were between the rails fastening a chain to the axle of the car, and did in so backing up catch and kill deceased, is known to and admitted by all; but the question presented for determination is: What force operated to move the engine backward, and how was such force applied? Before plaintiffs could be permitted to recover, they must have alleged in what this moving force consisted, and that it was applied because of some negligent act committed by defendant for which it was legally liable to plaintiffs.

As has been seen, plaintiffs charge in their petition such negligent act to have been committed by defendant in one of two ways: Either that defendant negligently permitted the air brakes and appliances to be and remain out of order and in a leaky condition, which caused the brakes to release and the engine to move backward; or that the throttle of the engine was out of order and leaked steam to such an extent as to move the engine backward.

If the efficient cause of the engine's backward movement originated in any act of the engineer himself, or of the fireman who remained on the engine, or in any other person, act, manner, or thing than those acts of negligence charged, plaintiffs may not recover, and it devolves upon the plaintiffs to establish one or both of the negligent acts charged against defendant was the efficient cause of the moving of the engine to the exclusion of all others.

The question now presented is: Did plaintiffs sustain the burden undertaken by them of producing evidence from which the jury was warranted in finding either or both acts of negligence charged was the efficient and proximate cause of the engine moving to the death of deceased? In other words, the evidence found in the record must return an answer to the question, What caused the engine to move? And that answer, when returned, must find either the one or the other, or both, of the negligent acts of defendant charged to exist as a fact, and such finding must be supported by the evidence, or the judgment entered may not stand.

Coming now to a consideration of the evidence as bearing on the question presented, well-known and conceded physical facts must be considered and applied. There is in the record no contradiction of the fact that from milepost No. 419 on defendant's line of road for a distance of ten telegraph poles to the north the grade is an upgrade, the place where the accident occurred was about seven telegraph poles north of milepost 419, the engine in question was running south, downgrade, at the place where the drawhead was pulled out, and the engine was stopped and left by the engineer when he went to assist in chaining the front car of the train to the engine. Suppose, then, it should be found to be true, as charged by plaintiffs, that the air brakes and appliances were out of repair and leaked air sufficient to release the brakes from the engine. What, in the very reason and nature of

things, must have happened when the engine, by the force of its own weight, moved? In compliance with natural laws it must have moved downward and from the train, and not upward and toward it.

Again, it is true, there is evidence in the record that the engine in question on the day of the accident leaked steam at the throttle; but the extent of such leakage is not shown, more than that the engine moved. It is argued, however, from these premises, as the engine did leak steam at the throttle, and as it did move backward, it will be presumed the engine must have leaked steam to such an extent as to show the railway company negligent or it would not have moved backward. This, however, is simply reasoning in a circle without established premises or necessarily correct conclusion, and for this reason: The presumption is that defendant furnished an engine reasonably suitable for the work to be performed by it, with appliances in a reasonably safe condition for use; that is to say, it was not negligent in this regard. This presumption must be overcome by evidence before a recovery can be had on this ground.

Again, the process of reasoning here employed is faulty and illogical, in that it bases the presumption of negligence on a presumption and not on an admitted or established fact; whereas, a presumption of fact must be based on a known or established fact, and can never be founded on another presumption. *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 707; *Manning v. Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761; *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; *United States, etc., Co. v. Des Moines National Bank*, 145 Fed. 273, 74 C. C. A. 553. In *Douglass v. Mitchell's Ex'rs*, 35 Pa. 443, Mr. Justice Thompson stated the rule as follows:

"That as proof of a fact the law permits inferences from other facts, but does not allow presumptions of fact from presumptions. A fact being established, other facts may be, and often are, ascertained by just inferences. Not so with a mere presumption of fact. No presumption can with safety be drawn from a presumption; there being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn."

See, also: *Phila. City Pass. Railway Co. v. Henrice*, 92 Pa. 434, 37 Am. Rep. 699; *Railway Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58.

Again, it is further shown by the same evidence that all locomotive engines when in use leak steam to a greater or less extent at the throttle. Therefore, if this be true, the mere showing that this engine did leak steam at the throttle, without any showing of the extent, would not support the charge made. The fact is, it cannot be determined from the evidence in this case what caused the engine to move. All the witnesses testifying in the case having any actual knowledge of the condition of the engine at the time of the accident said it was in good condition. The engineer in charge of the engine, as a witness for plaintiffs, testified he set the brakes on the engine, threw the reverse lever, which controls the movements of the engine backward and forward, in the center of the quadrant on which it moves. The evidence further discloses when this lever is in the exact center of the quadrant the application of steam at the throttle will move it in neither direction. When forward of the center, upon the application of steam, the

engine will move forward; or, if backward from the center, the engine will move backward. He further testified it is the duty of the engineer in stopping and leaving his engine to place the reverse lever in the center of the quadrant and set the brakes on the engine, and that he did this. As has been seen, if the air leaked, releasing the brakes, and the engine moved from its own weight, it would have moved forward not backward. If it moved from an application of steam to the cylinder through leaky valves, the reverse lever was not left at the center of the quadrant, but must have been left in reverse motion. However, there is no evidence in this record of the fact that the lever was left in reverse motion. The contrary appears from plaintiffs' own testimony. And if the engineer, contrary to his express testimony, negligently left the lever in reverse motion, there can be no recovery in this case for two reasons: (1) Defendant, as a matter of law, is not liable for such negligence in this case; (2) as such negligence is not charged, defendant was not required to meet it at the trial.

The evidence further disclosed the regular engineer in charge of engine No. 490 was Guy Danforth. That on the day preceding the accident this engine, in charge of Danforth, pulling an empty freight north, took the passing track at Oswego station. That the train was separated at a street crossing running east and west across the passing track to allow vehicles to pass. North of this street, attached to the engine, were some 16 to 18 cars. After the engine, with these cars attached, had been run north to clear the street crossing, had been stopped, and the engineer had climbed down from his engine, the engine with the cars backed up almost closing the gap made between the parts of the train at the street crossing. As shown from the record, this fact was given much weight by the trial court in refusing the request to instruct for defendant. However, Engineer Danforth testified, in regard to this transaction: That he left the engine in the reverse motion; that he released the air brakes in order to take up the slack of the train, and neglected to open the cylinder cocks and thus relieve the pressure in the cylinder heads, which started the engine in the act of backing up; that it was his fault, and not any defect of the engine, that caused it to back up on this occasion. It also appears that the passing track at this place was level or slightly down-grade to the south, from all of which we are of the opinion the conditions present on the 4th of August, the day preceding the accident in this case, were so different in character as to throw no light on the situation out of which the death of deceased arose.

Considering all the evidence found in the record, and giving to it all just inferences derivable therefrom, in our judgment, it was impossible for the jury to determine what caused the engine to move to the destruction of Foreman. Therefore the verdict returned is not supported by sufficient evidence, and the court, in the exercise of sound discretion, should have granted the request to instruct a verdict for defendant. *Patton v. Texas & Pacific Ry. Co.*, supra, and cases cited.

It follows the judgment must be reversed, and the case remanded for a new trial.

It is so ordered.

TITLE GUARANTY & SURETY CO. v. GUARANTEE TITLE & TRUST CO.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 31.

1. STATUTES (§ 233*)—CONSTRUCTION—APPLICABILITY TO UNITED STATES.

A statute is not to be construed to apply to, or to affect, any rights of the United States, in the absence of express words so providing.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 314; Dec. Dig. § 233.*]

2. BANKRUPTCY (§ 349*)—SUBROGATION (§ 7*)—DEBTS ENTITLED TO PRIORITY—DEBTS DUE UNITED STATES—RIGHT OF SURETY TO SUBROGATION.

The provisions of Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), with respect to the payment of taxes and the debts which shall have priority in the distribution of a bankrupt's estate, do not lessen nor affect the rights of the United States under Rev. St. § 3466 (U. S. Comp. St. 1901, p. 2314), which provides that, "whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied," nor the right of a surety in a bond given by the bankrupt to the United States who pays the money due on such bond to be subrogated to a "like priority" under the provisions of section 3468.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 349; * Subrogation, Cent. Dig. § 18; Dec. Dig. § 7.*]

3. BANKRUPTCY (§ 345*)—PRIORITY—STATUTES—CONSTRUCTION—"PERSON."

The United States is not a "person" within the meaning of Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

In the matter of the Pittsburgh Industrial Iron Works, bankrupt, of which the Guarantee Title & Trust Company was trustee. The Title Guaranty & Surety Company appeals from an order denying priority to its claim. Reversed.

Walter Lyon, John P. Hunter, and George J. Shaffer, for appellant.
R. T. M. McCready, for appellee.

Samuel I. Spyker and Clement W. Flynn, for wage claimants.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Pittsburgh Industrial Iron Works, the bankrupt, was so adjudged on November 21, 1907, and the Guarantee Title & Trust Company, its trustee, was thereafter elected. On October 8, 1907, the Title Guaranty & Surety Company, hereafter called the "surety," became surety for the bankrupt on a bond to the United States conditioned that the bankrupt comply with a bid for boilers it was furnishing to the government. On acceptance of such bid by the government, the bankrupt defaulted. On June 2, 1908, suit was brought by the United States on the bond against the surety. Of this the trustee was duly notified and required

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to defend. On November 30, 1908, judgment was recovered by the plaintiff against the surety for \$5,018.50, with costs, and on December 15, 1908, the surety paid such judgment. On December 26, 1908, the account of the trustee showing a balance of \$9,440.89 was filed, and a decree was entered distributing said amount, after payment of expenses, to wage claims duly proved; payment of which has not been made pending these proceedings. On December 29, 1908, the surety filed a petition, setting forth the above facts, and alleging that under the acts of Congress the undertaking of the bankrupt became and was a debt to the United States entitled to priority over all claims against the bankrupt, and, the surety having paid such debt to the United States, it became entitled under the acts of Congress to like priority. On December 30, 1908, formal proof of such preferred claim was made by the surety, and on January 5, 1909, it filed exceptions to the decree of distribution. On March 17, 1909, the referee filed a report and opinion reported in 57 Pittsb. Leg. J. 254, wherein he refused to award priority to the surety over the wage claimants and dismissed the exceptions. Thereafter the court below on May 29, 1909, following the opinion of the referee, confirmed the report. Thereupon the surety, assigning for error such action of the court, entered the present appeal.

The contention of the appellant is that the United States is given priority by Rev. St. § 3466 (U. S. Comp. St. 1901, p. 2314), over all claimants for the debt owing to it. That statute provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

And that like priority is given to the surety for such debt by Rev. St. § 3468 (U. S. Comp. St. 1901, p. 2314), which is:

"Whenever the principal in any bond given to the United States is insolvent, or whenever such principal, being deceased, his estate and effects which came to the hands of his executor, administrator or assignee, are insufficient for the payment of his debts, and in either of such cases any surety on the bond, or the executor, administrator or assignee of such surety pays to the United States the money due on such bond, such surety, his executor, administrator or assignee shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond in law or in equity, in his own name, for the recovery of all moneys paid thereon."

The effect of these statutes, standing alone, is conceded; but it is contended the general priority therein conferred is restricted by section 64 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), which provides, as is argued, first, for a primary priority to the United States for nothing but taxes in clause "a," which provides:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

And for a secondary priority for other debts under clause "b," which provides:

"The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be: * * * (4) Wages due to workmen, clerks, traveling or city salesmen or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the states or the United States is entitled to priority."

To sustain the contention of the appellee it must be held: First, that the United States is included in the word "person" in subdivision 5, viz., "debts owing to any person," etc.; or, secondly, that the designation of taxes under clause "a," viz., "all taxes legally due and owing by the bankrupt to the United States," etc., as entitled to priority, was an exclusion of priority to the United States in all other matters.

On the first point the authorities are uniform that the sovereign power is not included by the general language of a statute. In *Dollar Savings Bank v. United States*, 19 Wall. 239, 22 L. Ed. 80, it is said:

"It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. * * * The rule thus settled respecting the British crown is equally applicable to this government and has been applied frequently in the different states, and practically in the federal courts."

Moreover, that such was the intent of the act will appear in section 1, cl. 19, where a more inclusive meaning is given to the word "person." Such inclusion goes no further than "corporations * * * and officers, partnerships and women." It therefore unquestionably follows that by the passage of the bankrupt act there was no intent, by the use of the word "person," in subdivision 5, to restrain, diminish, or affect the existing priority given to debts of the United States under Rev. St. § 3466. And as the surety claims, not on the general right of a surety under the law against a defaulting principal, but on its right of statutory subrogation under Rev. St. § 3468, to "the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States," it is evident that its right, like the right of the United States, is unqualified by the bankrupt law. The clear purpose of the two sections in question is to confer and enforce the statutory rights of the United States for the benefit of the surety, and unless the principle here shown to apply to the United States is

also extended to the paying surety, the latter is not awarded "the like priority * * * as is secured to the United States."

On the second question, viz., that the designation of taxes under clause "a," viz., "all taxes legally due and owing by the bankrupt to the United States," etc., as entitled to priority, was an exclusion of priority in all other matters, we are, in view of the case of *Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513, equally clear. In that case the statutory priority of the United States under Rev. St. § 3466, was asserted and the effect on that statute of the bankrupt law of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), which gave a priority to "all debts due to the United States, and all taxes and assessments under the laws thereof," was discussed. It was there said:

"The United States are in no wise bound by the bankrupt act. The clause above quoted is in *pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give, and to exclude the possibility of a different conclusion."

Presumably, with this decision before it, Congress passed the present act, and, in the light thereof, the omission in the act of 1898 of words expressly giving priority to debts due to the United States had no more significance than the presence of such words in the act of 1867. In either case the statute did not affect the rights of the United States under Rev. St. § 3466, to lessen them in any respect. In the absence of any such express provision in the bankrupt law, we cannot inject one into it by construction, for, as said in *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275:

"Sanctioned as that principle is by two express decisions of this court, it would seem that further discussion of it is unnecessary, as it has never been questioned by any well-considered case, state or federal, and is founded in the presumption that the Legislature, if they intended to divest the sovereign power of any right, privilege, title, or interest, would say so in express words; and, where the act contains no words to express such an intent, that it will be presumed that the intent does not exist."

It follows therefore that the claim of the surety must be awarded priority in the distribution of the fund in the hands of the trustee.

MERCK v. TREAT, Collector.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 33.

INTERNAL REVENUE (§ 38*)—SUIT TO RECOVER TAXES PAID—LIMITATION.

Rev. St. § 3226 (U. S. Comp. St. 1901, p. 2088), provides that no suit shall be maintained for the recovery of any internal tax alleged to have been erroneously collected "until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision of the Commissioner has been had therein: Provided, that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at any time within the period limited in the next section." Section 3227 provides that no such suit shall be maintained, unless brought "within two years next after the cause of action accrued." *Held*, that the proviso of the former section is permissive only, and does not compel a claimant to bring suit within two years and six months after taking appeal in any case, but that he may at his election await the decision of the Commissioner, and, if adverse, bring suit within two years thereafter.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 38.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by George Merck against Charles H. Treat, as Collector, etc. Judgment for defendant on demurrer, and plaintiff brings error. Reversed.

On writ of error, to review a judgment entered upon a decision sustaining a demurrer, upon the ground that it appears upon the face of the complaint that the action is barred by the statute of limitations. The case is thus stated in the brief for the plaintiff in error.

"The complaint shows that the firm of Merck & Co., importers and dealers in drugs in the city of New York, were compelled to pay under the so-called war tax act of 1898, certain duties on various drugs named in the complaint. These taxes were paid by the affixing of stamps at various dates from July, 1898, until June, 1901. The government contended that the articles upon which these stamp duties were collected were compounded medicinal preparations, while the firm of Merck & Co. claimed that they were uncompounded medicinal drugs or chemicals. From the action of the collector the firm of Merck & Co., appealed to the Commissioner of Internal Revenue. The appeals were taken September 26, 1900, and December 12, and 13, 1901. The Commissioner did not render his decision until the 6th of February, 1906. In the meantime one of the members of the firm of Merck & Co. had retired and left the plaintiff in error. George Merck, as assignee of his interest and sole owner of the claim. This suit to recover the money illegally exacted was begun in December, 1907, less than two years after the decision of the Commissioner on the appeal, but more than five years after the taking of the appeal."

Currie, Smith & Maxwell (W. Wickham Smith, of counsel), for plaintiff in error.

Henry A. Wise, U. S. Atty., and William L. Wemple, Asst. U. S. Atty., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. We are of the opinion that the action was commenced in time. Section 3226 of the Revised Statutes (U. S. Comp. St. 1901, p. 2088) provides that no suit shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously assessed or collected "until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision of the Commissioner has been had therein: Provided, that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner, at any time within the period limited in the next section." Section 3227 provides that no suit referred to in the preceding section "shall be maintained in any court, unless the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same is brought within two years next after the cause of action accrued."

It is manifest that without the proviso above quoted no cause of action could accrue in such a suit until a decision of the Commissioner has been rendered. The 2 years' period commences to run from the promulgation of the decision. The statute, with the proviso omitted, declares a positive prohibition against the commencement of a suit until the decision is rendered, whether it be delayed 6 months or 6 years or 20 years from the date of the appeal. That such a statute would be grossly unfair to the citizen is obvious, for it would make the Commissioner an absolute dictator and would prevent all redress in case that official neglected or refused to act. To prevent such a denial of justice the proviso was inserted in the interest of the aggrieved party. It provides that he may after 6 months bring his suit without waiting longer for the decision. In other words he may, if he likes, treat the failure to decide as an adverse decision. If the contention of the defendant in error be correct the lawmakers should have used the word "must" and not "may." Indeed, if the intention were as contended it would have been best expressed by a provision that the cause of action should accrue 6 months from the date of the appeal unless the Commissioner sooner decides the controversy, and then at the date of the decision.

We think Congress intended to give the appellant the right to wait for the decision of the Commissioner, especially if he has reason to believe that it will be in his favor. Congress could not have intended to offer him the alternative of losing his claim or else commencing an expensive litigation which prevents a decision which may sustain his contention and for which he is entirely willing to wait. A construction which compels the claimant, upon pain of forfeiting all his rights, to sue within 2 years and 6 months from the appeal to the Commissioner and while that official is duly considering the questions involved, seems to us unreasonable.

On the other hand the interpretation which we place upon the statute provides a simple, fair and workable plan which preserves the rights of both parties. Certainly the government which holds the money cannot, from a pecuniary point of view, be injured by the delay. If, however, the Commissioner thinks otherwise he has the remedy in his own hands, he has but to decide the controversy and the period of limitation will immediately begin. It seems to us unseemly to make a suit compulsory against a government official when the regularly constituted authorities are examining the questions at issue in due course and may render a decision which will make a suit unnecessary; especially so when the party who has been deprived of his money is not complaining of the delay.

The practice as we construe the statute is plain and simple. The party whose property has been, as he thinks, wrongly taken by the collector appeals to the Commissioner. If the latter official renders a decision against him he must bring suit within 2 years from the date of such decision. But the decision may be unreasonably delayed and the claimant may thus be deprived of the use of his money for an

indefinite period. To guard against such injustice the option is given, if he sees fit to exercise it, of beginning his suit after the expiration of six months from the date of the appeal. The collector needs no protection of this kind, he has possession of the money and the Commissioner, if he so desires, can set the 2 years running by a decision on the same day as the appeal. The citizen whose property has been taken does need protection for, as has been stated, without the proviso he is absolutely remediless if the Commissioner neglects to decide. It is this protection which the proviso gives. As is pointed out in the plaintiff's brief, if these actions must be brought within the 2 years and 6 months the result will be that the courts will be overwhelmed with unnecessary litigation. Especially is this true where, as in the case at bar, a new act is to be construed.

We think the foregoing views are sustained by the Supreme Court in *Arnson v. Murphy*, 109 U. S. 238, 3 Sup. Ct. 181, 27 L. Ed. 920, and *Wright v. Blakeslee*, 101 U. S. 174, 25 L. Ed. 1048. In *Arnson v. Murphy* the Supreme Court, having under consideration a statute similar in all essential particulars to the one in hand, uses the following language:

"It appears to us quite plain, from the reading of the statute, that no action arises to the claimant, in such cases, until after a decision against him by the Secretary of the Treasury; and that his suit against the collector is barred unless brought within 90 days after an adverse decision upon his appeal; but, with the proviso, that if such decision is delayed more than 90 days after the date of his appeal, it is at the claimant's option either to sue, pending the appeal, treating the delay as a denial, or to wait until decision is in fact made, and then sue within 90 days thereafter. It cannot be that he is obliged, in case for any reason a decision at the Treasury Department is delayed beyond the appointed time, to treat the delay as an adverse decision, and to bring his suit while the matter is still sub judice. There is no language in the act requiring such a conclusion, it is inconsistent with the terms actually employed, and is not founded on any sufficient reason."

The judgment is reversed.

CITY OF ST. PAUL V. HYSLOP.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1909.)

No. 3,105.

1. MUNICIPAL CORPORATIONS (§ 791*)—SIDEWALKS—DEFECTS—DISCOVERY—SUPERVISION.

A city's duty to keep a street or sidewalk in order includes the duty of reasonable supervision, so that, if the exercise of such supervision would have led to a discovery of the defect by which plaintiff was injured in season to have enabled the city to have repaired it, or to protect the public against it, the city was subjected to the same liability as though it had actual knowledge.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1647-1651; Dec. Dig. § 791.*]

2. TRIAL (§ 242*)—INSTRUCTIONS—APPLICATION OF LAW TO EVIDENCE.

An instruction directing that the jury should take the law from the court and apply the facts to it was not misleading for failure to charge that they should apply the law to the facts.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 242.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—STATEMENTS BY COURT—CORRECTION.

In charging a jury, the court, after correctly stating the law as to the measure and elements of damage, said: "Now, that has been the rule laid down by the Circuit Court of Appeals; that is the rule in this jurisdiction. It is not for me to say whether I think it is a just rule or not." On objection that this was an intimation that the jury might ignore the law theretofore announced with respect to the damages, the court, in the presence of the jury stated: "I do not mean to make any such implication; I declare that as the law in this jurisdiction; I do not mean to make any such intimation as that." *Held* that, while the sentence first quoted was ill-advised, any error therein was cured by the court's explanation.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.*]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by William G. Hyslop against the City of St. Paul. Judgment for plaintiff, and defendant brings error. Affirmed.

J. C. Michael, C. E. Collett, and Morton Barrows, for plaintiff in error.

William H. Hallam and Anderson & Ekern, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. On October 1, 1907, about 7:30 o'clock in the evening, plaintiff was walking near the middle of the sidewalk on Fourth street, one of the principal business streets in the city of St. Paul. When in front of the Union Building a portion of the stone sidewalk gave way and precipitated him to the bottom of an excavation underneath the sidewalk, from which fall he sustained the injuries complained of. It had been raining, and the evening was quite dark, at the time of the injury. The sidewalk consisted of stone flagging, originally about four inches in thickness; said flagging resting upon, and supported by, iron rails. The walk was about ten feet in width and the excavation underneath about eight feet in depth. The stone flagging of the walk had been in place many years. The thickness of the stone near the center of the walk had been reduced about an inch by reason of the travel thereon. The walk, at the point where the injury occurred, was in front of a building which had been occupied for a number of years by a publishing house, and the paper which it used in the conduct of its business had been unloaded in large crates upon the walk in question. For some months previous to the date of the injury the stone flagging of the walk had been broken and exhibited cracks from a quarter to a half inch in width. The testimony showed that some persons accustomed to travel to and from their places of business daily over this walk guardedly avoided the center and passed along the walk nearer the edge thereof. One of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the witnesses stated that some three weeks prior to the accident, when walking along the walk at the point in question with a friend he "caught a crack" (as he expressed it), which he estimated was from a quarter to a half inch in width, running in a somewhat circular shape.

On the night in question plaintiff was passing along the walk when a portion of the stone flagging, in something of a triangular shape, about four feet long, three feet wide at one end and one foot at the other, gave way and precipitated plaintiff to the bottom of the areaway underneath, causing the injuries complained of, and to recover damages for which this action was brought. Plaintiff, a citizen of Wisconsin, was not an entire stranger in St. Paul, but testified that he did not think he had ever traveled over this walk before, though he might have done so.

The evidence does not show actual knowledge by the city of the defective condition of the walk, and complaint is made by plaintiff in error that the evidence was insufficient to submit to the jury the question whether, under the facts as shown, the dangerous condition of the walk was so apparent, and had existed for such a period of time, that the city was chargeable with constructive notice of such condition. The question was submitted to the jury with the following instruction:

"The duty of keeping a street or sidewalk in order includes the duty of reasonable supervision, and when exercising such supervision would have led to the discovery of the defect in season to repair it or to protect the public against it, there is the same liability as though there had been actual knowledge."

We think the evidence sufficient and properly submitted to the jury by the foregoing instruction.

The court, in its charge to the jury, said:

"It is your province to take the law from me as I give it to you, and to apply the facts to it as you find them from the evidence."

It is urged that this statement was misleading; that the jury should have been told to apply the law as given to them by the court to the facts as they should find them; and that it was error and misleading to tell the jury to apply the facts as they should find them to the law as announced by the court. We cannot conceive that the jury was in any way misled in respect of their duty by direction to apply the facts to the law rather than the law to the facts. The jury would clearly understand that they were to find the facts from the evidence, accept the law as announced by the court, and, considering the facts and the law together, render the proper verdict.

The court, in its charge to the jury, after correctly stating the law as to the measure and elements of damages, said:

"Now, that has been the rule laid down by the Circuit Court of Appeals; that is the rule of this jurisdiction. It is not for me to say whether I think it is a just rule or not."

It is urged that the expression, "It is not for me to say whether it is a just rule or not," was in effect a statement to the jury that they might ignore the law theretofore announced with respect to damages. This statement by the trial judge was at least an improvident one; but when counsel took exception to it, and suggested that it implied

that the court was of the opinion that the rule of the Circuit Court of Appeals should not be the law, the judge replied, in the presence of the jury:

"I do not mean to make any such implication; I declare that as the law in this jurisdiction; I do not mean to make any such intimation as that."

In view of the latter statement, it cannot be held that there was any error in the law given to the jury upon this subject, although the closing sentence was ill-advised and exceedingly unfortunate. As juries are usually guided by statements of the court upon the evidence as well as the law, care should be exercised not to make statements, by way of illustration or otherwise, not warranted by the law or the evidence.

There was no evidence of contributory negligence on the part of plaintiff, and the instruction of the court in this respect was properly given.

From the whole record, we think there was sufficient evidence to submit the case to the jury, and that the judgment should be affirmed.

CHICAGO, M. & ST. P. RY. CO. v. NEWSOME.

(Circuit Court of Appeals, Eighth Circuit. November 29, 1900.)

No. 2,953.

1. APPEAL AND ERROR (§ 997*)—DIRECTION OF VERDICT—REVIEW.

Where the evidence in an action for injuries was sufficient to require submission of the case to the jury, an assignment that the court erred in denying defendant's request for a directed verdict was unsustainable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024; Dec. Dig. § 997.*]

2. EVIDENCE (§ 577*)—TESTIMONY AT FORMER TRIAL—STENOGRAPHIC NOTES.

Where a witness promised, but failed, to be present at the second trial, plaintiff could not introduce his testimony, given at a former trial, over defendant's objection.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2406; Dec. Dig. § 577.*]

3. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—RECEPTION OF EVIDENCE—WITHDRAWAL.

The rule that error in the admission of evidence is cured by the court distinctly withdrawing it during the progress of the trial is inapplicable, if it appears that the impression made by the evidence on the jury was so strong or of such a character that it probably remained, notwithstanding the court's direction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4179; Dec. Dig. § 1053; * Trial, Cent. Dig. § 977.]

4. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—RECEPTION OF EVIDENCE—WITHDRAWAL.

A material witness for plaintiff having failed to appear at a third trial in accordance with his promise, the court erroneously permitted his testimony at the former trial to be read from a stenographer's notes, but later, discovering the error, withdrew it, and directed the jury not to consider it. The testimony covered 37 pages of the record, and bore on the vital issue of the case as to the conduct of defendant's brakeman in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ejecting plaintiff, a trespasser, from a train. The evidence was also so voluminous and interwoven with plaintiff's other testimony as to be incapable of adequate separation. Plaintiff's testimony on the important facts was positively contradicted by defendant's witnesses. The preceding trial resulted in a disagreement, and at the last trial the jury, after having the case for nearly 24 hours, reported their inability to agree, whereupon the court instructed them that, if a majority were agreed, the minority should seriously consider whether they may not reasonably doubt the correctness of their judgment, etc., whereupon a verdict for plaintiff followed. *Held*, that the erroneous admission of the evidence was not cured.

¶*Ed. Note.*—For other cases, see Appeal and Error, Cent. Dig. § 4179; Dec. Dig. § 1053; * Trial, Cent. Dig. § 977.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Oswald A. Newsome against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

M. B. Webber (Edward Lees, on the brief), for plaintiff in error.

Henry M. Lamberton (L. L. Brown, W. D. Abbott, and S. H. Somers, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. Newsome was a trespasser on a freight train, and claims he was compelled by a brakeman, by threats of personal violence, to get off while it was in rapid motion, and in doing so fell between the cars and was injured. He sued the railway company, and obtained a judgment, which was reversed. 83 C. C. A. 442, 154 Fed. 665. A second trial resulted in a disagreement of the jury. At a third trial Newsome obtained the judgment at which this writ of error is directed.

Without recapitulating the evidence, we think it was sufficient to require the submission of the case to the jury, and therefore the assignment of error based on the denial of defendant's request for a directed verdict cannot be sustained.

The only other assignment that need be noticed relates to the admission of certain evidence on behalf of the plaintiff. Against the objection of the defendant the trial court allowed plaintiff to read in evidence as part of his case the testimony of one Eckfeldt, given at the preceding trial. Eckfeldt had promised to be present at the last trial, but failed to appear, and his testimony was read from the stenographic notes of the reporter. This was error. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Hanks Dental Ass'n v. Tooth Crown Co.*, 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989; *Salt Lake City v. Smith*, 43 C. C. A. 637, 104 Fed. 457; *Diamond Coal & Coke Co. v. Allen*, 71 C. C. A. 107, 137 Fed. 705. Later, it having been discovered that, under the statutes regulating the mode of proof in actions at law in the courts of the United States, the evidence was not admissible, plaintiff asked the court to withdraw it from the jury; but defendant asked that a mistrial be declared, and that the case be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tried to another jury. The court denied defendant's request, and directed the jury to disregard the evidence, and to consider the case as if it had not been given. Of this action the defendant complains.

The general rule is that, if evidence erroneously admitted during the progress of a trial be distinctly withdrawn by the court, the error is cured; but it is otherwise if it appears that the impression made by the evidence on the jury is so strong or of such a character that it probably remains, notwithstanding the direction of the court. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543; *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663; *Turner v. American Security & Trust Co.*, 213 U. S. 257, 29 Sup. Ct. 420, 53 L. Ed. 788; *Armour & Co. v. Kollmeyer*, 88 C. C. A. 242, 161 Fed. 78, 16 L. R. A. (N. S.) 1110. The testimony of Eckfeldt covers 37 pages of the record, and it bore upon the important and vital issues touching the conduct of the plaintiff and the brakeman whose acts are alleged to have given rise to the cause of action. The plaintiff, Eckfeldt, and another witness, all of whom were trespassers riding on the train without lawful right, testified substantially to the same facts, and upon their testimony the plaintiff's case practically depended. The evidence improperly admitted was not confined to some particular fact, circumstance, or feature that was brought distinctly and clearly to the attention of the jury; but it was only identified by the court by the naming of the witness. It was so voluminous and so interwoven and connected with the mass of plaintiff's evidence as to be incapable of adequate separation, and we think it was impossible for the jury, however desirous of obeying the direction of the court, to escape entirely the influence of it.

We are the more persuaded that it prejudiced the defendant and influenced the result because the case was quite evenly balanced. The testimony for the plaintiff upon the important facts was positively contradicted by defendant's witnesses. The preceding trial resulted in a disagreement of the jury, and at the last one the jury, after having the case for nearly 24 hours, reported to the court their inability to agree. The court then gave them the instruction set forth in *United States v. Allis* (C. C.) 73 Fed. 165, 182, and the verdict followed.

The judgment is reversed, and the cause remanded for a new trial.

In re C. W. ASCHENBACH CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 85.

BANKRUPTCY (§ 54*)—INVOLUNTARY PROCEEDINGS—EVIDENCE OF INSOLVENCY.

A merchant, who was indebted, but solvent, took a partner, to whom he sold a half interest in his stock, but not in his credits, receiving payment therefor, and applying the amount on his debts, which were not assumed by the firm. Later the partners organized a corporation, to which the firm property and business were transferred. *Held* that, in bankruptcy proceedings against the corporation, the petitioners could not, for the purpose of proving its insolvency, charge it with liability for the outstanding

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

individual debts of the first owner of the business, the holders of which made no claim against the corporation, and for which it was in no way liable; the several transactions having been in good faith and without fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 84; Dec. Dig. § 54.*]

Petition to Review and Appeal from Order of the District Court of the United States for the Southern District of New York.

In the matter of the C. W. Aschenbach Company, alleged bankrupt. On petition of David G. Way and others to review an order dismissing the petition in bankruptcy. Affirmed.

The petition for review and the appeal present the question whether the petition in involuntary bankruptcy filed by the creditors of the alleged bankrupt was properly dismissed by the District Court. The petition was filed April 2, 1909, by three creditors alleging that the C. W. Aschenbach Company was insolvent and had committed an act of bankruptcy, "in that it transferred while insolvent, some portion of its property to one or more of its creditors with intent to prefer such creditors over its other creditors of the same class and that among such creditors was the firm of Kopf-Engel Company of New York City, to whom said C. W. Aschenbach Company paid the sum of \$15 or more during the last thirty days." On April 6th the alleged bankrupt filed an answer denying insolvency and that it had made any preferential payments or transfers of property while insolvent, or with intent to hinder, delay or defraud its creditors. The issues thus raised were referred to a special master to take testimony and report to the court with all convenient speed. On April 19, 1909, the special master reported that the Aschenbach corporation was at all times solvent. The District Court thereafter confirmed the report and dismissed the petition.

The special master finds, inter alia, as follows: Charles W. Aschenbach was engaged in business alone prior to July, 1908, at 65 Murray street, N. Y. City. At that time his debts amounted to about \$30,000, and the merchandise which he had on hand was valued at about \$20,000, and he had accounts receivable in the aggregate of about \$15,000. In that month he sold half of his interest in the merchandise to one Thomas Smith for the sum of \$10,000, reserving to himself all of the receivables, and entered into an agreement with Smith, that he would take care of all the outstanding liabilities. This co-partnership of Aschenbach & Smith continued until October, 1908, when a corporation was formed to take over the business of the co-partnership, and the business was transferred to the corporation, it paying for the same by certificates of stock of the new corporation, and subsequent to that time in February, 1909, those who took the stock sold it to the present stockholders of the alleged bankrupt corporation. The testimony fails to show that at any time Aschenbach had reason to believe that he was not entirely solvent. The incoming partner, Smith, paid a fair price for the assets of the firm. Aschenbach paid off his outstanding liabilities with the \$10,000 received from Smith as far as it would go. No fraud was shown. It is conceded that the claims of Aschenbach's creditors are not provable debts against the alleged bankrupt and cannot be taken into consideration in ascertaining its liabilities.

Henry Hoelljes (Walter Carroll Low, of counsel), for appellants.

Cohen, Creevey & Richter (William S. Creevey, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The only question to be determined by this review is whether in ascertaining the value of the corporation's assets the sum of \$8,250 alleged to be Asch-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

enbach's share in the surplus of the firm's property which was transferred to the corporation, is to be deducted. In *Du Vivier & Co. v. Gallice*, 17 Am. Bankr. Rep. 557, 149 Fed. 118, 80 C. C. A. 556, we held that a corporation organized for the express purpose of taking over the assets of a partnership composed of the same persons to whom all its stock is issued is liable for the partnership debts, even though they were not expressly assumed. No one disputes that this is a correct exposition of the law, the difficulty is that it has no application to the only question now before the court. The same observation may be made as to the rule laid down in *Booth v. Bunce*, 33 N. Y. 139, 88 Am. Dec. 372—namely, its lack of applicability.

There is no pretense of fraud in the present case. Indeed, the master finds specifically that the formation of the partnership between Aschenbach and Smith was honest, fair and open. He says:

"It must be borne in mind that this is not a transfer by partners who have an individual interest in assets of the firm and have individual debts, and that by such transfer they are seeking to avoid the payment of their individual debts, thereby committing a fraud, but it was the transfer of a man believing himself to be solvent, who, instead of availing himself personally of the benefits of the consideration, uses the whole of the consideration in the payment of his individual debts so far as such consideration would go."

The petitioning creditors are, of course, creditors of the corporation and they seek to have the property which is responsible for their debts reduced by the sum of \$8,250 for the benefit of the Aschenbach's individual creditors. By what process of law this is to be done or how they will be benefited if it be done, is not manifest. It may result in an adjudication it is true, but the amount which is now applicable to the debts of the petitioning creditors will be diminished to the detriment of the petitioners and all corporation creditors and the amount stated will be given to Aschenbach's individual creditors who make no complaint and have never attacked the partnership or the corporation as fraudulent or in any manner prejudicial to their rights. The position of the petitioning creditors seems extraordinary, if not inexplicable.

The principal issue referred to the special master arose upon the petition of the corporation creditors and the answer of the alleged bankrupt. This issue was whether the Aschenbach Company was insolvent at the time of the filing of the petition against it. The petitioners seem to proceed upon the theory that the transfer of the property to the firm was fraudulent as to Aschenbach's individual creditors and that the firm, never having title to this property, could not transfer it to the corporation and therefore the corporation is no more entitled to it than it would be to so much stolen property and is liable to refund it to these individual creditors. If the alleged bankrupt can be deprived of its property by such a process of reasoning it is easy to prove insolvency. But it will be observed that this result is reached in a proceeding to which the individual creditors are not parties and relates to transactions of which they have never complained and which have never been judicially declared illegal or void as between the parties.

The contention is also in direct conflict with the master's finding that the previous transfers were entirely free from fraud. If the individual creditors had attacked the transfers and had obtained a decree in a

plenary suit declaring them fraudulent and void, there would be more substantial ground for the present contention. Why the corporation creditors are anxious to transfer to the individual creditors a fund which the latter have not asked for and which they are apparently willing to share with the former we are unable to comprehend, except by imputing to the corporation creditors a broad altruism not often met with in bankruptcy proceedings. We agree with the special master and the court in thinking that the corporation is solvent and free from fraud.

The order confirming the report of the special master and dismissing the petition is affirmed with costs.

UNITED STATES V. RIO GRANDE WESTERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. November 19, 1909.)

No. 2,974.

1. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—ACTIONS FOR PENALTIES—EVIDENCE—CONDITION OF CARS BEFORE ALLEGED VIOLATIONS AND CHARACTER OF REPAIRS MATERIAL.

Evidence of the condition of alleged defective cars when last inspected, 37 miles distant, before they arrived at the station where the defects were discovered and the material slips of the workmen who repaired them, are competent evidence upon the issues in an action to recover penalties under Safety Appliance Act March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 886, Supp. 1909, p. 1143).

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

2. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—NECESSARY MOVEMENT OF SINGLE CAR FOR REPAIR NO VIOLATION.

The necessary movement of a defective car alone for the purpose of repair does not subject the carrier to the penalties of the act.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Utah.

Action by the United States against the Rio Grande Western Railway Company. Judgment for defendant, and the United States brings error. Affirmed.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

Philip J. Doherty (Wade H. Ellis, Asst. Atty. Gen., Hiram E. Booth, U. S. Atty., and Roscoe F. Walter, Sp. Asst. U. S. Atty., on the brief), for the United States.

Waldemar Van Cott (E. M. Allison, Jr., and William D. Riter, on the brief), for defendant in error.

SANBORN, Circuit Judge. The United States brought an action against the Rio Grande Western Railway Company to recover the penalties for 13 alleged violations of Safety Appliance Act March 2, 1893,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 886, Supp. 1909, p. 1143). The causes of action were separately pleaded in 13 counts, and the jury returned a verdict for the government on 5 and for the defendant on 8 of them.

The witnesses for the government testified that they found the alleged defects in the cars in the yard of the defendant at Ogden. Several of the cars had been hauled from Salt Lake City, 37 miles distant, and some of them were taken over a part of the yard at Ogden, which was used for switching cars and making trains, to certain designated repair tracks, a distance of from 900 to 1,200 feet, and were there repaired. The rulings of the court which admitted the testimony of an inspector at Salt Lake City to the effect that some of the cars were not defective when they left that station, and the material slips made by the workmen who repaired some of these cars, which set forth the specific repairs made upon them, are specified as errors, on the ground that none of this evidence was material. But the testimony of the inspector at Salt Lake City tended to show that the cars were not defective, and the material slips, verified, as they were, by the oath of the workman who made them, presented permissible evidence of the character of the defects in the cars repaired. These specifications of error cannot be sustained.

Complaint is made that the court charged the jury that if they believed, from the evidence as to any particular count, that the defendant moved the car therein specified, that when it was so moved its coupling apparatus was so defective that it would not couple automatically by impact, or could not be uncoupled without the necessity of a man going between the ends of the cars coupled together, they should find the defendant guilty as to such count, unless the movement and the only movement made was necessary for the purpose of repairing the defective coupler. If this instruction was correct in its application to the evidence upon the issues involved in the trial of any single count of the petition, it must be sustained.

There was evidence that the inspector for the government found Oregon Short Line Car No. 4582, which was charged in one of the counts to have been defective, upon the icehouse track in the yard of the defendant, that it had one draft timber broken, one spring and two followers gone, one pin chain broken, one end gate gone, two end gate rods gone, that it was impossible to repair it effectually in that yard, and that for this reason it was hauled over onto connecting tracks of the Southern Pacific Railroad Company at Ogden, and was there shopped and repaired. There was no evidence that this car was hauled over to the shop for any other purpose than to have the necessary repairs made upon it, or that its trip to the shop tracks was or could have been used for any other purpose than to secure the making of these necessary repairs.

In this state of the case the charge of the court was warranted by the decision and opinion of this court in *Chicago & N. W. Ry. Co. v. United States* (C. C. A.) 168 Fed. 236, 21 L. R. A. (N. S.) 690, and the judgment below is affirmed.

WIGG v. ERIE R. CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 81.

CARRIERS (§ 318*)—INJURY TO PASSENGER—EVIDENCE OF CARRIER'S NEGLIGENCE.

The mere facts that a railway passenger, in passing from one car into another, fell and was injured, and that the platform of one car was higher than the other by three or four inches, do not render the railroad company liable for the injury, in the absence of any evidence as to what caused the fall, or that the difference between the height of the platforms was unusual or dangerous.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

Injuries to railroad passengers while occupying positions other than regular seats, see note to *St. Louis, I. M. & S. Ry. Co. v. Leftwich*, 54 C. C. A. 4.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Mamie E. Wigg against the Erie Railroad Company. Judgment for defendant on directed verdict, and plaintiff brings error. Affirmed.

Charles W. Stapleton, for plaintiff in error.

Stetson, Jennings & Russell (Frederick B. Jennings and William C. Cannon, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The plaintiff was the only witness sworn. She testified that about 4:30 o'clock on the afternoon of February 2, 1906, she boarded the rear car of a train standing in the defendant's train shed at Jersey City, destined for her home at Nutley, New Jersey. She had frequently made the trip to New York and back. The train was advertised to leave about ten minutes later. The conductor, who knew the plaintiff, came forward and suggested that she would find pleasanter accommodations in the forward car. He took her parcel and she followed him. Her account of what occurred thereafter is as follows:

"Q. Then what happened? A. Well, in crossing from the rear car to the forward car I fell full length into the forward car. One car was elevated above the other. Q. You mean the platform of the car? A. I mean the platform of the car. Q. About how much? A. Well, after it all happened I looked back and it seemed to be three or four inches. It seemed to be quite an elevation."

On cross-examination she said:

"Q. Now, you say that you fell headlong into the forward car? A. Yes. Q. That is, your head and at least a part of your body went through the doorway? A. No, the door was open. You said through the doorway. Q. Your head and a part of your body went through the doorway? A. Yes. After I had been assisted to my feet I looked around and saw this difference in height of the floors between the two cars. I was in pain at the time."

This is all the testimony relating to the cause of the accident. The sole charge of negligence is based upon the alleged difference in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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height of the platforms of the two cars which the plaintiff thought to be between three and four inches. It is suggested that she may have tripped at this point. It will be observed, however, that when she looked back she was in the forward car which was higher than the rear car and, therefore, could not see with any accuracy the extent of the discrepancy between the cars, assuming that a difference in height existed. In other words, if she struck her foot against the higher platform of the forward car she could not, after entering the car and looking back at the platform, tell with any accuracy its height above the platform of the rear car. On the other hand, if the platform of the rear car were higher than the other she could not have struck her foot against the projection and it is hardly possible that the fall described by her could have resulted from stepping down three or four inches. But it will be observed that she does not say that she struck her foot against this obstruction, if it existed, or that it in any way caused the fall. All is left to conjecture. For aught that appears she may have caught her foot in her skirt or tripped on the door-sill. The precise cause of the accident does not appear and the plaintiff, upon whom rested the burden, has failed to show any negligence on the part of the defendant.

Even though it be conceded that the forward platform was higher than the other and that the plaintiff tripped thereon, we fail to see how a cause of action was proved in the absence of testimony that such construction was unusual or dangerous. The court can almost take judicial notice of the fact that the platform is frequently lower than the floor of the car and that in many cars the threshold is raised at least an inch, creating an obstruction which might cause a careless or unobservant person to stumble. Then too it is obvious that various causes which cannot be foreseen may cause a slight discrepancy in cars whose platforms as originally built were of uniform height.

The one fact which clearly appears from the proof is that the plaintiff while passing from one car to another of the defendant's stationary train fell and seriously injured herself. That the defendant was in any way responsible for these injuries has not been shown.

The judgment is affirmed.

ELDRIDGE et al. v. WARD, Revenue Collector.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 18.

INTERNAL REVENUE (§ 19*)—STAMP TAXES—BUCKET SHOP TRANSACTIONS.

A bucket shop, which made contracts for the purchase and sale of stocks and commodities with its customers, and executed the same by pretended purchases and sales through another bucket shop having no relations with such customers, the contract between them expressly providing that the first was not an agent of the second, was conducting a separate business, and the transactions of both concerns were subject to the stamp tax imposed by War Revenue Act June 13, 1898, c. 448, § 25, schedule A,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

30 Stat. 458, as amended by Act March 2, 1901, c. 806, § 8, subd. 3, 31 Stat. 943 (U. S. Comp. St. 1901, p. 2302).

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 19.*]

In Error to the Circuit Court of the United States for the Northern District of New York.

Action by Harry Eldridge and Elwood Blessing against John G. Ward, Collector of Internal Revenue for the Fourteenth district of New York. Judgment for defendant (155 Fed. 253), and plaintiffs bring error. Affirmed.

On writ of error to review a judgment entered October 30, 1907, in the Circuit Court for the Northern District of New York upon the decision of the court, a jury trial having been waived, dismissing the complaint, with costs. The action was brought to recover of John G. Ward, as collector of internal revenue, \$1,804.88, alleged to have been unlawfully collected by him as taxes under the war revenue act of June 13, 1898. The taxes were imposed upon plaintiffs' business as stockbrokers, commonly known as a "bucket shop." The opinion of the Circuit Court is reported in 155 Fed. 253.

Eugene D. Flanigan, for plaintiffs in error.

George B. Curtiss, U. S. Atty., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. But little need be added to the opinion of the judge of the Circuit Court, which carefully considers all the questions presented. He finds the following facts:

First. The plaintiffs and their New York correspondent, the Stock, Grain & Provision Company, were at all the times in controversy engaged in conducting, respectively, what is commonly known as a "bucket shop."

Second. The plaintiffs were not the agents of the New York company, the contract between them expressly providing to that effect.

Third. The agreement between the plaintiffs and their customers was an entirely separate and distinct affair. The customer only knew the plaintiffs in the transaction. If the customer's wager as to the rise or fall of the market was successful, the plaintiffs paid him the amount of his winnings; if he lost, the amount was divided between the plaintiffs and the New York company.

Fourth. The New York company stamped a duplicate of the written statement of each transaction, but the plaintiffs paid no tax on the transaction at Albany.

Upon these facts we think the court was correct in holding that there were two entirely separate and distinct transactions, one at Albany and another at New York, each liable to pay under the law. The same ruling was made in *Municipal T. & S. Co. v. Ward*, 133 Fed. 70, affirmed 138 Fed. 1006, 70 C. C. A. 284. The only distinction between the two cases is that in the *Municipal Co.* Case the memorandums delivered by the correspondents to their customers were stamped, but the plaintiff did not stamp the memorandums sent to its correspondents.

The law there enunciated is equally applicable here, for it was distinctly held by implication that the transaction between these plaintiffs

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and their customers was distinct from the transaction between plaintiffs and their New York correspondent, and that each must pay the revenue tax.

The judgment is affirmed.

THOMPSON et al. v. GREEN (two cases).

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

Nos. 43, 44.

1. CARRIERS (§ 280*)—CARRIERS OF PASSENGERS—DEGREE OF CARE REQUIRED.

Under the law of New Jersey a carrier of passengers is bound to exercise the highest degree of care, which prudent and careful men would under such circumstances exercise to carry the passengers safely.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1087; Dec. Dig. § 280.*]

2. CARRIERS (§ 348*)—ACTION FOR INJURY TO PASSENGER—INSTRUCTIONS.

Instructions of the court, in an action against a trolley company to recover for an injury to a passenger, considered and read as a whole, *held* correct, and the refusal of requested instructions not error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403-1407; Dec. Dig. § 348.*]

In Error to the Circuit Court of the United States for the District of New Jersey.

Actions by Dora May Green and William H. Green, respectively, against William J. Thompson and the Delaware River Amusement Company. Judgment for plaintiffs, and defendants bring error. Affirmed.

Fred A. Rex and William Harris, for plaintiffs in error.

Ralph W. E. Donges, for defendants in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Wm. H. Green and his wife, Dora May Green, brought suits to recover the respective damages sustained by each as the result of an injury to Mrs. Green while a passenger on defendant's trolley car. Verdicts were rendered for each, and, on entry of judgments thereon, writs of error were sued out by the defendants to this court.

The car in which Mrs. Green sat was going slowly in daylight from a wharf to Washington Park, when it was run into from the rear by another car going at high speed. It was contended by the defendants that a trespasser had gotten aboard this second car and started it in the motorman's absence, and that the defendants were not liable for such trespasser's conduct. On the part of the plaintiffs it was contended the man was not a trespasser, but a hanger-on around the amusement park, who was accustomed to run cars with the permissive knowledge of the defendants, and that, whether he was a trespasser or not, the defendants were liable, if their motorman, when leaving the car, failed to take with him the controller handle, by which alone the car could be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

started. The court so charged, and by the verdict we must assume, either that the colliding car was negligently operated by one for whose negligence the company was responsible, or that the company's motorman was negligent in leaving the controller upon it when he left the car. That portion of the charge is assigned for error in which the judge said:

"The defendant on the 3d day of August—that is the date, I believe—accepted Mrs. Green and Myrtle as passengers on one of its trolley cars running from the wharf up to Washington Park, and thereby it became liable to exercise a high degree of care, the highest degree of care which reasonably prudent and careful men would, under such circumstances, exercise, to carry the passengers safely."

In this we find no error. It simply made the carrier's duty the sum total of all the care "which reasonably prudent and careful men would, under such circumstances, exercise to carry the passengers safely." Such a standard is in accord with the authorities in New Jersey. *Whalen v. Consolidated Co.*, 61 N. J. Law, 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723; *Scott v. Bergen*, 63 N. J. Law, 410, 43 Atl. 1060; *Hansen v. North Jersey Co.*, 64 N. J. Law, 686, 46 Atl. 718; and *Delaware Co. v. Dailey*, 37 N. J. Law, 526, in which latter case it was said:

"The rule that carriers of passengers are bound to exercise the highest degree of care, the highest degree of care and diligence that a reasonable man would use, and that they are responsible for the slightest negligence, has been very generally adopted in this country, and is the law of this state."

Error is also assigned to the language in which, after stating that, if a trespasser boarded and ran the car, the defendants were not liable, the court said:

"Provided the motorman who started the car from the wharf, and who was admittedly a servant of the defendant when he left the car to go forward, as he says he did, to help another car which had been stalled, took reasonably proper and effective means to guard his car from being started by a trespasser during his absence."

No complaint is made to the general statement, but only to the use of the word "effective," which it is now contended made the test absolutely preventive means. We cannot accede to this contention. The language of court and counsel when the judge's attention was called to the word "effective" made plain to the jury that the word was qualified by the context, and meant "reasonably effective" means to prevent the car from being started. Of this language, as well as of other parts of the charge complained of, we find no just cause of complaint, when the words are read in the light of the context, as they must be to get the sense in which they were used.

It remains to say we find no error in the court's treatment of the defendants' request to charge. It contained a recital of the fact that Boltz, the man who was running the car, was a trespasser, and that, therefore, the defendants were not liable. The court submitted to the jury the fact whether Boltz was a trespasser, which was the controverted question in the case, and, if so found, the jury was told to find for the defendants.

Finding no error, both judgments are affirmed.

In re ISAACSON.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 17.

1. **BANKRUPTCY (§ 484*)—JURISDICTION OF COURTS—ALLOWING COMPENSATION TO RECEIVER.**

Where, on the filing of a petition in involuntary bankruptcy, a receiver is appointed and authorized to continue the debtor's business, but a second petition is afterwards filed in another district, where an adjudication is made, and to which the proceedings are transferred under General Order No. 6,¹ as being the district of his domicile, the court in the other district has jurisdiction to fix the compensation of its receiver and his counsel, although payment can only be made on order of the court having custody of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 484.*]

2. **BANKRUPTCY (§ 114*)—APPOINTMENT OF RECEIVER—CONTINUANCE OF BUSINESS.**

An order authorizing a receiver in bankruptcy to continue the business of the bankrupt for a limited time is largely discretionary, and cannot be collaterally attacked.

[Ed. Note.—For other case, see Bankruptcy, Cent. Dig. § 165; Dec. Dig. § 114.*]

Petition to Review Orders of the District Court of the United States for the Southern District of New York, in Bankruptcy.

In the matter of Samuel D. Isaacson, bankrupt. On petition by Harding, Whitman & Co. to revise orders of the District Court. Orders modified and affirmed.

See, also, 161 Fed. 777, 779.

This cause comes here upon a petition to revise two orders of the District Court, entered October 26, 1908. One of these orders confirmed a report of the special master, which overruled objections filed by petitioner to various petitions for allowances and to the accounts of the receiver. The other order denied a motion to set aside such report.

Hyman & Campbell (A. R. Campbell, of counsel), for petitioners.

H. & J. J. Lesser (R. P. Levis, of counsel), for respondents.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. On February 27, 1908, involuntary petition in bankruptcy was filed in the Southern district of New York, and William Blau was appointed receiver. He took possession of two places of business of the alleged bankrupt, one in the borough of Manhattan and the other in the borough of Brooklyn. On the day following receiver's appointment an order was made permitting the continuance of business for 20 days, and under it the receiver actually continued business for 5 days. On March 4th an adjudication of bankruptcy was made. Meanwhile, on March 2d, petitioner and two other creditors filed a petition in involuntary bankruptcy against Isaacson in the Eastern district. After various proceedings, which it is not necessary to recite, Isaacson was adjudged a bankrupt, and William Blau and Warren I. Lee were appointed receivers by the bankruptcy court in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

¹ 32 C. C. A. 1x, 89 Fed. v.

Eastern district. The adjudication in the Southern district was vacated, "trial of petition filed in Eastern district to be brought on first under rule 6" (32 C. C. A. ix, 89 Fed. v) and all property held by the Southern district receiver was turned over to the Eastern district receivers.

On or about May 16, 1908, petitions were presented to the United States District Court for the Southern district of New York, by William Blau as temporary receiver, by H. & J. J. Lesser, as attorneys for such temporary receiver, and by H. & J. J. Lesser, as attorneys for the petitioning creditors in the proceedings in said court, for allowances to them for their work done in the said proceedings; and the petition of William Blau prayed also the allowance of his accounts, which were annexed to said petition. It is the decision of the court upon such petitions, after report by special master, which it is now sought to revise.

It is contended that there was legal error in fixing the amount of the allowances and directing their payment, for the reason that the bankruptcy court in the Southern district had no jurisdiction. We cannot assent to the proposition that the court which appointed the receiver, and for which his services were rendered, has not jurisdiction to examine into the nature and extent of those services and to determine what is a proper compensation therefor. Technically that court has no jurisdiction to order the receivers appointed by another court to make disbursements out of the fund in their hands, and in that particular the order of October 27, 1908, is modified; but the bankruptcy court in the Eastern district will undoubtedly give full faith and credit to the determination of the court in the Southern district as to the value of services rendered by an officer of that court to that court, and will instruct its own receivers accordingly.

It is further contended that it was imprudent and negligent of the receiver to undertake to continue the business, even for 5 days. We need not examine this question. No proceeding was ever had to review the order authorizing him to do so, and it may not be thus collaterally attacked. This matter of continuing a going business till it can be determined whether or not such course will be for the best interests of all is so largely a matter of discretion confided to the bankruptcy courts that it would require a most extraordinary showing to persuade an appellate court to the conclusion that such discretion had been abused.

As to the amount of the allowances, we are inclined to the opinion that, in the case of the receiver's counsel at least, they are extremely liberal; but we see no reason to disturb the determination of the District Judge, who was necessarily more familiar than we are with the nature and extent of the services. We concur with the special master, as did the District Judge, that the receiver should not be surcharged for losses on sales during the continuance of the business, and find nothing in the objections as to exclusion of evidence or as to the filing of briefs with the special master which calls for discussion.

With the modification above indicated, the orders are affirmed.

ROBINSON v. NATIONAL TUBE CO.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 41

TRIAL (§ 141*)—TAKING QUESTION FROM JURY—QUESTIONS OF FACT—CONCLUSIVENESS OF EVIDENCE.

Where the evidence on an issue is uncontradicted, or of such conclusive character that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it, such issue may properly be withdrawn from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by George W. Robinson against the National Tube Company. Judgment for plaintiff, and he brings error. Affirmed.

Thos. M. & Rody P. Marshall and O. K. Eaton, for plaintiff in error.

David A. Reed, Wm. A. Seifert, and Reed, Smith, Shaw & Beal, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below George W. Robinson brought suit against the National Tube Company to recover damages for injuries caused by negligent blasting operations of the latter. Such negligence, for the purposes of the case, was conceded, and the evidence confined to proof that Robinson was struck by a missile and to the damage done thereby. On the part of Robinson the contention was that his hearing was entirely sound before the accident, and that thereafter, as the result of a blow on the left side of his head, his right ear suppurated and destroyed his hearing. The plaintiff made no proof of causal connection between the blow on the left side of the head and the subsequent deafness of the right ear. On the other hand, the defendant offered proof that there could be no such causal connection, that Robinson had scarlet fever in childhood, that his right ear had suppurated thereafter, and that his sense of hearing had become impaired before the blasting operations complained of. It also proved by uncontradicted professional testimony that, when examined shortly after the accident, Robinson's ear bore evidence of chronic suppuration of long standing. Thereupon the trial judge allowed the jury to assess damages for other injuries, but instructed them not to assess damages for loss of hearing. The jury found a verdict for \$100, and on entry of judgment plaintiff sued out this writ, assigning for error the judge's withdrawal from the jury of the assessment of damages for loss of hearing.

We have carefully examined the testimony, and are satisfied the judge was correct in the ruling complained of. As the case was declared on and tried, the contention of the plaintiff rested wholly on his showing that his hearing was unimpaired before the accident, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

damages by him for loss of hearing were and could be based only on such contention. On that point, however, the proof was of such overwhelming preponderance that a judge could not have allowed such a verdict to stand. Under such circumstances, it was the duty of the court to prevent a mistrial in that regard, and restrict the consideration of the jury to that portion of the case which alone warranted a verdict. For, as said in *Lackawanna Case v. Converse*, 139 U. S. 472, 11 Sup. Ct. 569, 35 L. Ed. 213, and restated in *Patton v. Texas*, 179 U. S. 660, 21 Sup. Ct. 275, 45 L. Ed. 361, the court may "direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

The judgment below will therefore be affirmed.

In re JACOB BERRY & CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 39.

ELECTION OF REMEDIES (§ 7*)—CLAIM AGAINST BANKRUPT—RIGHT TO RECLAIM PROPERTY FROM TRUSTEE—ELECTION OF REMEDIES.

Where a firm of brokers, prior to their bankruptcy, without authority pledged stocks of customers in their hands to secure loans to themselves, the action of such a customer in proving his claim against the estate for the value of his stock, without reservation, with full knowledge of the facts, constituted an election of remedies, and he cannot reclaim the stock on its subsequent return to the trustee.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 12; Dec. Dig. § 7.*]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

In the matter of Jacob Berry & Co., bankrupts. On petition of James D. Butcher to review an order of the District Court (146 Fed. 623). Order affirmed.

Francis M. Applegate, for petitioner.

James, Schell & Elkus (R. P. Lewis, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a petition to revise an order of the District Court confirming the report of a special master to the effect that the petitioner had elected to prove against the estate for the value of stock wrongfully hypothecated by the bankrupts, and therefore could not subsequently claim the stock or its profits specifically.

It is to be inferred from the opinion of the Supreme Court in *Thomas v. Taggart*, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, that a creditor who does this without making any reservation has finally elected his remedy. In that case, arising out of this same bankruptcy, the creditor proved a claim for the value of stocks wrongfully

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hypothecated by the bankrupts, but expressly reserved his right, notwithstanding, to recover the certificates or their proceeds. The court said:

"In this claim the essential question is as to the effect of Hall's proof of his claim in bankruptcy as a waiver of his right to recover the shares of stock covered by the receipt. We are of the opinion that, in view of the reservation just made, there was nothing in Hall's conduct, amounting to an election to pursue his claim as a creditor in bankruptcy, which now prevents his recovery of the certificates of stock in question. It is true that he voted at the first meeting of the creditors on December 19, 1904, upon an informal ballot for trustee in bankruptcy, and at the formal election of trustees on December 21, 1904, Mr. Hall did not vote, though the referee finds that he participated actively at the meetings held for the election of trustees. We are of the opinion that the reservation of Hall evidenced his intention to hold on to whatever rights he had in his shares of stock, and there is nothing in his conduct which would preclude him, after he had discovered that the shares had been returned to the assignee in bankruptcy, from reclaiming them as his own property."

If the record in this matter showed that the petitioner made his claim without knowledge of all the facts, or even in ignorance of his legal rights to follow the certificates or their proceeds, the situation might be different; but it does not. On the contrary, the special master and the District Judge both found that he acted with full knowledge of all the facts. The situation he is now in is not due to his laches, or to any estoppel arising out of anything done to the prejudice of others, but to the fact that he has deliberately elected a remedy inconsistent with the claim he now makes.

The order is affirmed.

ARMSTRONG v. BELDING BROS. & CO.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 158.

1. PATENTS (§ 168*)—CONSTRUCTION—ESTOPPEL BY PROCEEDINGS IN PATENT OFFICE.

In interference proceedings between two applicants for patents, one was successful on proof of priority of invention, whereupon his opponent purchased his application and substituted for the claims therein two claims from his own pending application, and the patent was granted thereon. He had previously, through counsel, expressed an opinion as to the meaning of such claims to differentiate them from a prior patent, which, however, was also antedated in invention by the applicant in whose application the claims were later embodied. *Held*, that such expression of opinion did not estop him from insisting on a broader construction after the patent was issued, which might have been claimed by the original inventor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.*]

Conclusiveness and effect of decisions of Patent Office in proceedings on applications, see note to Novelty Glass Mfg. Co. v. Brookfield, 95 C. C. A. 530.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—THREAD PACKAGE.

The Schroeder patent, No. 546,251, for a thread package especially designed for embroidery silk, discloses invention, and a novel and useful device, and is entitled to a liberal construction; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

3. PATENTS (§ 328*)—INFRINGEMENT—SKEIN THREAD HOLDER.

The Schroeder patent, No. 546,123, for a skein thread holder, is for an improvement merely, and entitled to a narrow construction only. As so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the District of Connecticut.

Suit in equity by Benjamin L. Armstrong against Belding Bros. & Co. Decree for complainant (172 Fed. 234), and defendant appeals. Affirmed in part, and reversed in part.

This cause comes here upon appeal from a decree of the Circuit Court, District of Connecticut, finding infringement of two patents, No. 546,123, September 10, 1895 to William Schroeder, assignor to B. L. Armstrong, for a thread package, and No. 546,251, to William C. Schroeder, September 10, 1895, for skein thread holder, both made of paper. The second of these is the earlier patent, application having been filed June 22, 1894, while the application for the other was not filed until June 11, 1895. No. 546,251 is therefore referred to as the first Schroeder patent. The opinion of the Circuit Court is found in 172 Fed. 234.

Robert B. Honeyman and A. Parker Smith, for appellant.
Livingston Gifford and Ernest Chadwick, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The invention is designed more especially for what are generally known as "embroidery silks," which easily become tangled and need to be protected, not only from dust, but also from exposure to light, which tends to fade their delicate colors. The two claims of the first patent read:

"1. A thread package, consisting of a folded casing embracing the skein, the said casing being provided with a bearing piece, folded upon itself, the bight of the fold forming a bearing for the skein and a partition between the sides of the skein, the said folded bearing piece being permanently attached to one only of the opposite sides of the casing, substantially as set forth."

"2. A thread package, consisting of a folded casing for embracing the skein, one of the folded parts of the casing located between the walls of the casing being further folded, the bearing edge of the fold extending transversely to the longitudinal direction of the skein and forming a partition between the sides of the skein, substantially as set forth."

Examination of the record induces entire concurrence in Judge Platt's conclusion that Schroeder is entitled to a generous treatment of his patent, which was the first invention that undertook to preserve and care for individual skeins of embroidery silk: that tangling and soiling of the skeins were practically done away with, the worker could remove the entire skein, thread by thread, by drawing it over the bearing piece by an end pull, without breaking up the package; color and size be duplicated at the store without carrying a sample; and that it was "a boon to maker, seller, and user."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The argument in this court was concerned mainly with infringement. Defendant has one less folded strip in his casing, and the convolutions of the projection of paper which is folded into his bearing piece are not exactly the same as those of Schroeder. A long argument has been made as to the effect of these differences. But examination of the actual thing which defendant makes, and which is not modeled upon or conformed to any structure prior to Schroeder's, shows that it is covered specifically by the language of the claims. This was demonstrated very effectively upon the argument by separating the bearing piece of each thread holder from the rest of the holder by the use of the scissors. The pieces thus cut off were each "folded upon itself." The bight of each formed a bearing for the skein and a partition between the sides of the skein. The "partition" of the structure made in accordance with the drawings of the patent was longer than defendant's partition; but the latter acted to keep the two sides or limbs of the skein separated from each other at the loop or uncut end of the skein, which is the location where according to the specifications it is particularly important to have a partition. The specification states that the core (partition) should preferably correspond in length to the interior length of the skein, but that "preferential" length is not incorporated in the claims, and there is nothing in the prior art to make it necessary to read it in, in order to save them. The bearing pieces of both devices, also, when the thread packages are unfolded to show their precise structure, are seen to be permanently attached to only one of the sides of the casing; not to the same casing side in both instances, but the claims are not limited to the precise arrangement shown in the drawings, and there is nothing in the prior art which makes it necessary so to limit them. Defendant contends that, when the package is completed by pasting down the edge of the right-hand casing side on top of the left-hand casing side, his bearing piece is "permanently attached" to both of the opposite casing sides; but examination of the package when opened up shows that the right-hand casing does not even come in contact with the bearing piece. The complainant's expert on cross-examination stated that so long as the gum or mucilage held the bearing piece would be attached to both of the opposite sides of the casing; but we are satisfied that he is entirely in error. Inspection of the package is sufficient.

There is nothing in the file wrapper and contents of the Schroeder patent which requires any modification of the language used in the claims, and taken at their face value, with nothing in the prior art to qualify them, they read upon defendant's structure, which accomplishes the same result in the same way.

A novel point is presented by defendant. The Schroeder application, which was filed June 22, 1894 contained eight claims, none of them in the language of the two finally allowed. The examiner cited a patent issued to Armstrong (complainant in this suit) July 17, 1894, on an application dated May 18, 1894 (No. 523,139). Schroeder at once filed an affidavit showing reduction to practice prior to the filing date of the reference, and his priority thereto stands undisputed. The same Armstrong had another application pending in the Patent Office.

which as to some claims was subsequently issued to him on September 10, 1895 (No. 546,127). With some of the claims in this application Schroeder was thrown into interference, and prevailed on his record date. After decision in his favor, Armstrong bought up the Schroeder application, and substituted for the claims of Schroeder two of the claims in his own application, which the Patent Office had approved, subject to Schroeder's proof of priority. While Armstrong was struggling with the Patent Office to differentiate his application from his own prior patent, he, through counsel, expressed his opinion as to the meaning of the language used in these two claims which subsequently went into the Schroeder patent. It is now contended that these expressions of opinion as to claims in the Armstrong application are to be taken as limitation on the same claims contained in the Schroeder patent. This would carry the doctrine of estoppel or abandonment by reason of conceding the soundness of departmental criticism far beyond any recorded decision, and we cannot assent to any such extension. Armstrong was seeking to differentiate his later patent from the conceded prior art (his own patent 523,139), which stood in his way; but Schroeder concededly antedates that patent, and there was no necessity to differentiate himself by concession from a patent subordinate to the one which was issued to him. As to the first Schroeder patent the decree should be affirmed.

The second Schroeder patent is manifestly not a pioneer, but a mere modification, possibly an improvement on his earlier patent. We need not discuss this in detail, because defendant's package differs from it in an important particular. Defendant's package, like that of the first Schroeder patent, renders the threads as they are pulled out over an extended straight edge, which gives free play for them without bunching or congestion. The second Schroeder patent renders them, not over a straight edge, but through two V-shaped corners. With a subordinate patent like this the difference is substantial, and infringement cannot be predicated. As to the second Schroeder patent, therefore, the decree should be reversed.

The decree, therefore, is modified as expressed in this opinion, and since appellant has prevailed in part and been defeated in part, there should be no costs of appeal to either side.

NATIONAL CASKET CO. v. STOLTS.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 62.

1. EQUITY (§ 241*)—SUIT FOR INFRINGEMENT—DEMURRER TO BILL—HEARING.

On demurrer to a bill for infringement of a patent, the court cannot consider testimony given in a prior case and not in the record.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 515; Dec. Dig. § 241.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 328*)—VALIDITY—FACE-PLATE FOR BURIAL CASKETS.

The Hamilton reissue patent, No. 12,750 (original No. 619,567), for a face-plate for burial caskets, is not void on its face.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the National Casket Company against Julius W. Stoltz, as president and treasurer of J. & W. Stoltz, an unincorporated joint-stock association. Decree dismissing bill on demurrer, and complainant appeals. Reversed.

On appeal from a decree of the Circuit Court for the Southern District of New York, dismissing the bill on demurrer. The bill alleges the infringement of reissued letters patent, No. 12,750, for a face-plate for burial caskets, dated February 11, 1908, to William Hamilton, deceased, assignor to the complainant. Decisions in the former litigation based upon the original patent will be found reported in 127 Fed. 158; 135 Fed. 534, 68 C. C. A. 84; 153 Fed. 765; and 157 Fed. 392, 85 C. C. A. 300.

Charles H. Duell, Frederick P. Warfield, and Holland S. Duell, for appellant.

Arthur v. Briesen and Hans v. Briesen, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. As the case is now before us upon demurrer we can only consider the bill, the demurrer and the original and reissued patents, profert of both being made by the complainant. The defendant's argument proceeds upon the theory that the issue between the parties is res judicata. The third ground of demurrer alleges:

"That it appears from the bill of complaint that the issues raised in the present suit have been tried and disposed of by this court and that said prior adjudications constitute res judicata of all the issues of the present suit."

We are unable to find such an averment in the bill. It is true that it alleges that for seven years prior to November, 1907, there was almost constant litigation between the parties and that at the date last mentioned the complainant was first informed by this court that the original patent was inoperative and void for failing to claim the invention with the requisite certainty and accuracy, and for the further reason that the inventor claimed more than he had a right to claim. This falls far short of an averment or admission that the issues presented by the bill have been decided adversely to the complainant. The records in the former litigations are not before us and cannot be introduced upon the issue presented by the bill and demurrer. The demurrer admits what the bill alleges but the bill does not allege that the original patent was held invalid because of lack of patentability.

The courts may, of course, in considering a demurrer, take judicial notice of matters within the common knowledge of the people, but we have grave doubt whether we are justified in considering the testimony and exhibits produced before us at an argument which took place two years ago. Even if we were permitted to consider face-plates for burial caskets as matters of common knowledge, we are not sufficiently

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

familiar with their details to justify us in considering the art prior to Hamilton's application, in the absence of exhibits and testimony identifying and explaining them. The evidence of the witness who testified to a prior use in the suit on the original patent may be decisive of this case also, but his testimony is not before us and it would, we think, be establishing a dangerous precedent were we in aid of a demurrer to resort to testimony not in the record.

We cannot say upon the face of the reissued patent alone that it fails to disclose a patentable invention. Neither can we say that the reissue is illegal.

It is, of course, important that litigation should not be unnecessarily protracted, but as the appellant offers to stipulate into the case at bar the proofs adduced in the former case, it is manifest that without serious delay or expense all the questions discussed can be presented upon a record which leaves no doubt as to the right of the court to consider them.

The decree is reversed with instructions to the Circuit Court to enter an order overruling the demurrer with permission to the defendant to answer within 20 days.

AMERICAN LAUNDRY MACHINERY MFG. CO. v. TROY LAUNDRY
MACHINERY CO., Limited.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 185.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CLOTHES DRIER.

The Barnes patent, No. 684,776, for a clothes drier, was not anticipated, and discloses invention; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CLOTHES DRIER.

The Hagen & Cooper patent, No. 735,366, for a clothes drier, *held* not anticipated and valid, but limited by the prior art to a construction covering only the specific stop device shown and described; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Suit in equity by the American Laundry Machinery Company against the Troy Laundry Machinery Company, Limited. Decree for complainant (171 Fed. 878), and defendant appeals. Affirmed.

Livingston Gifford and E. B. Stocking, for appellant.

Church & Rich (F. F. Church, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The facts are fully stated, the patents carefully described, and the prior art discussed in Judge Ray's opinion above cited, and also in a prior opinion by the same judge on motion for pre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

liminary injunction. 161 Fed. 556. The Barnes patent is also discussed in an opinion by Judge Holland in Circuit Court, Eastern District of Pennsylvania. *Barnes v. Lingo*, 151 Fed. 59. It will not be necessary to rehearse what was said in these opinions.

As to the Barnes patent, we concur with Judge Ray's reasoning and conclusions. When the motion for preliminary injunction was under discussion, there seems to have been some question raised as to infringement, requiring construction of the claims in the light of file wrapper and contents; but we understand that defendant does not now dispute the statement in the later opinion below that it has copied Barnes' arrangement in all its parts.

The combination of a steam-heated dry room with an endless conveyor carrying the clothes into, through, and out of the room, which Barnes disclosed in his patent, is a simple one. It seems strange that those skilled in the art did not find it obvious, and the question of patentable invention is a close one. Nevertheless it accomplished results long sought for, and remedied defects which were generally recognized as very troublesome. The reception accorded to it by laundrymen, when it was first shown to them at their convention in 1900, and subsequently, we find persuasive to the conclusion that it was because of the exercise of the inventive faculty that Barnes discovered a combination which did not occur to them, although they had long been seeking for something which would better existing conditions.

Defendant criticises this "commercial evidence" on the ground that it does not appear that any builder or user of these drying rooms knew of the Norton conveyor. That conveyor is shown in two English patents granted in 1864, there is no suggestion that it ever existed, except on paper, and presumably no one in this country ever saw or heard of it till it was dug up as a reference in this litigation. But we do not understand that any peculiarities of the Norton conveyor are essential to the success of the new combination. Any conveyor which would carry the clothes dependent from it through the room would seem to answer the purpose; and it must be assumed that laundrymen generally, like other intelligent and observing men, must have known that the endless conveyor was a device in common use in many arts. The circumstances that it did not occur to any of them when trying to improve their dry rooms individually, or collectively in their conventions, to combine such a conveyor with the side-heated room, seems to us sufficiently to determine the question of patentable invention in favor of Barnes.

As to the Hagen & Cooper patent, we concur with the Circuit Court, but think that, in view of the state of the art, the claims cannot be sustained broadly for any and every form of stop device "adjustable on the carriers" or "on the conveyor." They must be so restricted as to cover only the specific devices shown in the specifications; but, as thus restricted, they seem to be infringed.

The decree of the Circuit Court is affirmed, with costs.

GRAY TELEPHONE PAY STATION CO. v. BAIRD MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909. Rehearing Denied November 20, 1909.)

No. 1,470.

1. PATENTS (§ 72*)—ANTICIPATION—ACCIDENTAL SIMILARITY OF PARTS.

A patent for a mechanical combination is not anticipated by a prior patent, which incidentally shows a similar arrangement of parts, where such arrangement was not claimed nor designed to perform the function for which it is designed and claimed in the second patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 89; Dec. Dig. § 72.*]

2. PATENTS (§ 66*)—ANTICIPATION—APPLICATION ANTEDATING ALLEGED ANTICIPATING PATENT.

A patent is not anticipated by other patents, which, although prior in date, had not been granted when application for such patent was filed, and which were therefore not in the prior art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. § 66.*]

3. PATENTS (§ 328*)—INVENTION AND INFRINGEMENT—TELEPHONE PAY STATION.

The Gray patent, No. 593,720, for a coin-controlled telephone pay station, embodies the first device based upon the idea that the pay-box signal, produced by the falling coin, should be communicated to the transmitter by means of resonant connection between the two, as contrasted with the employment of air waves, as in the prior art. It discloses invention and is not limited to the particular form of connection described, nor was the right to such broad construction lost by anything which occurred in the patent office. Also, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

4. PATENTS (§ 328*)—ANTICIPATION—TELEPHONE PAY STATION.

The Gray patent, No. 598,610, for a coin-controlled telephone pay station, discloses no patentable improvement over the device of patent No. 593,720 to the same inventor, and is void for anticipation thereby.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

5. PATENTS (§ 168*)—CONSTRUCTION—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.

Where an applicant for a patent persisted in the basic idea upon which he claimed invention, although amending his claim from time to time after rejections by the examiner as to details of construction in attempts to avoid references by the examiner, and his application was finally rejected by the examiner but allowed on appeal, on the broad ground that such basic idea involved invention, such amendment did not limit the claim as finally allowed to the precise construction therein described.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Gray Telephone Pay Station Company against the Baird Manufacturing Company. Decree for defendant, and complainant appeals. Reversed in part.

Appellant filed its bill below for an injunction restraining defendant from infringement of patent No. 593,720, granted to W. Gray, November 16, 1897, for a telephone toll station, and claim 1 of patent No. 598,610, granted to the same party February 8, 1898, for a coin-controlled telephone pay station. The former patent has but one claim, which reads as follows, viz.:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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"In combination with a set of telephone instruments, a signal-box containing a channel-board, a signal device, located in the path of the falling coin, openings through the wall of the box for the reception of a coin, the channel-board secured in firm contact with a wall of the signal-box, the transmitter, and the transmitter-support secured in firm contact with that part of the signal-box to which the channel-board is secured, all substantially as described."

Claim 1 of the latter patent reads as follows, viz.:

"1. In a telephone toll apparatus, in combination with a transmitter-base or support of metal, a transmitter pivoted to the support, a metallic signal-box having its wall secured in close contact with the transmitter-base, a signal-sounding device located within the box, and the coin-channel registering with the coin-slot through the wall of the box."

The Circuit Court found no infringement and dismissed the cause for want of equity. The answer sets up invalidity and noninfringement. The main contention is in regard to the one claim of the patent first named, which appellant insists is for a broad invention, viz., the securing of a resonant connection between the signal within the signal-box and the transmitter, in place of the action on the transmitter caused by the sound of a gong or bell conveyed thereto externally as theretofore employed. To accomplish this, appellant, as will be seen, provides for a signaling device, as a bell or gong, in the pay-box, operated by gravity-impelled coin, in such arrangement as that the vibration caused by the sound thereof shall correspondingly actuate the wall of the signal-box, which is constructed in firm contact with the transmitter-support.

The patent seems to have had a stormy time of it in the Patent Office. By application serial No. 491,190, filed November 17, 1893, appellant sought to be allowed two claims broadly calling for a closed signal-box arranged in contact with an integral portion of the transmitter-support or to the backboard thereof, and containing devices for operating signals by means of falling coin. Those claims were rejected by the examiner on December 16, 1893, on patent No. 469,647, granted to Gray, February 23, 1892, for a coin-controlled apparatus for telephones. On July 1, 1895, Gray amended by erasing both claims and substituting a new claim in place of them, which reads as follows, viz.:

"In combination in a telephone, a signal-box containing devices for the sounding of signals by the operation of a falling coin, and a transmitter and its supporting part arranged in contact with the box, all substantially as described."

In presenting the amended claim, applicant says:

"The claim as now presented clearly avoids the reference. Said reference shows the transmitter or its supporting part, supported above the box and at some distance therefrom. The claim is limited to the transmitter or its supporting part being in contact with the box."

On July 2, 1895, this claim was rejected by the examiner, on Gray of record and patent No. 440,118, granted to H. C. Root, November 4, 1890, for an automatic toll system for telephone pay stations. On January 4, 1895 (presumably 1896), the examiner notified Gray that the last-named claim had been taken up for action under rule 65 of the Patent Office and finally rejected on the patents of Gray and Root of record. On July 2, 1896, Gray submitted amendments to the specification and substituted an amended claim, which reads as follows, viz.:

"In combination with a set of telephone instruments, a signal-box containing a channel-board, a signal device located in the path of movement of a falling coin, openings through the wall of the box for the reception of a coin, the channel-board secured in close contact with the top of the signal-box, the transmitter, and the transmitter-support secured in close contact with the cover of the signal-box, all substantially as described."

On July 7, 1896, the examiner held this amended claim was not the same in substance as the rejected claim, and might not be entered for the purpose of appeal. He also held it to be too late to present it as a new claim. On July 14, 1896, Gray, through his attorney, admits the broad claim as set out to be untenable, but claims patentable novelty, and asks that the paper filed with appeal be considered on its merits. On August 3, 1896, the examiner notifies Gray the amendment of July 2, 1896, has been entered, claim examined, and

rejected on Gray 469,649 of record. He thereupon waives the right to further rejection, and consents to the renewal of appeal to the Board of Examiners in Chief. Appeal was taken July 2, 1896, and renewed February 2, 1897, with request that the appeal fee filed in connection with appeal of July 2, 1896, be applied. On May 12, 1897, Gray, through his counsel, files his brief in which he asks to amend the amendments of July 1, 1896, among other things, by substituting the word "firm" or "firmly" in place of the phrase "close contact," and inserting after the words "transmitter-support" the phrase, "thereby establishing a resonant connection between the signal within the box and the transmitter located outside thereof." In this brief it is stated:

(1) That in patent No. 469,649 the base of the transmitter is not in contact with the walls of the signal-box, but is fastened to a backboard, and at a distance from the box.

(2) That experiment and careful test have proved that the arrangement of patent No. 469,649 with the deflector removed and the hole stopped would not be usable for the reason that the sound of the signal within the box could not be picked up by the transmitter and conveyed to the central office.

On May 17, 1897, the Board of Examiners allowed the amendments and reversed the examiner. In their decision they describe the invention as an improvement on patent No. 469,649, "in which the sound of the signal was transmitted to the transmitter, through a deflector tube. This tube is in the present device omitted, and the transmitter arm, c, or the base or support therefor (not lettered) are brought into firm contact with the top or some part of the box containing the signaling device, whereby a resonant connection is established through the parts in firm contact with each other, and the sound of the bell can be heard through the transmitter without the use of the tube. It is stated by counsel for applicant, as a matter of fact determined by experiment, that, if the deflector tube of apparatus like that shown in the patent is closed, the connection between the signal and transmitter by way of the backboard cannot be relied upon. There is thus a new and simple construction, by which better results are obtained, and which in our opinion required invention to devise."

Thereupon the patent was issued as above.

From the file wrapper and contents in the record, it appears that the original application for the second patent, Gray, No. 598,610, called for the allowance of eight claims, and is for an improvement upon the device of patent No. 593,720. It was filed December 4, 1895. Its claim 1 differs from the former claim mainly in the employment of metallic media in obtaining resonant connection.

On January 3, 1896, all the claims were rejected on references cited in notice, amendments were made to the specification, and claims 1, 2, 6, 7, and 8 were erased and a new claim substituted in place of claims 6, 7, and 8, and filed July 2, 1896. On July 20, 1896, all of the claims were again rejected by the examiner. On January 20, 1897, a reconsideration was asked in a letter containing the statement: "Applicant has by repeated and continued experiments with all the devices demonstrated the fact that with a transmitter and toll-box united to a common base, the same results cannot be attained as in a device in which the bases of said parts are in contact." On February 16, 1897, claims 1 and 3 were rejected by the examiner, and the other claims were allowed. On February 19, 1898, Gray erased all the claims and presented five claims together with amendments to the specification. On March 18, 1897, the examiner rejected new claims 1 and 3. Gray asked for a reconsideration of claims 1 and 3, which was granted on January 13, 1898, and patent allowed as above.

Defendant employs a signal device different from that of the claims in suit, in that the coin is carried by an arm into contact with the signaling device, so that the signal is not produced by the falling coin. Defendant's device also is different in that it has no transmitter-base in contact with a wall of the signal-box. It operates, however, upon the same principle.

It appears further from the evidence that on or about the 22d day of August, 1900, appellee submitted to appellant, at the latter's request, a device known as a "Baird Triplet" containing the same sound conductor and signal devices as those of the present alleged infringing machine, viz.: "Complainant's Exhibit Defendant's Machine B," for inspection, and that after examining the same, complainant wrote defendant as follows, viz.:

"Hartford, Conn. Aug. 22/1900.

"The Baird Clock Co., Mr. E. P. Baird, President, 141 Clinton St., Chicago, Ill.—Dear Sir: The model of the Baird pay station sent to us from Cleveland by your instructions has been submitted to our patent attorneys, who advise us that as now constructed it does not infringe any of our patents. Please accept thanks for your courtesy in the matter. Model will be returned to you at once.

"Yours truly,

[Signed] Charles Soby, Secretary."

The other material facts will be found in the opinion.

Harrie E. Hart and Charles K. Offield, for appellant.
Fred Gerlach, for appellee.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It was old in the telephone toll-station art to employ means for imparting signals from the pay-box to the transmitter of a telephone. This was attained in several ways: It would be electrically effected by the employment of a coin in making or breaking the circuit, thereby at once advising the central office, or by operating the signal device from the central office, or by depositing a coin in the channel provided for that purpose, so arranged as to cause a bell or gong to sound. We have to do only with this latter device.

It seems to have been assumed that the signal could be conveyed to the transmitter through air waves alone. With this in view, various conductors were employed whereby the sound or signal was projected upon the diaphragm of the transmitter from the outside.

Complainant claims to have been the first to utilize the principle of solid vibration. Its patent first above named is for a device in which the signal is given to the transmitter by means of resonant connection between the signal or pay box and the transmitter-support, thereby avoiding all appliances which employ the air waves for that purpose. So far as the record discloses, such a device is desirable, being both effective and simple. In view of the art and the advantage to the public of every advance therein tending to better service, there seems to be little doubt that, if the patentee was the first to disclose a toll station employing this means of operating the transmitter, he and his assigns are entitled to the protection of a court of equity, unless they have in some way waived their rights. There are several patents in the prior art, which, in a degree at least, might well have been claimed, though unconsciously to their inventors, to have afforded the assistance of the vibration caused by resonant contact of the signal-box with the transmitter-support. The various signaling methods referred to, wherein the sound is conveyed by deflectors or other means for impacting upon the transmitter-diaphragm through the air, would undoubtedly, if so arranged as to permit of vibration, be supplemented directly, if indeed the vibration were not the principal channel of sound conduction to the transmitter, as, for instance, Gray's several patents, Nos. 469,649, 469,650, 462,813, and Root patent, No. 440,118, and Holbrook patent, No. 481,903. Owing to the fact that the signal-box and transmitter-support have a common backboard, even though they be not in actual close contact, there could hardly fail to be some degree of vibration through the limited resonant connection. Granting this to be

the case, yet the patentees neither made claim for such a result, nor sought to take advantage thereof, and the record fails to make it apparent that any satisfactory and practical results could have been obtained thereby.

"A patent for a mechanical combination is not anticipated by a drawing in a prior patent which incidentally shows a similar arrangement of parts, where such arrangement is not essential to the first invention, and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor." *Brill v. Third Ave. R. C.* (C. C.) 103 Fed. 289.

As was said in *Canda v. Michigan Iron Company*, 124 Fed. 486, 61 C. C. A. 194:

"But if the patent gives no sign of such contemplated use and makes no provision adapting it to other uses, the patentee cannot be said to have invented that for which he has given no specific directions for construction. * * * It (the patent there in suit) was not constructed with a view to the special purpose of the patent in suit. It is true that it might happen that a casing would be made under the Hardy patent which would be adapted to the use contemplated by Canda; but, if so, it would be merely accidental. It would not result from any preconception nor from anything specifically directed by the patent for organizing his invention."

Defendant cites Gentry patent, No. 516,433, granted March 13, 1894, for a telephone toll station, and Alexander patent, No. 544,077, granted August 6, 1895, for improvement in coin-signal apparatus for telephone pay stations. The application for the patent in suit was filed November 17, 1893. It thus appears that at the time the application for the patent in suit was filed these two alleged anticipating patents were not in the prior art, and cannot be availed of as anticipations. *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Anderson v. Collins*, 122 Fed. 451, 58 C. C. A. 669; *Eck v. Kutz*, 132 Fed. 758; *Walker on Patents*, § 70; *Robinson on Patents*, § 331, and note, 332, 334; *Barnes v. Sprinkler Co.*, 60 Fed. 605, 9 C. C. A. 154.

It is insisted by defendant that, even though the rule be as above stated, the fact that the patentee amended his application on July 1, 1896, by substituting the words "firm" or "firmly" in place of the words "close contact," and inserting, after the words "transmitter-support," the phrase, "thereby establishing a resonant connection between the signal within the box and the transmitter located outside thereof," leaves these patents in the prior art as to the matters contained in the amendment. Theretofore the patentee had always used the term "close contact" to indicate a path of practical vibratory travel for the signal. To avoid any uncertainty as to his meaning, he substituted the word "firm." There never was any doubt in the mind of any one, and certainly not in the mind of any one skilled in such matters, as to the meaning of the phrase "close contact." The context, as well as the avowed object to attain sound travel from the signal to the transmitter, made it clear that the term first used meant just what was expressed in the amendment. Therefore the substitution of the word "firm" can be viewed as nothing more than an elaboration of the idea, and in no sense a new feature. There is therefore nothing in the record to warrant the consideration of either of these two patents as an anticipation.

Gray was the first to devise and construct a toll station based upon the idea that the pay-box signal should be communicated to the trans-

mitter by means of resonant connection between the two. He took steps to secure the utmost freedom of vibration from one to the other. His means of doing so involved a firm or rigid relation of the one to the other—such as would afford the most complete vibratory medium. This would never have been achieved without the idea of vibratory conduction of the sound signal along the solid wood or metal located in the path of vibration between the signal and the transmitter. The accidental vibration growing out of the constructions of the prior art would never have developed reliable vibratory communication. Accuracy of enunciation is the end toward which telephony is striving. Every step in advance is a victory gained over the unknown. The invention must of necessity, if it be such, consist in the device of the patent, and not in the conception of the principle to be utilized. *Sewall v. Jones*, 91 U. S. 171, 23 L. Ed. 275. But the conception must precede the adaptation to practical use. While the properties of wood and metal as conductors of sound were matters of general knowledge, it cannot be said that the harnessing of this natural principle to the telephonic service was known to be practicable or practical—else why the long-continued employment of the clumsy and inconvenient deflectors and signal-box openings. We deem invention conclusively established.

A more serious difficulty is disclosed by the file wrapper and contents. From the statement of facts it appears that the patentee made application for a device, the main feature of which was the resonant connection between the signal-box and the transmitter-support. Claim 1 called for the signal produced by a falling coin in terms. Claim 2 called for it only by reference to the specification. Both contemplate a signaling device arranged with a view to obtaining the most effective vibratory connection between the signal and the transmitter. Through the objections of the examiner in charge, the patentee amended his claims from time to time, dwelling at each step more and more upon the details of the signal device, which was not new, but never yielding his claim for the discovery of a toll station in which the signals should be communicated to the transmitter through vibratory action upon the signal-box and transmitter-support.

In the course of his attempts to save his idea, while seeking to meet the demands of the examiner, he seems several times to have come perilously near recantation. His struggle is apparent at every step. Notwithstanding the seeming abandonment of his basic claim by counsel, he continually returns to it, and is at last defeated by the examiner. On appeal to the Examiner in Chief, the application was considered upon the question of patentable novelty involved in constructing a toll station in which the signals are conveyed to the transmitter by vibration in a path through solid materials as contrasted with the employment of air waves, as in the prior art. The details of arrangement of the signal and signal-box are not referred to, but evidently are deemed mere incidents of a plan to dispose of the signals in such a manner as to attain the best possible vibratory results. There is no intimation that the applicant was limited in any way by the concessions made to the examiner in respect to the particular signaling device. Nor in our judgment should there have been any. On hearing had, the examiner was reversed, and the patent granted with the statement:

"There is thus a new and simple construction by which better results are obtained, and which in our opinion requires invention to devise."

We are therefore of the opinion that complainant is not limited to the particular form of signal production named in the claim under consideration, and that the patentee did not part with his right to a patent based upon his invention of the new method of transmitting signals from the signal-box to the transmitter, by reason of any steps taken in the Patent Office.

If we are correct in our conclusion that Gray was the first inventor of a device designed to take advantage of the vibration path through the solid substances of the signal-box and transmitter-support, regardless of the specific form in which the signal-box is operated, then it follows that claim 1 of the second patent in suit, Gray No. 598,610, if valid at all, must be very narrow. The complainant's brief fails to point out any invention, but is confined to a description of its form. Nor does the evidence disclose anything new other than the material used and the relative location of the signal-box and the transmitter. Defendant charges complainant with having, prior to the proceedings herein, treated this patent as its basic invention. It appears to effectuate complete vibratory relations between the desired parts of the toll station, but differs only in degree from the claim of the first patent with reference to the substance thereof. It surely would be deemed to infringe the first patent in the hands of a stranger. Complainant contends there has been no attempt to anticipate this patent. The reason would seem to be that it is substantially the same as the first patent.

Defendant asserts that if the first patent in suit is to be construed broadly, then it will not be permissible to operate under the expired patents of the prior art. There is nothing in the case to justify such a statement. When construed as above indicated, the prior patents cannot be held to affect the subject-matter.

The defendant denies infringement in fact and sets up acquiescence on the part of complainant. With regard to the latter claim, complainant insists its acquiescence was with reference to the arrangement of the signal-box. Defendant claims that the alleged infringing toll station was submitted to and approved by complainant. Of course, if defendant's contention be true, and the device submitted disclosed the appropriation of the resonant contact idea, then complainant may not now retract and claim damages. It seems hardly credible that complainant could have inspected defendant's complete device B, and found no infringement.

An inspection of defendant's physical exhibit, "Baird Triplet pay station," discloses the fact that the so-called "pay station" consists of that part of the apparatus which has hereinabove been designated as the "signal-box." There is nothing in the exhibit or in the record which would justify us in holding that the sample box sent complainant for inspection contained any feature which would be calculated to advise complainant that defendant intended to appropriate the gist of the patent in suit. For all that appears, defendant might have been contemplating the use of the deflector, or some other feature of the prior art. The record is very scant upon the matter and certainly cannot be held to make a case of estoppel.

That defendant's pay station complete is an infringement of the first patent in suit we entertain no doubt. All three of the machines shown in the record involve the principles and construction of the Gray patent. Wherein there is any difference, the rule as to equivalents obtains.

The decree of the Circuit Court is therefore reversed as to Gray patent, No. 593,720, with directions to enter a decree in favor of appellant-complainant for the relief sought in its bill, in conformity with the foregoing opinion. For the reasons above stated, the judgment of the court below dismissing the bill as to Gray patent, No. 598,610, is affirmed.

SHARP & SMITH v. PHYSICIANS' & SURGEONS' APPLIANCE CO.

(Circuit Court, E. D. Wisconsin. December 15, 1909.)

1. PATENTS (§ 168*)—CONSTRUCTION—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.

The fact that a claim in an application for a patent was rejected by the Patent Office, and another substituted by the applicant, does not preclude a broad construction of the claim as allowed, except as to features which were clearly surrendered by the substitution; and where the claim as allowed contained a new feature or element, not contained in the original claim, such feature or element is entitled to the benefit of the doctrine of equivalents, wholly unaffected by the rejection of the original claim.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. § 168.*]

2. PATENTS (§ 328*)—INVENTION AND INFRINGEMENT—JOCK-STRAP AND SUSPENSORY.

The Bennett patent, No. 594,673, for a combined jock-strap and suspensory, was not anticipated, and discloses invention, and is not to be so narrowly construed as to limit the patentee to the precise method of construction of the article shown. As so construed, held infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by Sharp & Smith, a corporation, against the Physicians' & Surgeons' Appliance Company. Decree for complainant.

Dyrenforth, Lee, Chritton & Wiles, for complainant.

A. L. Morsell, for defendant.

SANBORN, District Judge. Suit for infringement of patent No. 594,673 for a combined jock-strap and suspensory issued to Charles F. Bennett November 30, 1897, and for an injunction and accounting in the usual form. The defenses are that the patent is invalid and non-infringement. Defendant's bandage is an exact counterpart of complainant's in material, shape, and function, but is put together in a different way. It is claimed by defendant that, if the patent is valid, it must be construed so narrowly as to cover a bandage made precisely as described in the patent claim, excluding any other.

Jock-straps are quite similar to the common swimming trunks made of cotton cloth, and which were extensively in use for the purposes of a suspensory bandage prior to the introduction of the patented bandage. The jock-strap is designed to hold the male private organs in the position of greatest safety, so that athletes, equestrians, etc., may be protected against accident to those organs. By this device the parts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

are steadily held up against the lower part of the abdomen, and above the lower abdominal bone or pubis, so that behind them is only the soft muscular wall of the trunk. They are thus held completely above the crotch, so that a jar or fall such as might be received on any article of gymnasium equipment, or on a bicycle, motor cycle, or horse could not inflict any injury. Prior to the introduction of complainant's device, former devices, to be mentioned in connection with the prior art, had been practically discarded by athletes for the common cotton swimming trunk.

Although the jock-strap may be loosely called a suspensory, yet there is an important distinction between jock-straps and suspensories. The suspensory is designed to hold the parts up slightly, in order to relieve muscular or nervous strain, and not to hold them in such position that they cannot be injured. The jock-strap, on the other hand, must be so made and the material must be of such a sort that, when the parts are placed in the position shown by experience to be the best adapted for safety, they will be maintained in this position in spite of any movements of the body that may be connected with the various exercises of the athlete. It is also essential that the material and its arrangement should be such as to prevent any slipping away from the position in which they are placed during exercise. In order that a device of this kind may possess these fundamental characteristics, there must be elasticity so as to allow the bandage to lie close to the body and keep in place during exercise, and at the same time be of such a nature that the parts will not be unduly heated or subjected to undue pressure. For comfort, as well as sanitary reasons, it is desirable that the anal opening should be left uncovered.

In the patented supporter the material is so arranged as to provide a pouch or sack for the reception of the parts; the whole being made of elastic material and so arranged as to bring the greatest strain at the sides of the material, so as to prevent the slipping or escape of the parts from the pouch or sack. It is a one-piece jock-strap, so put together as to create a pouch, pocket, sack, or "medial fullness" for the parts, as distinguished from a flat strip like the old swimming trunk. It contains thigh-circlets, and comprises a wide front elastic pouch portion and narrower circlets, and is so constructed that the greatest tension comes at the outer edge of the thigh-circlets, thus holding the parts in place and preventing their escape under movement and strain.

In order to illustrate what seems to be the main claim to novelty of the patent, take a piece of paper four inches wide and ten inches long, fold it in the middle lengthwise, and cut or tear it along the line of the fold four inches from one end towards the other. If the two detached ends, each two inches wide by four inches long, are then crossed at right angles to each other, the whole idea of the sack or "medial fullness" of the device will be at once understood. Then, if the two narrower pieces are gummed together, the paper may then be set upon the table like a chair without legs, and will have an upright back in the shape of two sides of a box, and a flat seat and two extending wings to steady it. Now if a waistband is attached to the uncut end of the strip of paper, and the narrower strips are extended, brought up, and attached to the lower edge of the waistband, the device of the patent in suit will be fully exhibited. The sole claim of the patent is as follows:

"A combined jock-strap and suspensory comprising an endless belt portion, and two elastic belts separated at one end and attached to the rear of the belt and crossed intermediate of their length and secured together at their inner edges from said point of crossing to the other end and attached at said other end to the front of the belt, whereby there is provided at the rear an opening and at the front a pouch substantially as and for the purpose set forth."

The defendant's jock-strap is exactly the same in form as the other, but is made in a different way. The pouch is made by cutting a notch in the end of the middle band and bringing the edges together and sewing them. The thigh-circlets are then sewed on to the bottom of the pouch. It is exactly the same thing made in a different way. It contains every structural feature of the patented article. Therefore, if the patent is valid and not to be too strictly construed, there is no question of the infringement.

As to the prior art, none of the prior patents were designed to hold the parts up against the abdomen, except possibly the Hall patent, No. 425,784, and the Pfister patent, No. 452,529. Neither of these, however, provided any pouch or sack. They were much the same as the swimming trunk. The only patents in the prior art which contained anything approaching the sack or pouch are the Rawson patent, No. 39,452, and the Hill patent, No. 208,240, both of which were pure suspensories, not designed to hold the parts against the abdomen or out of the reach of harm.

It also appears from the testimony that, immediately after the issue of the patent in suit, the form of the jock-strap covered by it, and known in the trade as the "Bike" supporter, came on the market. Prior supporters were sold at 50 cents, and the "Bike" at 75 cents. As soon as the latter could be bought, practically all athletes took to it as an improvement in place of the Morton device or swimming trunk, which was then practically the only one in use. All other devices were almost entirely rejected, and the "Bike" supporter or patented device almost completely displaced them.

I think invention is shown in the specifications and claim of patent, in that the patentee, in a simple and inexpensive manner, by the use of two pieces of elastic material, was able to form a pouch or sack so adjusted that the line of greatest tension is at the sides of the pouch, thus not only giving room for the parts, but holding them in the position of greatest safety, and so preventing their displacement that no movement, however violent, on the part of the wearer will make any change or readjustment necessary. Prior devices were superseded, the article came into immediate and almost universal use, and so remains up to the present time, except to the extent it may be displaced by the similar device of the defendant. I do not think anything in the prior art anticipated the invention of the patent, and that, if infringement exists, there should be a decree in its favor.

I find the most serious question in the case, as it seems to me, depends upon the proper construction of the claim of the patent in the light of the evidence shown by the file wrapper. The original application contained three claims, each of which attempted to cover a new article of manufacture, a jock-strap formed of elastic material with an endless waistband and endless thigh-circlets. A jock-strap in combi-

nation with a suspensory and formed integral therewith is also claimed. These claims were all rejected as anticipated by the Hall and Pfister patents and one other, on the ground that it was common to make supporters of elastic material, and for other reasons. The applicant then amended his application and substituted a single claim for a combined jock-strap and suspensory comprising an endless belt portion and two elastic bands secured apart at one end and secured together at the other end to the opposite side of the belt. It will be seen that so far no claim was made to what is here considered the patentable feature; that is, the pouch or "medial fullness." The claim was again rejected on the references cited against the first three claims and also on the Rawson patent. The applicant again amended his case by requesting the cancellation of the previous claim and the substitution of a claim substantially the same as that of the patent, omitting, however, the following:

"Whereby there is provided at the rear an opening and at the front a pouch."

This claim was again rejected, on the ground that it covered nothing more than a pair of suspenders attached to a belt. The examiner further stated:

"The case is considered devoid of patentable novelty."

Thereupon the applicant canceled the previous claim and substituted the claim which was finally allowed. In the argument accompanying the last amendment, the following statement was made:

"Applicant has produced a new article made from three strips or bands of elastic material so arranged and connected as to provide the necessary rear opening and the front pouch, and the simplicity and cheapness of the article, aside from its novelty, argues in favor of an allowance of a claim therefor."

And it was further stated that the new claim is presented as more clearly defining the invention and to emphasize the feature of the device upon which the invention is predicated, and that the references cited do not show an article, while serving every purpose, but yet so simple and inexpensive and being made from three lengths of material of substantially the same width and same material, and that it required ingenuity and inventive skill to divide a single strip of material so as to form three parts and so combine and attach those parts as to make an article which will with increased efficiency answer the purposes of the cumbersome and comparatively expensive devices shown in the prior art.

It is claimed that the result of this history is that the only difference between the patented article and those of the prior art, to which the examiner's attention was called, consisted in the make-up—that is, the fact that the patented jock-strap is formed with three pieces or strips of material, and that the inventive act is stated in his argument to be that of so combining these three strips so as to form a jock-strap—and that whatever increased efficiency was believed to exist was supposed to be due to the make-up of the article from three pieces of material, two of which were crossed and connected at their side margin so as to form the pouch.

The rule of Winchester Repeating Arms Co. v. Peters Cartridge Co. (C. C.) 173 Fed. 86, in the Second Circuit, is cited, to the effect that,

where a claimant for a patent is entitled to broader claims than those he accepts, everything not contained in the patentee's claim is dedicated to the public; and that, inasmuch as applicants for patents have the right of appeal from the decision of the examiner, they should take that remedy, rather than submit to the unjust narrowing of their claims; and if they do not do so, but submit to the decision of the examiner, everything previously claimed of a broader nature than that contained in the patent is absolutely lost. While the case just cited undoubtedly expresses the law in a general way, yet the rule in this circuit is deemed to be very much more liberal to applicants for patents than that stated in the cited case. This is emphatically shown by the case of *Gray Telephone Pay Station Co. v. Baird Mfg. Co.*, 174 Fed. 417, 98 C. C. A. —. In that case the court says:

"In the course of his attempts to save his idea while seeking to meet the demands of the examiner, he seems several times to have come perilously near recantation. His struggle is apparent at every step. Notwithstanding the seeming abandonment of his basic claim by counsel, he continually returns to it and is at last defeated by the examiner."

It further appears on appeal to the examiner in chief the case went off on another point, and it was held that the patentee was not in that case limited to the particular form of signal production mentioned in his claim, and did not waive his fundamental claim, the only one which showed any novelty.

An applicant in attempting to procure an allowance of his claim by the Patent Office is dealing with an exceedingly practical question. He is generally very desirous of avoiding the expense and delay of an appeal, and he is sometimes brought to yield things to which he is entitled under stress of this situation. If he clearly gives up anything to the public, he cannot afterwards claim it; but the record in the file wrapper is not to be construed too strictly against him. Such a rule would work intolerable hardship. The patentee puts nothing forward now which was rejected in the Patent Office. The examiner did not reject the pouch feature of the article, but his decision was entirely addressed to other matters. *Western Tube Co. v. Rainear* (C. C.) 156 Fed. 49, 56.

While a patentee cannot revive a rejected claim by a broad construction of a claim allowed, he is entitled to a fair construction of the terms of the claim as actually granted. *Hubbell v. U. S.*, 179 U. S. 77, 21 Sup. Ct. 24, 45 L. Ed. 95.

I do not think that the patentee ever surrendered, or intended to surrender, the pouch feature of his invention. It is true that, in order to persuade the examiner to allow his patent, he emphasizes other matters; but there is nothing in this to show any intention to surrender or abandon the important and fundamental feature in question.

In view of these considerations, complainant is not to be confined to the precise method of constructing his invention as shown by his claim. Defendant has the same article in identically the same form, only made in another way.

I think there was invention and infringement, and that an injunction and accounting should be decreed.

THE LARIMER.

(District Court, E. D. Pennsylvania. December 7, 1909.)

No. 53.

SEAMEN (§ 21*)—SHIPPING ARTICLES—"FINAL PORT OF DISCHARGE."

Under shipping articles signed in New York for service on the vessel during a voyage to Port Arthur, Tex., "and back to final port of discharge, * * * with liberty to call at intermediate ports," where she loaded a cargo of oil at Port Arthur, in part for Philadelphia and in part for New York, the latter, as the port where she was completely discharged of her cargo, was the "final port of discharge," and the action of the seamen in leaving the vessel at Philadelphia after her partial discharge there, was in violation of the contract, and amounted to desertion, which forfeited their right to wages.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 92-110; Dec. Dig. § 21.*]

In Admiralty. Suit by John Oegelsel and others against the steamship *Larimer*. Libel dismissed.

Joseph Hill Brinton, for libelants.

Robert W. Archbald, Jr., for respondent.

J. B. McPHERSON, District Judge. This is a libel brought by several seamen to recover wages from the steamship *Larimer*. The facts have been agreed upon by the parties and are as follows:

"(1) That each and all of the libelants hereinafter named, on November 25 and 26, 1905, at the port of New York, signed shipping articles to serve as mariners on board the steamer *Larimer*, whereof one L. G. Johnson was master; and a true copy of said shipping articles is annexed to and made part of this stipulation and marked 'Exhibit A.'

"(2) That on said dates the libelants went on board of the said steamer, and entered into her service, and remained upon her discharging their respective duties under said articles; and the term of service and amount of wages earned by each of the libelants, respectively (except so far as the same may be forfeited under the law by reason of the other facts herein set forth), are as follows: [Here follows list of claims.]

"(3) That thereafter the said steamer proceeded on her voyage from the port of New York to Port Arthur, Tex., and at Port Arthur, Tex., under the direction of her owner and her master, was loaded with a cargo of oil in bulk and in barrels, consigned from Port Arthur, Tex., in part to the port of Philadelphia, and in part to the port of New York. Thereafter in due course the said steamer proceeded under the command of her master to the port of Philadelphia, and there discharged that part of her cargo consigned to said port, and upon the discharge of the same proceeded under the command of her master to the port of New York, where she discharged the remaining part of her cargo. The total cargo consisted of 1,244,575 gallons in bulk and 696 barrels, of which 994,720 gallons and 300 barrels were delivered in Philadelphia, and 251,257 gallons and 396 barrels were delivered in New York.

"(4) That at the port of Philadelphia the libelants on December 27, 1905, being the time set forth above as fixing the completion of their term of service, left the said steamer without the consent and against the orders of her master and officers, and did not further perform service on board of her. The said action of the libelants was entered at the time as a desertion in the log-book of the said steamer.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(5) If the court be of opinion that the libelants were entitled under the facts above stated to leave the said steamer and their employment at the port of Philadelphia, then a decree shall be entered in favor of the libelants for the sums respectively set opposite their names above, with interest and costs; but if the court shall be of opinion that under the facts above stated the libelants were not justified in leaving the said steamer and their employment at the port of Philadelphia, and that their conduct in doing so amounted to desertion of the said steamer, and that therefore by reason of the provisions of said shipping articles, or by reason of the laws of the United States and this court, the libelants have forfeited their wages, then a decree shall be entered for the respondent dismissing the said libel, with the costs."

The relevant provisions of the shipping articles are as follows:

"We, the undersigned, crew of the steamship Larimer, * * * now bound from the port of New York to Port Arthur, Tex., and back to a final port of discharge north of Hatteras; and, if so desired by the master ——— other voyages completing ——— voyage, with liberty to call at intermediate ports, do agree that, in consideration of the monthly wages against the name of each member of the crew hereunder set, they severally shall and will perform the above-mentioned voyage or voyages. * * * And it is further agreed that in case of desertion * * * the wages are to cease. * * * And it is further agreed that none of the crew shall demand or be entitled to his wages, or any part thereof, until the completion of this agreement."

The question for decision is whether, under these articles and the stipulated facts, Philadelphia or New York was the "final port of discharge." As it seems to me, only one answer can properly be given. Philadelphia was in fact the first port of discharge, not the final port; and the articles not only contain nothing to override this fact—as by forbidding the ship to have more than one port of discharge—but there is a positive provision that she is to have "liberty to call at intermediate ports." The port of final discharge means, I think, the port at which the vessel is completely relieved of her cargo and thus becomes ready for another venture; and the phrase seems to imply clearly that there may be other ports of prior and partial discharge. This construction accords with the purpose of hiring seamen for a voyage, and not for a specified time. They are to serve the ship until the object of the voyage is accomplished, namely, the carriage and unloading of the cargo; and this object is not accomplished until all of the cargo has been taken out of her holds and put on shore. Of course, the terms of a particular agreement may modify this rule, and extreme cases may arise in which it would be inequitable to enforce it strictly; but in a case such as is now presented, where the cargo was partially discharged at one port, while a considerable fraction remained for discharge at another port, and no question of the ship's good faith is involved, I think that the second port must be regarded as within the articles. In *United States v. Barker*, Fed. Cas. No. 14,516, Mr. Justice Story, sitting at circuit, had occasion to construe the words in question, and he instructed the jury as follows:

"The fact that the destination was by the original instructions of the owner to Boston does not necessarily make it the port of discharge. 'Port of destination' and 'port of discharge' are not equivalent phrases. To constitute a port of destination a port of discharge, some goods must be unladen there, or some act done to terminate the voyage there. But here the words are 'final port of discharge,' so that the owner had a right to order the ship from port to port, until there was a final discharge of the whole cargo."

See, also, *Moore v. Taylor*, 1 A. & E. 25 (28 E. C. L. 22); 9 Am. & Eng. Enc. of Law (2d Ed.) 464; 19 Am. & Eng. Enc. of Law (2d Ed.) 974 (e).

In my opinion, therefore, the seamen were not justified in quitting the vessel at Philadelphia, and accordingly their libel must be dismissed, with costs.

AMERICAN NAT. BANK OF WASHINGTON v. TAPPAN et al.

(Circuit Court, D. Massachusetts. November 30, 1909.)

No. 621.

1. COURTS (§ 307*)—JURISDICTION OF FEDERAL COURTS—SUIT BY NATIONAL BANK.

Act July 12, 1882, c. 290, § 4, 22 Stat. 163 (U. S. Comp. St. 1901, p. 3458), which provides that jurisdiction for suits by or against national banks shall be the same as for suits by or against banks not national doing business in the same place, deprives the federal courts of jurisdiction of suits by or against national banks by reason of their national incorporation, leaving such jurisdiction dependent on diversity of citizenship alone, unless a federal question is otherwise involved; and under Act March 3, 1887, c. 373, § 4, 24 Stat. 554, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 436 (U. S. Comp. St. 1901, p. 514), which makes the citizenship of such banks for jurisdictional purposes dependent upon their location, a federal court in a state is without jurisdiction of a suit by a national bank of the District of Columbia against a citizen of such state on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 307.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. COURTS (§ 279*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—PLEADING.

A federal question, which will give a federal court jurisdiction of a suit, is not presented merely because in the course of the proceedings reference may be had to some federal statute; but it must be shown by the pleadings that there is a controversy concerning the meaning or application of the statute.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 279.*]

Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co.*, 35 C. C. A. 7.]

Action by the American National Bank of Washington against Fannie N. Tappan and trustee. On plea to jurisdiction. Plea sustained.

Barker & Stanton, for plaintiff.

Frank I. Babcock (Edward S. Goulston and Leopold M. Goulston, specially), for defendants.

LOWELL, Circuit Judge. The plaintiff, a national bank, doing business in the District of Columbia, brought an action in this court against the defendant, a citizen of Massachusetts. The defendant appeared specially and pleaded to the jurisdiction of the court. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff has argued in support of the court's jurisdiction on two grounds:

First. That this court has jurisdiction of suits brought by a national bank doing business in the District of Columbia, inasmuch as the plaintiff is a federal corporation, entitled as such to sue in the federal courts. In the absence of statutory prohibition, any corporation created by the authority of the United States can, by virtue of its incorporation, maintain suit in the appropriate federal court. But Act July 12, 1882, c. 290, § 4, 22 Stat. 163 (U. S. Comp. St. 1901, p. 3458), provided:

"That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suits may be begun."

This provision of law, which applied to all national banks, including those doing business in the District, in effect deprived this court of its jurisdiction by reason of the national incorporation of any bank. Under that statute, or otherwise, this court could have no jurisdiction of the case at bar by reason of diversity of citizenship, for a bank not national incorporated in the District could not maintain an action on that ground.

Act March 3, 1887, c. 373, § 4, 24 Stat. 554, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 436 (U. S. Comp. St. 1901, p. 514), provides:

"That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state."

The statute of 1887 is said to be "similar in its terms to that of 1882." *Ex parte Jones*, 164 U. S. 691, 693, 17 Sup. Ct. 222, 41 L. Ed. 601. It does not mention national banks located in a territory or in the District of Columbia. Jurisdiction by reason of their incorporation had been abolished by the statute of 1882, and there is nothing in the statute of 1887-88 to revive it. For the purpose of bringing suit in the federal courts, the two statutes, taken together, make the citizenship of a national bank to depend upon its location. For that purpose, therefore, the plaintiff's citizenship must be deemed to be in the District of Columbia, and this court is without jurisdiction, on the ground of diversity of citizenship, of suits brought by any citizen of the District against the citizen of any state. This the plaintiff admits, but contends that, inasmuch as the statute of 1887-88 does not directly apply to a national bank incorporated in the District, therefore this court must be deemed to have jurisdiction of suits brought by such a bank on the ground of its national incorporation. The contention appears to me untenable. The statute of 1887 may not deprive a bank located in the District of any right of access to the federal courts which it had enjoyed before the passage of the statute,

but it cannot be taken to give back to the plaintiff a right which had been taken away from it by the statute of 1882, and which by the statute of 1887 was denied to the vast majority of national banks. I can find in the statute of 1887 no trace of an intention to permit national banks located in the District and in the territories to have recourse to the federal courts merely by reason of their federal incorporation.

Second. The plaintiff argues for jurisdiction on the ground that a federal question is involved. The plaintiff has declared on a guaranty of indebtedness alleged to have been made by the defendant. The federal laws and statutes are not brought into controversy further than that the contract may be deemed to have been entered into in view of the laws in force in the District. That there is any controversy concerning the meaning or application of these statutes and laws is nowhere suggested. A federal question is not presented merely because in the course of the proceedings reference may be had to some federal statute. There must be shown a controversy concerning the meaning or application of the statute to give this court jurisdiction. If the plaintiff were right, a citizen of the District, alleging an assault made upon him in Washington by a citizen of Massachusetts, might sue for the personal injury in this court, on the ground that the law of the District defining assault and battery must be taken to control.

HOBART v. HALL et al.

(Circuit Court, D. Minnesota, Fourth Division. August 31, 1909.)

1. NAVIGABLE WATERS (§ 39*)—RIPARIAN RIGHTS—TITLE AND RIGHTS.

Grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the lands lie.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 239; Dec. Dig. § 39.*]

2. NAVIGABLE WATERS (§ 36*)—LANDS UNDER WATER—OWNERSHIP BY STATE.

Under the law of Minnesota, the state has no proprietary title to the bed of the Mississippi river or other navigable streams or lakes within the state below low-water mark; but such title as it has is sovereign only, held in trust for the protection of the public right of navigation and incapable of alienation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.*]

3. NAVIGABLE WATERS (§§ 37, 42*)—RIPARIAN RIGHTS—TITLE TO LANDS UNDER WATER.

A grantee from the United States of land in Minnesota bounded by a stream navigable in fact, like the Mississippi river, where there is no reservation, takes the absolute title in fee to high-water mark, or at furthest to low-water mark, and also a right or title to the land under water between such boundary and the middle thread of the stream, which is proprietary and exclusive as to all others than the state or the general government, and as to them except as they may exercise their sovereign ownership for protecting or improving the public right of navigation. The riparian owner or his grantee has the exclusive right to reclaim, occupy, and use for any purpose not inconsistent with such public right such land

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

under water or any island or part thereof between his shore line and the middle thread of the stream, whether such island existed at the time of the survey and was omitted therefrom in good faith and without palpable mistake, or was afterward formed by the gradual action of the waters.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. §§ 37, 42.*]

Action by Corinna L. Hobart against P. M. Hall and the City of Minneapolis. Judgment for plaintiff.

The above-entitled cause came on for trial without a jury, a jury having been expressly waived by the parties, on the 2d day of March, A. D. 1909, at the courtroom in the federal building in the city of Minneapolis in said district. The plaintiff appeared by her attorney, Frederick W. Reed, Esq.; the defendants by their attorneys, Frank Healy, Esq., Albert C. Finney, Esq., and Geo. W. Armstrong, Esq.

The court having heard the evidence and arguments of counsel, and having read the briefs filed, and having duly considered the same, and the pleadings herein, now makes and files the following findings of fact and conclusions of law:

Findings of Fact.

1. That at the time of the commencement of this action plaintiff was, and ever since has been, a resident and citizen of the state of Illinois. That defendant city of Minneapolis is a municipal corporation, duly organized under the laws of the state of Minnesota. That at the time of the commencement of this action each defendant was, and ever since has been, a citizen of the state of Minnesota, and a resident of the Fourth division of the district of Minnesota. That the amount in controversy herein, exclusive of interest and costs, exceeds the sum of \$2,000.

2. That the United States in 1847 duly made a survey of that part of section 15, township 29, range 24, in what is now Hennepin county, state of Minnesota, lying on the easterly side of the Mississippi river, and by patent dated March 24, 1849, and recorded in the office of the register of deeds of Hennepin county, Minn., September 10, 1858, in Book M of Deeds, on page 338, duly conveyed to Pierre Bottineau lot 3 of said section. That in 1853 said United States duly made another survey, completing the survey of said entire section 15 on both sides of said river and including said river. That plats of both of said surveys were duly made and filed. That said Pierre Bottineau thereafter duly platted a portion of said lot 3 as "Bottineau's addition," which plat was duly recorded in the office of the register of deeds of said Hennepin county, in Book A of Plats, on page 4, and in Book 23 of Plats, on page 19. That through mesne conveyances the plaintiff herein, on April 1, 1896, became, and ever since has been, the owner in fee of that part of said Bottineau's addition known as "Boom Landing," and more particularly described as follows, to wit: Commencing at the intersection of the northeasterly line of lot 5 in Auditor's subdivision No. 44 in Hennepin county, Minn., produced, and the northwesterly line of Eighth avenue northeast; thence north, 60 degrees west, to a point 12.66 chains north, 60 degrees west, from the most easterly corner of said lot 5; thence south 14 degrees west to the Mississippi river; thence southerly along said river to said northwesterly line of said Eighth avenue northeast produced; thence northeasterly along said line to the place of beginning, together with all riparian rights in and attached to said premises, between the shore line thereof and the middle thread of said river. That said premises are on the easterly side of the Mississippi river, in the city of Minneapolis, just north of the easterly end of Plymouth avenue bridge, which crosses said river from the westerly end of Eighth avenue northeast to the easterly end of Plymouth avenue.

3. That said plats of said surveys of 1847 and 1853 show said lot 3 meandered on the Mississippi river and show said river as the boundary thereof on the southwesterly side thereof. That the plat of said Bottineau's addition shows said Boom Landing as bounded on the southwesterly side by the said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

river, and said river is the boundary thereof on the southwesterly side thereof.

4. That at the time said surveys in 1847 and 1853 were made and said plats filed there was no island in the Mississippi river between plaintiff's above-described premises and the west shore of said river, and no island was shown on either of said plats.

5. That about the year 1875, or a little prior thereto, there began to appear above the surface of the water in the river opposite plaintiff's premises, at several different points, separated from each other by stretches of water, the island, afterwards known as "Hall's Island," the title and right to the possession of a portion of which is here in controversy. That when this island first began to appear it was, at these several different points, above the surface of the water at ordinary low stages thereof, and at ordinary high stages it was entirely submerged. That by gradual deposits of earth and sand and other material from the water of the river the exposed portions of said island grew gradually in area, extent, and height, so that in a few years the detached portions thereof became connected together in one continuous island, which island showed continuously thereafter above the water at all ordinary stages except extreme high water during the spring freshets. That the growth of said island continued in like manner until the year 1902 (in which year the patent from the state to defendant Hall hereinafter referred to was issued), at which time it was more or less covered with willows, brush, and cottonwood trees, and was about $1\frac{1}{2}$ acres in extent. That this island was formed, by gradual deposits on the bed of the river of earth and sand and other material from the water thereof, at and about a line of boom piers which had been placed in the river at a distance of about 200 feet from plaintiff's shore line, and where the water was about 8 or 10 feet deep, which piers had been put in for the purpose of attaching booms thereto to hold and control logs coming down the river. That said island was formed on the east side of the middle thread of the said Mississippi river, and the main navigable channel of said river has since the formation of said island always been on the west side thereof; said island lying between said main navigable channel and plaintiff's shore line. That the width of the open navigable channel of said river on the west side of said island is about 600 feet, and the depth thereof for a large part of said distance is from 10 to 15 feet. That while said island at the time of its formation as above set forth was, and ever since has been, separated from plaintiff's shore line by the water of the river for a distance of from about 75 to about 200 feet, said water, or channel, if it may be called a "channel," varying in width at different points between said limits, the bottom of said channel has been gradually filling up with earth and sand and other material from the water of the river, so that the depth of the water therein was, at times of ordinary low water, in the year 1902 and for some years prior thereto, only about 2 feet at any point from the shore of the island to the shore of the mainland at the shallowest part thereof, and about from 3 to 5 or 6 feet at the deepest part thereof, and in the year 1908 only from about $1\frac{1}{2}$ to about 2 feet at the shallowest part, and from about 3 to 4 feet at the deepest part, except where the same had been artificially deepened.

6. That in the year 1902 the auditor, or land commissioner, of the state of Minnesota, caused a survey to be made of said island, and thereafter, on the 13th day of November, 1902, there was, for a valuable consideration, issued to defendant Hall a patent from the state of Minnesota purporting to convey said island to said defendant Hall as swamp land; said island being described in said patent as lot No. 9 of the state subdivision of section 15, in township 29 north of range No. 24 west of the Fourth principal meridian, containing .80 of an acre, more or less, according to state survey, and situated in the county of Hennepin and state of Minnesota according to the official plats of the surveys of the said lands, on file in the state land office, which patent was duly recorded in the office of the commissioner of state lands in Patent Record A, Swamp Land, on page 1, and in the office of the register of deeds of Hennepin county, Minn., in Book 575 of Deeds, p. 15. That no patent from the United States to the state of Minnesota was ever issued for said island, nor was there ever any swamp land selection list of lands filed showing said island.

7. That thereafter, on the 14th day of November, 1902, the defendant P. M. Hall and Anna C. Hall, his wife, for a valuable consideration, duly made, exe-

cuted, and delivered to the defendant city of Minneapolis a deed purporting to convey said island to said defendant city of Minneapolis, in trust, however, as expressed in said deed, "for the use and purpose, and upon the terms, conditions, reservations, and agreements herein set forth and declared, to wit: For the location and operation of a public crematory for the destruction of garbage, refuse, and other waste matter of the city of Minneapolis. And if at any time hereafter said premises shall not be, or shall cease to be used for the purpose above specified, or are diverted to other uses and purposes, then and in that event said premises and all additions, extensions, and accretions thereto shall revert to, and shall be and become the property of the grantors herein, and of their heirs and assigns"—which said deed was duly recorded in the office of the register of deeds of Hennepin county, Minn., on the 27th day of November, 1903, in Book 575 of Deeds, p. 16. That thereafter, on the 4th day of June, 1906, said defendant P. M. Hall and Anna C. Hall, his wife, for a valuable consideration, duly made, executed, and delivered to the defendant city of Minneapolis another deed purporting to convey said island to the said defendant city of Minneapolis, in trust, however, as expressed in said deed, "for the uses and purposes, and upon the terms, conditions, and agreements herein set forth and declared, to wit: For public municipal purposes only. And if at any time hereafter said premises shall cease to be used for public municipal purposes, or are diverted to other uses and purposes, then and in that event, said premises and all additions, extensions, and accretions thereto shall revert to, and shall be and become the property of the grantors herein and of their heirs and assigns"—which said deed was duly recorded in the office of the register of deeds in and for Hennepin county, Minn., on the 24th day of November, 1906, in Book 615 of Deeds, p. 488.

8. That thereafter the defendant city of Minneapolis took possession of said island and made and constructed large and valuable improvements thereon, using the same as a public park, and the channel on the east side thereof as a public swimming pool in the summer months, and as a public skating rink in the winter months.

9. That on November 26, 1903, and before said defendant city of Minneapolis had taken possession of the said island and made the said improvements thereon, plaintiff caused a written notice to be duly served on defendant city of Minneapolis, which is in words and figures following, to wit:

"To the Honorable the City Council of the City of Minneapolis:

"Notice is hereby given: That Corinna L. Hobart is the owner in fee and in actual possession of the following described premises situated in the city of Minneapolis, Hennepin county, Minnesota, to wit: Commencing at the intersection of northeasterly line lot 5, Auditor's subdivision No. 44, Hennepin county, Minnesota, produced, and the northwesterly line of Eighth avenue northeast; thence north 60 degrees west, to a point 12.61 chains north, 60 degrees west, from most easterly corner of said lot 5; thence south 14 degrees west, to Mississippi river; thence southerly along river to northwesterly line of said Eighth avenue northeast; thence northeasterly to beginning, section 13, township 29, range 24. And that said Corinna L. Hobart, by virtue of her ownership of said tract of land and of the riparian rights incident thereto claims title to and right to the exclusive possession of all accretions to said tract formed along the bank or shore of said river, whether contiguous to said tract or detached therefrom, and whether a part of the mainland or islands adjacent thereto, lying and being between said tract and the main navigable channel of the river, and included between the lines extending out to the middle thread thereof respectively from the most northerly and southerly points of, said tract on the bank or shore of said river at right angles to said shore. And whereas, said Corinna L. Hobart is informed and believes that the city of Minneapolis claims some right or interest in or title to a portion of the premises above described, to wit, the island commonly known as "Hall's Island," a large portion of which is included between the lines defining the premises claimed by said Corinna L. Hobart as above set forth; and that said city of Minneapolis proposes to take possession thereof and appropriate the same to its own use, thus trespassing upon and violating the said rights of said Corinna L. Hobart therein: Now, therefore, notice is hereby given that said Corinna L. Hobart claims title to and the right to the exclusive possession of

all that portion of said island included within the lines as above set forth, and that she will hold the said city of Minneapolis liable for any infringement of or interference with her rights in said island.

"Corinna L. Hobart, by W. H. Bennett, Her Attorney.

"Dated November 26, 1903.

"Koon, Whelan & Bennett and R. D. Taylor, Attorneys and of Counsel for Corinna L. Hobart."

10. That after said notice was so served upon defendant city of Minneapolis it was by said defendant city turned over to said defendant P. M. Hall, who was the then health officer of said city, and from and after said November 26, 1903, both defendants had full notice and knowledge of the rights and title which said plaintiff then claimed, and in this action claims, in said island.

Conclusions of Law.

1. That the plaintiff is the owner in fee simple absolute and entitled to the immediate possession of all that portion of lot 3 in section 15, township 29, range 24, Hennepin county, Minn., commonly known as "Boom Landing," lying north of Eighth avenue northeast in the city of Minneapolis, Minn., as shown on the plat of Bottineau's addition on record in the office of the register of deeds of said county, and more particularly described as follows: Commencing at the intersection of the northeasterly line of lot 5 in Auditor's subdivision No. 44 in Hennepin county, Minn., produced, and the northwesterly line of Eighth avenue northeast; thence north 60 degrees west to a point 12.66 chains north 60 degrees west from the most easterly corner of said lot 5; thence south 14 degrees west to the Mississippi river; thence southerly along said river to said northeasterly line of said Eighth avenue northeast produced; thence northeasterly along said line to the place of beginning.

2. That as such riparian owner plaintiff is the beneficial owner, and entitled to the immediate and exclusive possession and use (subject only to the paramount right and title of the state therein, or of the general government, for the purpose of protecting, preserving, and improving the public right of navigation on said river) of all that part of that certain island, known as "Hall's Island," in said river, which lies between the shore line of said above-described premises and the middle thread of said river, and between two lines drawn perpendicularly to said thread, one at the northerly and one at the southerly end of the shore line of said premises, and is therefore, as against the defendants herein, entitled to the immediate possession of said portion of said island.

3. That plaintiff is entitled to recover from defendants herein her costs and disbursements herein.

Let judgment be entered accordingly.

Frederick W. Reed, for plaintiff.

Frank Healy, Albert C. Finney, and Geo. W. Armstrong, for defendants.

MORRIS, District Judge. The question involved in this case is the right to the possession of a portion of a small island which has arisen from the bed of the Mississippi river, having been formed by gradual deposits from the water of the river subsequent to the government survey and subsequent to the issue of the patent to plaintiff's shore land. The plaintiff bases her claim to such right upon her title, derived under patent from the government and through mesne conveyances, to the land on the shore of the river opposite to which the island has been formed; the island being between the shore line and the main navigable channel of the stream. The defendant city of Minneapolis bases its claim to such right upon a patent to the island issued by the state of Minnesota, after a survey of the island by direction of the state auditor, or land commissioner, to the defendant Hall, and a deed from defendant Hall to it. The city of Minne-

apolis further contends that, even if the patent to Hall conveyed no title, still the plaintiff has no title or right of possession, and the court should leave the parties as it finds them.

Questions which might arise in this connection either by reason of gradual changes in the main navigable channel of the river, or by avulsion, are not here involved and need not be considered.

This island having risen from the bed of the stream by gradual deposits of the river, and having been at all times separated from the shore by the water of the river, it would seem to be too clear for argument that the character and extent of the title, either of the state or of the riparian owner, to such an island, must depend upon and follow the character and extent of their title to the bed of the stream on which it has been formed. If it should be found that the state has no proprietary right or title in the bed of a navigable stream, and consequently in islands arising therefrom which it can alienate, but that whatever right or title it has it holds in its sovereign capacity, as trustee for the people, for public use, and that therefore the state has no right or title in this island which it could convey to a private party, and that for that reason the defendants herein have no right or title thereto, yet this would not be decisive of the case, for the plaintiff cannot recover upon the weakness of the defendants' title, but must recover upon the strength of her own. If the plaintiff has no title or right of possession to this island, whatever may be the rights of the defendants, she cannot recover in this action.

It is now well settled beyond controversy, both by the decisions of the Supreme Court of the United States and by the decisions of the Supreme Court of the state of Minnesota, that grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the lands lie. *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; and other cases. So that the declarations of text-book writers and the decisions of other states will be of little assistance here, and a proper solution of this controversy must be found, if possible, in the decisions of the Supreme Court of Minnesota. The question therefore is: What right or title have the state and a riparian proprietor, respectively, in this state, under the decisions of its highest court, to the bed of a stream, above the flow of the tide, but navigable in fact, like the Mississippi river, or any island formed thereon, between the shore line of the riparian proprietor and the middle thread of the main navigable channel of the stream?

While this question has been clearly, fully, and finally decided, in decisions which are wholly irreconcilable, by the Supreme Courts of certain of the states, as for instance, of the states of Illinois and Mississippi and of the states of Iowa and Missouri, the former holding that the ownership in fee of the bed of the stream to the middle thread thereof is in the riparian proprietor, subject to the public easement, and the latter that the ownership of the riparian proprie-

tor stops at the water's edge, and that the full, complete, and absolute ownership in fee of the bed is in the state (*Hardin v. Jordan*, supra), the decisions bearing upon it in Minnesota are not altogether clear and satisfactory, but are somewhat confusing. I think, however, that the error into which the court fell in *St. Paul*, etc., *R. Co. v. First Division*, etc., *R. Co.*, hereinafter cited, in its interpretation of the decisions of the Supreme Court of the United States in *Railroad Co. v. Schurmeier*, 7 Wall. 272, 19 L. Ed. 74, as to that court's construction of the United States statutes in reference to the survey and sale of the public lands, and the limitations imposed thereby in grants of the government in patents to lands upon navigable streams (*Lamprey v. State*, supra), has for a long time dwelt with it, and has, to some extent at least, produced the seeming confusion; and, bearing this in mind, I think I have been able to determine correctly from its decisions what the definite and final holding of the court is.

In *Schurmeier v. St. Paul & Pac. R. Co.*, 10 Minn. 82 (Gil. 59), 88 Am. Dec. 59, the first case in which the question here under consideration was discussed, the action was brought to enjoin the defendants from constructing and using a railroad along the levee, or landing, on the Mississippi river in the city of St. Paul in front of lots of the plaintiff, fronting, according to the plat of said city, on said levee, or landing. In 1849 Lewis Roberts purchased and received from the government a patent for certain government subdivisions fronting on the Mississippi river and platted the same as the town of St. Paul; plaintiff's town lots being a part of said plat and of said government subdivisions. The plat extended to the main channel of the river. A strip of land along the Mississippi river, extending to the main channel, was designated on the plat as "Landing." The government survey of these subdivisions was made and the map thereof filed in 1847. The map of the survey did not indicate the existence of any island in the river opposite the lot in which plaintiff's premises were situated, but showed a clear, open river. There was, in fact, in the river opposite said lot, and outside of the meander line of the bank of the Mississippi river, as shown by said map, a small island, which in high water was covered with water. At a medium stage of the water the island was above water, and between it and the mainland there was a current, or flow of water. At low water there was no current and very little water; such as there was standing in pools. In 1856 the government caused this island to be surveyed and designated on the map, "Island No. 11." Prior to this the city of St. Paul had established the grade for and graded the levee so as to include the island, filling in between it and the mainland. The plaintiff, who derived title from Roberts to his town lots, which fronted on the levee, constructed a warehouse on them, according to the grade of the levee as so established. The defendant railroad company, claiming under Act Cong. March 3, 1857, c. 99, 11 Stat. 195, granting lands to the territory of Minnesota to aid in the construction of certain railroads therein, and so forth, and Act Cong. Aug. 4, 1852, c. 80, 10 Stat. 28, to grant right of way to rail and plank roads through public lands of the United States, and other acts of Congress, and

of the territorial and state Legislatures, to carry such acts of Congress into effect, entered in 1862 upon that part of the levee which included said island and the space between it and the mainland, to construct along the same its railroad tracks, raising the grade for that purpose so as to obstruct plaintiff's use of his warehouse in connection with the river. The case was tried before a referee, and judgment rendered enjoining the defendants as prayed in the complaint, and that judgment, on appeal to the Supreme Court of the state of Minnesota, was affirmed.

The court, after referring to the meander line, and the contention (which is not made or involved here) that it, and not the river, was the boundary of the government subdivisions, and holding that in such a case as the one there presented there is no such thing as a meander line separate and distinct from the line of the river, and that the meander line is not a boundary, but that the water whose body is meandered is the true boundary, whether the meander line in fact coincides with the shore or not, says:

"We think therefore that it is too clear to admit of a reasonable doubt that the river bounds this lot on one side. But this being admitted, the further question is presented whether the riparian owner takes to high-water or low-water mark, or to the middle thread of the stream. At common law, grants of land bounded on rivers above tide water carry the exclusive right and title of the grantee to the middle thread of the stream, unless an intention on the part of the grantor to stop at the edge or margin is in some manner clearly indicated, except that rivers navigable in fact are public highways, and the riparian proprietor holds subject to the public easement. In this case no intention is in any way indicated to limit the grant to the water's edge, and if the common-law rule prevails here, Roberts, by his purchase, took to the center of the river, including the land subsequently surveyed by the government, called 'Island No. 11,' and which is now claimed by the defendants. The common law of England, so far as it is applicable to our situation and government, is the law of this country in all cases in which it has not been altered or rejected by statute, or varied by local usage under the sanction of judicial decisions.

"We think, in respect to the rights of riparian owners, it is as applicable to the circumstances of the people in this country as in England. It is not true in fact, as has been alleged, that the navigability in fact of a river above the flowing of the tide is a state of things unknown to or unprovided for by it. See Hall, *Treatise De Jure Maris*, etc., pt. 1, c. 3. In its application to cases like the one under consideration it has not been varied or rejected in this state, and the few states of the Union that have repudiated it are exceptions to the general rule. (See cases cited.)

"Some—we believe most—of the authorities that deny that the riparian proprietor owns to the middle thread of the stream hold that he takes to the low-water mark. (Citing cases.) This we think would include the land claimed by the defendant, and designated 'Island No. 11.' We hold therefore that by the patent to Roberts the United States conveyed to him said 'island.'

"We think no reason can be given why the same rule should not apply to grants made by the government that are applicable to grants made by individuals. Section 9 of the act of Congress first above cited provides that all navigable rivers within the territory to be disposed of by virtue of that act shall be deemed 'to be and remain public highways.' At common law rivers navigable in fact are public highways, and the riparian owner holds subject to the public easement. This act of Congress therefore is merely a declaration or affirmance of the common law, and not a modification of it. The fact that these rivers are, and must remain, public highways, is not at all inconsistent with the view that riparian owners have the fee of the bed of the stream. *Peck v. Smith*, 1 Conn. 133 [6 Am. Dec. 216]."

The remaining portion of the opinion relates to a question not here involved.

It will be noticed that, while the holding of the court really was that the riparian proprietor of land bounded on one side by the Mississippi river takes the complete and absolute fee at least to the low-water mark, and that the land in dispute in that case, designated "Island No. 11," was included within such boundary, yet the very learned Chief Justice here declares, in clear and unmistakable language, that the navigability in fact of a river above the flowing of the tide is not a state of things unknown to or unprovided for by the common law, that under that law the riparian owner holds the fee to the middle thread of the stream, subject to the public easement, that in respect to the rights of riparian owners that law is as applicable to the circumstances of the people in this country as in England, and, by unavoidable inference, that it is the law of this state.

In *Rippe v. Chicago, D. & M. R. Co.*, 23 Minn. 18, the court says:

"Conceding that these lots abutted on the Mississippi river, a legally-declared public highway, there can be no question but that their owner possessed the riparian right of constructing thereon suitable landings and wharves for the convenience of commerce and navigation (*Dutton v. Strong*, 1 Black, 23 [17 L. Ed. 29]; *Railroad Co. v. Schurmeier*, 7 Wall. 272 [19 L. Ed. 74]), and to extend such construction out into the river to the point of navigability (*Dutton v. Strong*, 1 Black, 23 [17 L. Ed. 29])."

In *Brisbine v. Railroad Co.*, 23 Minn. 114, the court holds that the owner of a piece of land bordering on the Mississippi river, purchased from the United States, and comprising a block of land in a city, and a narrow strip between such block and the river, continues to be a riparian proprietor, though such strip has become a public street by a common-law dedication, and that, even after he has conveyed such block, describing it in his deed as extending to the street, he continues to be a riparian proprietor in respect of his ownership of the fee of that half of the street between the center thereof and the river, and that the absolute title in fee to all the land between the center line of the said street and the river at low-water mark undoubtedly remains in the plaintiff, together with all such riparian rights as follow the ownership of real estate bordering upon a navigable stream. As to these rights, the court says, at page 129:

"What these rights are, especially in regard to land acquired originally from the United States, and bordering, as this does, upon the Mississippi river, we regard as fully and correctly settled by the federal Supreme Court. *Dutton v. Strong*, 1 Black, 23 [17 L. Ed. 29]; *Railroad Co. v. Schurmeier*, 7 Wall. 272 [19 L. Ed. 74]; *Yates v. Milwaukee*, 10 Wall. 497 [19 L. Ed. 984]. According to the doctrine of these decisions, the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves, and piers, on and in front of his land, and to extend the same therefrom into the river, to the point of navigability, even though beyond low-water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, subordinate and subject only to the navigable rights of the public, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority. The rights which thus belong to him, as riparian owner of the abutting premises, were valuable property rights, of which he could not be divested without consent, except by due process of law, and, if for public purposes,

upon just compensation. *Yates v. Milwaukee*, 10 Wall. 497 [19 L. Ed. 984].

"If, as is claimed by the defendant, Water street was in fact a street lawfully dedicated to public use as such, whatever its actual width—whether occupying the whole or only part of the intervening space between the block and the river—the fee of the south or river side half thereof remained in the plaintiff, subject only to the specific easement created by the act of dedication. *Banks v. Ogden*, 2 Wall. 57 [17 L. Ed. 818]. No additional servitude could be imposed upon it against his will, except for some public purpose, and upon compensation as provided by law. The company had no right to occupy it for the purposes of its road, nor could it acquire any such right from the city of St. Paul. *Gray v. First Div. St. Paul & Pacific R. Co.*, 13 Minn. 315 [Gil. 289]; *Schurmeier v. St. Paul & Pac. R. Co.*, 10 Minn. 82 [Gil. 59, 88 Am. Dec. 59]. Being such owner in fee of this half of the street, even though no soil was left remaining between it and the river at low-water mark, he was a riparian proprietor of land bounded by a navigable stream, and certainly possessed of all the rights appurtenant to such ownership. *Banks v. Ogden*, 2 Wall. 57 [17 L. Ed. 818]; *Yates v. Milwaukee*, 10 Wall. 497 [19 L. Ed. 984]."

But in the case of *In re Minnetonka Lake Improvement Company*, 56 Minn. 513, at page 520, 58 N. W. 295, 296, 45 Am. St. Rep. 494, the court says:

"While the title of a riparian owner on navigable or public waters extends to ordinary low-water mark, yet it is unquestionably true that his title is not absolute, except to ordinary high-water mark. As to the intervening space, the title of the riparian owner is qualified or limited by the public right. The state may not only use it for purposes connected with navigation without compensation, but may protect it from any use of it, even by the owner of the land, that would interfere with navigation."

So that it would now appear that under Minnesota decisions the absolute title in fee of the riparian owner extends only to ordinary high-water mark.

In *St. Paul, etc., Ry. Co. v. First Division, etc., R. Co.*, 26 Minn. 31, 49 N. W. 303, the court says:

"The controversy in this case is concerning the title to a strip of land lying along the northerly shore of the Mississippi river at St. Paul, and opposite lot 1, section 5, town 28, range 22, and lots 3 and 4, section 32, town 29, range 22. Lot 1 was conveyed by patent to Louis Robert, March 24, 1849, and lots 3 and 4 to Norman W. Kittson, the same date. The surveys were made in 1848, and approved, and the official plats of the townships were, of course, at the date of the patents, on file in the land office of the district. In 1852 the strip in question was, pursuant to instructions from the General Land Office, surveyed as an island, and inserted upon the plats as lot 3, section 5, and lot 5 of section 32 above, and April 7, 1855, was conveyed by patent to John M. Lamb. Under the latter, this plaintiff claims title; the defendants under Robert and Kittson. Lot 1, section 5, and lots 3 and 4, section 32, abut, according to the official plat, on the river. The plaintiff claims, as a fact, that at the date of the patents to Robert and Kittson the strip in controversy was an island, surrounded at all stages of water by the waters of the river, with a channel and current between it and the main shore. The defendants claim, as a fact, that it was then a part of the main shore, although in high water entirely, and in medium and low water partly, separated from it by a slough, into which the waters of the river flowed. As a question of law, the defendants claim that the rule of the common law that the grantee, in a grant bounded generally upon a nonnavigable stream, takes to the middle of the stream, is in this state applicable to the Mississippi river and its tributaries, they being 'nonnavigable' in the common-law sense of the term as applied in the construction of grants, and that this rule controls in the construction of patents of the public lands issued by the general government, as well as to conveyances between private persons. The plaintiff claims that

the patentee of a governmental subdivision, bordering on a stream navigable in fact, takes only to the meandered line, or, at most, that he takes only to low-water mark. On the trial below, the parties having given evidence of their respective claims as to the fact, and rested, the court held that the patentees, Robert and Kittson, took, under their patents, to the middle line of the river, and directed a verdict for the defendants. From an order denying a new trial, this appeal is taken.

"This court, in *Schurmeier v. St. Paul & Pacific R. Co.*, 10 Minn. 82 [Gil. 59, 88 Am. Dec. 59], decided that the meander lines of governmental subdivisions, bordering on navigable rivers, do not limit the grant in a patent; and this decision was affirmed by the Supreme Court of the United States in the same case. *Railroad Co. v. Schurmeier*, 7 Wall. 272 [19 L. Ed. 74]. The question is therefore set at rest. In the same case, this court held that the common-law rule as to the construction of grants of land bordering on streams is in force in this state, and is applicable to patents or grants of the public lands by the general government. But patents and grants by the general government may be controlled in this respect, as in others, by the acts of Congress regulating the survey and sale of the public lands; and, in the case we have cited, the Supreme Court of the United States decided that, under the various acts of Congress providing for the survey and sale of the public lands, the title of the patentee of lands bordering on streams navigable in fact stops at the stream, and that the title to the beds of such streams is reserved to the government. This, being a construction of statutes of the United States by the court of last resort, is binding, and settles the rule applicable to patents of the public lands by the general government, issued pursuant to the statutes referred to. The court below was therefore wrong in its reason for directing a verdict.

"It remains to be considered whether, aside from this reason, the defendants were entitled to a verdict. The record contains copies of the official plats of section 5, town 28, and section 32, town 29. Upon these plats the Mississippi river through or opposite these sections is delineated. The plats show no island in that part of the river, no land between which and the mainland any channel runs. From them it appears that the lots granted to Robert and Kittson extend to the body of the river, the main stream. By the survey, as shown on the plats, the strip in question was surveyed, not as an island, but a part of the mainland, and included in those lots. After the government has sold lands according to a survey and plat, it cannot (as a general rule, at least) dispute the truth of such survey and plat. *Bates v. Illinois Central R. Co.*, 1 Black, 204 [17 L. Ed. 158]; *Lindsey v. Hawes*, 2 Black, 554 [17 L. Ed. 265]; *Railroad Co. v. Schurmeier*, 7 Wall. 272 [19 L. Ed. 74]. If there can be any case in which, after a sale of the lands, the government may question the accuracy of the survey and plat by which it sold, it is not such a case as this.

"There is nothing to call in question the good faith towards the government of the surveyors who made the first survey. The testimony makes it doubtful whether, at the time of that survey, the strip in controversy was an island or part of the mainland. In such case, the surveyors may determine, to the best of their judgment, whether such strip should be surveyed as an island or a part of the mainland; and if their survey is approved, and the land sold according to it, the government is bound by their action. This being so, the title to the strip in question passed under the patents to Robert and Kittson, and, as a consequence, the subsequent survey and platting of it as an island was unauthorized, and the patent issued to Lamb, pursuant to it, passed no title. For the same reason, the proceedings of the officers of the land office, upon Lamb's application to pre-empt under the subsequent survey, which plaintiff offered to prove, were null. Those officers could have no jurisdiction to determine anything in relation to lands which the United States had already conveyed."

It will be noted that the court here says that it held, in the *Schurmeier Case*, that the common-law rule as to the construction of grants of land bordering on streams is in force in this state, and is applicable

to patents or grants of the public lands by the general government. But it here assumes (and here is the error heretofore referred to) that the Supreme Court of the United States had construed the acts of Congress regulating the survey and sale of the public lands as restricting the title of the patentee of lands bordering on streams navigable in fact to the edge of the stream, and had held that by virtue of those acts the title to the beds of such streams is reserved to the government. But not only has the Supreme Court of the United States repudiated any such construction of the acts of Congress, and the holding resulting therefrom as supposed by the Minnesota Supreme Court (*Barney v. Keokuk*, *supra*; *Hardin v. Jordan*, *supra*), but the Supreme Court of Minnesota has also repudiated it (*Lamprey v. State*, *supra*). So that it would now seem that, if Judge Wilson was correct in his statement of the common-law rule in the *Schurmeier Case*, the trial court in this case was right, not only in its conclusion, but in the reason it gave therefor.

It is difficult to tell from the opinion (the paper book is not at hand) whether the strip or island there in controversy was within or outside of the meander line as surveyed by the government surveyor, and whether or not the court meant to hold that, where there is a small island in the river opposite the shore land and between it and the middle thread of the main channel of the river, which the surveyor might, and did, in good faith, omit from the survey, deeming it so inconsiderable (a negligible fraction) that it was unnecessary to survey it, the island would be considered a part of the mainland and included in the survey thereof, and would pass by the grant in the patent to the owner of the shore lying opposite to it by virtue of his riparian ownership and as appurtenant thereto; but it would seem from the dissenting opinion by Judge Berry that this was intended to be the holding. And if it be the law in this state that such small unsurveyed island, existing at the time of the survey and situated between the shore and the middle thread of the main channel of the river, would pass to and be the property of the patentee of the adjacent shore land by virtue of this riparian proprietorship, the question at once suggests itself: Would not an island formed subsequent to the survey by deposits of the stream in a similar locality become his property by virtue of such proprietorship? In the latter case at least, however, it would seem, from the doctrine announced by Judge Wilson in the *Schurmeier Case*, and from what has been said by the court in subsequent cases, that his ownership would be subject to the public easement; that is, subordinate and subject only to the navigable rights of the public, and such action as might be taken, or such needful rules and regulations as might be prescribed, by the state, or by the general government if the stream could be used for purposes of interstate commerce, by competent legislative authority, for the protection, preservation, and improvement of such rights. *Brisbine v. Railroad Co.*, *supra*.

In the case of *Morrill v. St. Anthony Falls Water Power Co.*, 26 Minn. 222, 2 N. W. 842, 37 Am. Rep. 399, the only question involved was as to the uses which a riparian owner may make of the water of the stream flowing past his land. That question is not involved here,

but there are certain portions of the opinion which bear upon the question here. At page 228 of 26 Minn., page 846 of 2 N. W. (37 Am. Rep. 399), the court says:

"Dutton v. Strong, 1 Black, 23 [17 L. Ed. 29], affirmed the right of a riparian owner on a navigable lake to build and maintain, for his own exclusive use and benefit, a pier into the lake as far as the point of navigability. The right to encroach upon the shallow water of the lake, by an exclusive appropriation even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right.

"As it seems to us, none of these opinions state the right too strongly. If the right exists *jure naturæ*, because the land has, by nature, the advantage of being washed by the stream, it is impossible to see how any such distinction as defendant claims can be made as to the peculiar uses which the riparian owner may make of the waters. The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right.

"It is now settled by the decisions of the court of last resort that, under the acts of Congress providing for the survey and sale of the public lands, the patentees of lands bordering on the Mississippi river and its tributaries take only to the stream—at farthest, to low-water mark—leaving the title to the bed of the stream below low-water mark in the government. Those streams, below low-water mark, stand therefore, in respect to the rights of the government and individuals in them, the same as tidal rivers. The rights of riparian owners are the same in both."

It will be noticed that the error above referred to, into which the court fell in *St. Paul, etc., R. Co. v. First Division, etc., R. Co.*, *supra*, still remains with it in the clause above quoted, wherein it declares that it is now settled by the decisions of the court of last resort that, under the acts of Congress providing for the survey and sale of the public lands, the patentees of lands bordering on the Mississippi river and its tributaries take only to the stream—at farthest, to low-water mark—etc., and that the right of riparian owners are the same in both tidal and nontidal rivers. It will be well also to note here (because it has been repeated with approval by the court in *Hanford v. St. Paul & Duluth R. Co.*, hereinafter referred to) the declaration of the court that the right of the riparian owner to encroach upon the shallow water, by an exclusive appropriation even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the river opposite his land not inconsistent with the public right, that the limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right.

In *Union Depot, etc., Co. v. Brunswick et al.*, 31 Minn. 297, at page 301, 17 N. W. 626, at page 628, 47 Am. Rep. 789, the court says:

"In this state it is the settled doctrine that the riparian owner has the fee to low-water mark. *Schurmeier v. St. Paul & Pac. R. Co.*, 10 Minn. 82 [Gil. 59, 88 Am. Dec. 59]; *Brisbine v. St. Paul & Sioux City R. Co.*, 23 Minn. 114. But while he only has the fee to low-water mark, he has certain riparian rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low-water mark, and, to this extent, exclusively to occupy for such

and like purposes the bed of the stream, subordinate only to the paramount public right of navigation. *Dutton v. Strong*, 1 Black, 23 [17 L. Ed. 29]; *Railroad Co. v. Schurmeier*, 7 Wall. 272 [19 L. Ed. 74]; *Yates v. Milwaukee*, 10 Wall. 497 [19 L. Ed. 984], *supra*; *Rippe v. Chicago, D. & M. R. Co.*, 23 Minn. 18; *Brisbine v. St. Paul & Sioux City R. Co.*, *supra*. These riparian rights are property, and cannot be taken away without paying just compensation therefor. The state could not do it or authorize any one else to do it. *Yates v. Milwaukee*, *supra*; *Lyon v. Fishmongers' Co.*, L. R. 1 App. Cas. 662; *Brisbine v. St. Paul & Sioux City R. Co.*, *supra*.

"The term 'point of navigability,' as used in the cases referred to, is not, perhaps, capable of a fixed definition. Its meaning and application must vary with and depend upon circumstances. It is not to be understood in the narrow sense of being limited to that point where the waters of the stream may be navigable for some purposes at certain stages of water. When it is said that a riparian owner may construct landings, etc., 'to the point of navigability,' it must be understood as giving him the right to do so to the extent necessary to make his abutting property reasonably available at any ordinary stage of water for any kind of navigation for which the stream is used, and for which it is adapted, provided, of course, it does not obstruct the paramount rights of the public. It must have reference not only to an ordinarily low stage of water, but also the size and kind of vessels which navigate the stream, and the kind of business done upon it. The right would be of little value if it did not permit this to be done. Neither is it material whether, in exercising these riparian rights, the property is made available and useful by building piers and landings of wood or other material, or, as is the usual, and often the only practical, way on the Mississippi and its tributaries, by reclaiming the land by artificial filling with earth out to the requisite depth of water. Whether the fee in this 'made land' would be in the state or in the riparian owner—that is, whether it partakes of the nature of the bed of the stream upon which it is made, or of the shore to which it is added—may be a question of speculative interest; but it is not one of any practical importance. If the fee be in the riparian owner, yet, of course, it must be a qualified fee; that is, subject to the paramount right of public navigation. But if it be in the state, the riparian owner still has, subject to this same public right, the exclusive right of possession and the entire beneficial interest. Hence the determination of the question one way or the other would not affect the value of the riparian owner's interest in the property, or the amount of compensation he is entitled to.

"Suppose, however, a riparian owner has unlawfully intruded into the water beyond the point of navigability, as above defined, and filled up the bed of the stream beyond that point, for the sole purpose of extending his possessions, and so as to obstruct and interfere with the public right of navigation. This would constitute a purpresture. The public would have a right to abate it as a public nuisance. It would give no rights to the person who made it. It would not forfeit or destroy his riparian rights as they existed before, but he could claim no additional rights on account of it. When it is proposed to take his property for public use by the exercise of eminent domain, he can claim no additional compensation by reason of it. * * *

"Whether, in view of the fact that the rights of the state to the stream and its bed are sovereign and not proprietary, and are held by it in trust for the public as a highway, and the further fact that Congress has, in the act authorizing a state government, expressly provided that the Mississippi river and the waters leading into the same shall be common highways and forever free to the inhabitants of the state, and all other citizens of the United States, the Legislature has the power to divert the bed of the St. Croix from the trust for which it was vested in the state, and destroy the public use of it as a public highway, is a question not here involved, and which we do not consider. It is sufficient to say that they cannot by any such grant impair or take away the riparian rights of the respondents without compensation."

Here the court declares that it is the settled doctrine in this state that the riparian owner has the fee to low-water mark, citing *Schur-*

meier v. St. Paul & Pac. Railroad Co., *supra*, and *Brisbine v. St. Paul & Sioux City Ry. Co.*, *supra*. But see, also, *In re Minnetonka Lake Improvement Co.*, *supra*. But may it not be that in this declaration the error heretofore referred to into which it fell, as to the construction placed by the Supreme Court of the United States upon the acts of Congress regulating the survey and sale of public lands, still dwells with it? And may it not be that it means to declare that the riparian owner has the absolute and unqualified fee to low-water mark, and, in view of what is further said in the opinion, may it not be that it had in mind that, but for what it supposed to be the holding of the Supreme Court of the United States in the Schurmeier Case such riparian owner would also have a qualified fee in the soil under water? The court seems to have overlooked, influenced possibly by the error above referred to, what was the real holding in the Schurmeier Case, to wit, that the riparian owner has the fee at least to low-water mark, and the very clear declaration there by Judge Wilson that under the common law the title in fee of the riparian owner extends to the middle thread of the stream, subject only to the public easement, and the inevitable inference that such is the law in this state, and that it would so have been determined in that case if necessary to support the conclusion reached. It repeats what had been said in former decisions as to the right of the riparian owner to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low-water mark, and, to this extent, exclusively to occupy for such and like purposes the bed of the stream, subordinate only to the paramount public right of navigation, and after declaring that the question whether the fee to land made by the riparian owner, in the exercise of his riparian right to make available and useful the navigable part of the stream, by reclaiming the land beyond low-water mark by artificially filling with earth out to the requisite depth of water, would be in the state or in the riparian owner, is one of speculative interest only, and not one of any practical importance, it goes on to say:

"If the fee be in the riparian owner, yet, of course, it must be a qualified fee; that is, subject to the paramount right of public navigation. But if it be in the state, the riparian owner still has, subject to this same public right, the exclusive right of possession and the entire beneficial interest."

The question at once suggests itself to the mind: If a riparian owner could reclaim the land under the water beyond low-water mark by artificially filling with earth from the shore line to the point of navigability, and would have, subject to the paramount right of public navigation, the exclusive right of possession and the entire beneficial interest in said land, could he not make, by artificially filling in, an island between his shore line and the point of navigability, and have the exclusive right of possession and the entire beneficial interest therein, subject to said paramount right? See *Hanford v. St. Paul & Duluth R. Co.*, and *Bradshaw v. Duluth Imp. Mill Co.*, hereinafter referred to. And if he would have such exclusive right of possession and entire beneficial interest in such made island, would he not also have such exclusive right of possession and such entire beneficial in-

terest in an island made by the action of the waters between his shore line and the point of navigability?

In this connection we should also bear in mind what the court says, as to the term "point of navigability," that:

"It is not to be understood in the narrow sense of being limited to that point where the waters of the stream may be navigable for some purposes at certain stages of the water. When it is said that a riparian owner may construct landings, etc., to the 'point of navigability,' it must be understood as giving him the right to do so to the extent necessary to make his abutting property reasonably available at any ordinary stage of water, for any kind of navigation for which the stream is used, and for which it is adapted, provided, of course, it does not obstruct the paramount rights of the public."

In the case of *Lake Superior Land Co. v. Emerson et al.*, 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679, the action was brought by the plaintiff to remove, from its title to the blocks of land described in the complaint and opinion, the cloud created by the execution and record of the deed of block 122, described in the opinion. The trial judge ordered judgment for the plaintiff, and upon appeal this judgment was affirmed. The Supreme Court states the facts as follows:

"In 1858 the owner of what is known as 'Rice's Point,' a point of land extending into that part of Lake Superior now called the 'Bay of Duluth,' platted the same as a town, and recorded the plat. On the plat there were delineated certain blocks, numbered 64, 75, 84, and 95. The streets separating these blocks have since been duly vacated, so that they now lie in one solid parcel of land, which is bounded on the east by the waters of the bay. At the time of the platting, said parcel as platted extended to and beyond the low-water mark, and the bay front of the parcel was then, ever since has been, and now is, under water. There were also delineated, on said plat, blocks in part of said parcel, which were, as shown on the plat, in the water beyond the low-water mark, and where the person then platting had no title to the land. Among the blocks so delineated in the water, and below the low-water mark, was one numbered 122. The said owner thereupon conveyed blocks 64, 75, 84, and 95, and plaintiff now has the title so conveyed. On the same day said owner executed to one Wilson a deed purporting to convey to him block 122, and Wilson subsequently executed to the defendants a deed purporting to convey said block to him. Plaintiff is in the actual possession of the blocks so conveyed to it."

The court then goes on to say:

"The chief question in the case is: What did the plaintiff's and the defendant's grantors respectively get by the deeds from the said owner? That owner owned the land only to low-water mark. The title to the soil beyond that, and under the water, was in the state. The only rights he could have beyond the low-water mark were certain riparian rights incident to land bordering upon a navigable stream or lake. Among these were the right to enjoy free communication between his abutting premises and the navigable waters of the lake, to build and maintain suitable landings, piers, and wharves on and in front of his land, and to extend the same therefrom into the lake to the point of navigability, even beyond low-water mark; and to this extent exclusively to occupy for such and like purposes the bed of the lake, subordinate to the public paramount right of navigation. *Brisbine v. St. Paul & Sioux City R. Co.*, 23 Minn. 114; *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626 [47 Am. Rep. 789]. These rights pertain to the use of abutting land in connection with the water, or of the water in connection with the land. The right to use beyond the low-water mark rests upon the title to the bank, and not to the bed of the water. *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248 [24 Am. Rep. 399]. It is a right peculiar to the owner of the land bordering on the lake or stream, and not possessed by others.

Morrill v. St. Anthony Falls Water Power Co., 26 Minn. 222, 2 N. W. 842 [37 Am. Rep. 399], and cases cited. The owner of the abutting land has the right to enjoy, for the purposes of gain or pleasure, all the facilities which the location of his land with reference to the lake affords. *Delaplaine v. Chicago & N. W. Ry. Co.*, 42 Wis. 214 [24 Am. Rep. 386]. It exists *jure naturæ*, because the land has, by nature, the advantage of being washed by the stream. *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662. The right is incident to the land—belongs to it by nature. We have not found any case holding that it may be severed from the right to the abutting land, so as to become a right in gross; one person owning exclusively the shore, and another the riparian right incident to it, though owning no shore. As the owner of the shore has no title to the soil under the water, he can convey nothing in the soil; and, as he cannot convey the riparian right severed from the shore, his deed of conveyance of the soil under the water must be inoperative. Undoubtedly he may release his riparian right to the owner of the soil under the water—the state, or its grantee or licensee. Perhaps he may transfer the right to the owner of shore land, in connection with which it can be used and enjoyed, though not directly abutting; but that is not this case. Riparian rights incident or appurtenant to no land cannot exist. No interest passed by the deed under which defendants claim. The grantee in that deed, and his grantees, must be presumed to have known the situation and character of what the deed purports to convey, so that no estoppel could arise by reason of it. * * *

"The act making Rice's Point, as platted, a part of the city of Duluth, cannot be construed as a transfer or surrender by the state of its title to the soil below low-water mark."

It would be difficult to find a decision in which the premises on which the conclusion is based are more clearly and emphatically stated, and, these premises being admitted or assumed, Judge Gilfillan, with that unerring logic for which he was so justly distinguished, reached the conclusion announced in the opinion. He could not reach any other conclusion. But, as will be seen hereafter, not only have the premises been abandoned by the court, but the conclusion as well; the case having been entirely overruled. And here may it not be again said that, where the court declares that the owner of the shore line has no title to the soil under the water, the error heretofore referred to, into which the court had fallen in *St. Paul, etc., R. Co. v. First Div., etc., R. Co.*, *supra*, still remained with it?

In *Miller v. Mendenhall*, 43 Minn. 95, 44 N. W. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219, the court says:

"This case involves the consideration of the riparian rights of the owners of lands abutting upon the Duluth Harbor or Bay of Superior, in the shoals or land covered by water between low-water mark and the deep or navigable waters, and within the dock or harbor line established by the authority of the Legislature. These waters are within the jurisdiction of the state and federal governments, and the state holds the title to low-water mark in its sovereign capacity, in trust for the people, for the purpose chiefly of protecting the rights of navigation. But, though the title is nominally in the state, the common right of the people is limited to what is of public use for the purposes of navigation and fishery; and the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines, after conceding to the state all the public rights. *Gould, Waters*, § 168. The right of access and communication with the navigable waters, which pertain peculiarly to the ownership of the upland, in order to be available and of practical use, necessarily includes the right to fill in and to build wharves and other structures in the shallow water in front of such land, and below low-water mark, and the exercise of such rights, though subject to state regulation, can only be interfered with for public

purposes; and such improvements are encouraged because they are in the general interest of navigation and commerce, and are a public as well as a private benefit. In *Dutton v. Strong*, 1 Black, 23, 32 [17 L. Ed. 29], it is said that: 'Wherever the water is too shoal to be navigable, there is the same necessity for such erections for lake navigation as in the bays and arms of the sea; and, where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it.' And in *Yates v. Milwaukee*, 10 Wall. 497 [19 L. Ed. 984], it is held broadly that these riparian privileges are to be treated as valuable property rights, which cannot be taken or interfered with for public use without compensation. *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626 [47 Am. Rep. 789]. And if a stranger makes a filling or an obstruction in the waters in front of his land, the owner of the adjacent upland may enjoin its continuance, or recover in trespass, if not in ejectment. * * *

"The action of the state, through the Legislature, in establishing the dock lines, is to be construed in connection with the established doctrine of riparian rights of which we have spoken, and the practical use permitted and necessarily made by riparian owners of land under water in front of the dry or upland. In *Aborn v. Smith*, 12 R. I. 370, it is said by the court that the owners of the upland are in such cases impliedly permitted to carry the upland forward to the harbor line, so that each owner will occupy the part abreast his own land. In *Gerhard v. Bridge Com'rs*, 15 R. I. 334, 5 Atl. 199, and in *Engs v. Peckham*, 11 R. I. 210, 223, 224, it is held to be a permission and invitation by the state to the riparian owner to fill out and incorporate the flats with his upland to the line. *Eldridge v. Cowell*, 4 Cal. 80. In *Fitchburg R. Co. v. Boston & Maine R. Co.*, 3 Cush. [Mass.] 58, 71, it appeared that the Legislature had established a harbor line for Boston Harbor, but prohibited the extension of the existing wharves to the line without legislative permission. Afterwards the Legislature passed an act authorizing the owners of certain wharves to extend them out to the line. This act was held to be a grant, and not a mere revocable license (page 87), and in *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51, 57, 6 N. E. 531, a legislative authority to extend wharves to the channel of a river was held equivalent to a grant of a possessory title, if not an absolute interest in the soil. In *Norfolk City v. Cooke*, 27 Grat. [Va.] 430, 438, the court treats the right to use and occupy the land within such lines with wharves, etc., as a qualified proprietary interest in the soil, sufficient to support an action for the possession. *Guy v. Hermance*, 5 Cal. 73 [63 Am. Dec. 85]; *Power v. Tazewells*, 25 Grat. [Va.] 786. But the title of the state is not extinguished by such legislative action merely. In this country the generally accepted doctrine is that the *jus privatum* passes to the owner of the adjacent lands, and in this state extends to low-water mark, with the accompanying riparian rights, while the *jus publicum* belongs to the state, which holds the title to the soil under the water as trustee. 'The sovereign is trustee for the public, and the use of navigable waters is inalienable.' 3 Kent, Comm. 427. See *Com. v. Alger*, 7 Cush. [Mass.] 53, 89, 93.

"The state is authorized to regulate the exercise of riparian rights in the interests of the public, and may also make concessions to private owners of possessory rights in the soil of navigable waters, the effect of which will be to give them private and exclusive rights equivalent to a grant. *Gould, Waters*, §§ 138-140. While the public right of navigation and fishery may not be extinguished until the waters are excluded, yet after the submerged land is filled or occupied the riparian owner will have the exclusive right of possession, and the entire beneficial interest; and whether his dominion would be absolute, and his title indefeasible as against the state, is not necessary to inquire. *Union Depot, etc., Co. v. Brunswick*, *supra*. The action of the Legislature in establishing a harbor line is to be construed as a regulation of the exercise of the riparian right. It settles the line of navigability, above which the state will not interfere, and is an implied concession of the right to build, possess, and occupy to the established line, which amounts practically to a qualified possessory title. 141 Mass. 51, 6 N. E. 531, *supra*. The importance and substantial character of these rights are recognized by the courts, and there is a growing tendency in different directions to give effect to contracts

and grants in respect to riparian occupancy and improvements. *Norfolk City v. Cooke*, 27 Grat. (Va.) 430, 436; *Parker v. West Coast Packing Co.*, 17 Or. 510, 515, 21 Pac. 822 [5 L. R. A. 61]. It is true the right of access and communication with the navigable water belongs exclusively to the riparian owner, except with his permission. But if in the case of a railway corporation he may, for a consideration, concede the right to occupy with its roadbed the land under the shore, and obstruct such communication, by a valid contract, which we presume will not be questioned, why may he not contract with natural persons to grant to them the right of possession and occupancy of building sites within the dock line for wharves or elevators, for use in connection with navigation, or such other purposes (the state not objecting), as the grantees may be advised, with right of way, if need be, over his land, or, as in this case, impliedly over streets laid over the same, as designated in the plat and dedicated to the public use? In many instances, however, such right of entry or easement of passage may be found entirely unnecessary; the occupant having other means of reaching the locus in quo. If the riparian owner may make such improvements, and afterwards grant and convey his possessory title, or contract to do so, the courts ought not to stand upon so narrow a distinction as that he may not bind himself by contract that another may have and enjoy the same possessory rights in a particular site or lot which he has in it, for his right is not a mere revocable license, though held in subordination to the public interest, and subject to some restraint for the general good as other property may be, though differently situated. *Com. v. Alger*, 7 Cush. [Mass.] 53, 95."

While in this case, as in all the *Duluth*, or *Rice's Point*, cases here-in cited (*Lake Superior Land Co. v. Emerson*; *Hanford v. St. Paul & Duluth R. Co.*; *Bradshaw v. Duluth Imperial Mill Co.*), the discussion of the rights of riparian owners is predicated upon a condition there existing by the establishment of a dock or harbor line, yet, in view of what the court here says as to the action of the Legislature in establishing a harbor line being a regulation of the exercise of the riparian right, and in farther view of what it says in the *Bradshaw Case*, which will hereafter be referred to, it is apparent that it here recognizes and declares generally: That, while the state holds the title to the bed of a navigable lake or stream below low-water mark, its ownership of the soil under the water is not proprietary but in its sovereign capacity, in trust for the people for public purposes connected with the use of the water, and chiefly for the purpose of protecting the public rights of navigation. That, though the title is nominally in the state, the common right of the people is limited to what is of public use for the purposes of navigation and fishery. That the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines—that is, below low-water mark—after conceding to the state all the public rights. That these rights and privileges are to be treated as valuable property rights which, though held in subordination to the public interest and subject to state regulation, would entitle such owner, as against a stranger who should make a filling or an obstruction in the waters in front of his land, to an injunction restraining the continuance of such filling or obstruction, or to recover in trespass, if not in ejectment. In other words, that, while the title of the state for the purpose of protecting the public rights of navigation and fishery is paramount, its ownership is not absolute or proprietary, but is a limited or qualified ownership—limited to the protection and

preservation of these public rights—and that the riparian owner has also a limited or qualified title to the soil under the water, which is proprietary, and as to all others than the state exclusive, and even as to the state in some measure proprietary.

In *Hanford v. St. Paul & Duluth Railroad Co.*, 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722, the dock line had been established subsequent to the acquisition of defendant's title, and the opinion delivered after reargument is based upon a broad consideration of the rights of riparian owners of land abutting upon navigable waters in the soil under water beyond low-water mark, and fully discusses and declares the law in this state in respect to the rights or ownership of the state and the rights or ownership of the riparian proprietors in such soil.

In the first opinion of the court, the decision in *Lake Superior Land Co. v. Emerson*, *supra*, was adhered to, and the case was decided on the doctrine there declared that the defendant, having the exclusive right to possess and use the shore, had also the right to possess and enjoy the riparian rights appurtenant to the shore, and that such rights could not be alienated or severed from the riparian land. But in the opinion delivered after the reargument the court, after referring to the *Emerson Case*, and saying that in view of the importance of the subject they had entered into a full examination and reconsideration of it, declares that it had been thus led to the conclusion that the proposition that the riparian proprietor's right of occupancy and use of lands beyond the boundary of his ownership in fee is inalienable and incapable of existence, apart from the right of occupancy and use of the adjacent bank, should not be adhered to. It then declares that it did not sufficiently consider in former decisions the peculiar nature, extent, and relation of the private and public rights, respectively, in the lands lying between the boundary of the riparian owner's fee and the point of navigability, and that undue importance had been given to the fact that these riparian rights have their origin in the relation of the riparian lands to the water, and are properly incident or appurtenant to the riparian lands. It then directs attention to the "facts," as it calls them, that those riparian rights partake largely of the ordinary qualities of private property, which is in general divisible and transferable by the proprietor, that they are of such a nature that they may be enjoyed separate from the adjacent lands to which they were originally appurtenant, and that there is an absence of substantial reasons, so far as the nature of these rights are concerned, why they may not exist independently of the adjacent riparian estate. It then says that it does not affirm that all riparian rights are thus severable, and that some, from the very nature of things, may be incapable of separate existence; but it does not indicate what these are.

The court then goes on to say (I quote at great length because I deem it necessary to a full understanding of the decision):

"In this state the title of the proprietor of lands abutting upon navigable waters extends to low-water mark; the bed of the stream or body of water below low-water mark being held by the state, not in the sense of ordinary absolute proprietorship, but in its sovereign governmental capacity, for con-

mon public use. *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626 [47 Am. Rep. 789], and cases cited. The estate or interest of the riparian owner in the bed of the stream above (*below?*) low-water mark is subject to the right of the public to use the same for the purposes of navigation; but, restricted only by that paramount public right, the riparian owner enjoys valuable proprietary privileges, among which we shall consider particularly the right to the use of the land itself for private purposes. A considerable extent of the shores, not only along tide waters of the ocean coasts, but on our great inland waters, are of such a nature, out to and even beyond low-water mark, as to be in general unavailable by the public for the purposes of navigation, and must remain forever waste and useless lands, unless reclaimed by artificial means from the shallow water covering them, or unless otherwise improved. It is established beyond question in this state, and in other states as well, that the proprietor of the riparian lands may make such improvements. Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and exclusive right to construct and maintain suitable landings, piers, and wharves into the water, and up to the point of navigability, for his own private use and benefit. (Citing cases.) And it is obviously immaterial, if the public interest be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed. (Citing cases.) As the right of private use and enjoyment of the improved or reclaimed premises will continue so long, at least, as it does not interfere with the limited and defined public interests, it is obvious that, in general, it may continue forever.

"This private right of use and enjoyment is not, we think, limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right. (Citing cases.) As was said in *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 228, 2 N. W. 842 [37 Am. Rep. 399], referring to the decision in *Dutton v. Strong*, 1 Black, 23 [17 L. Ed. 29]: 'The right to encroach upon the shallow water of the lake, by an exclusive appropriation even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right.' The following language of the *Morrill Case*, just cited, although used with reference to the riparian right to use the water of a navigable stream, is applicable here: 'The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right.' No one but the riparian proprietor has the right to improve and occupy such premises for private purposes, and it does not concern other persons how or for what particular purposes the reclaimed lands may be used, so long as there is no violation of the maxim, *sic utere tuo ut alienum non lædas*. It is for the interest of the state that such lands, not available for the public purposes for which alone the state exercises authority over them, shall be improved and used for profitable enterprises, rather than that they lie forever waste and unproductive. And the state, while recognizing the ancient riparian right of occupancy, has not assumed to prescribe or limit the purposes or manner of its enjoyment. That seems to have always been left to the discretion of the person in whom the right is exclusive, and the decided cases afford many illustrations of uses in no way connected with the purposes of navigation.

"This right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises—the right itself to reclaim, improve, or occupy—is a property right, vested in him, recognized and protected in the law as property. He cannot be deprived of it without due process of law. It cannot be taken from him, and devoted to public use, without compensation. (Citing cases.) Such property is subject to the law of eminent domain. A railroad company, locating its line of road over such submerged lands, might acquire, by condemnation proceedings and the payment of compensation, the necessary right of way, divesting the riparian owner of so much of his property. But cannot the riparian proprietor voluntarily convey, for an agreed compensation, what the company could thus take from him by legal proceedings *in invitum*? If he were to convey by deed the right to oc-

occupy exclusively for railroad purposes the premises in front of the riparian lands, would not the company acquire a right to occupy and enjoy the use of the premises, although it took no interest in the upland estate?

"These peculiar property rights of the riparian owner may constitute, estimated in connection with the riparian land, the chief value of the premises. It may even be that the whole value of such real property consists in the right to improve and occupy the submerged lands for private purposes. The extent of the riparian right in this respect is not measured by the value of the upland, nor by the distance to which the owner's estate may extend inland from the shore. The barest strip of upland, though wholly valueless and useless in itself, justifies the owner in the exercise and enjoyment of the privileges of riparian proprietorship to the fullest extent.

"If it be true, as we have said, that the riparian proprietor may improve and occupy such premises in any manner not inconsistent with the public rights, it follows that, although the origin of this peculiar private right is referable to an adjacent riparian estate to which it was originally incident or appurtenant, still its nature and qualities are not in themselves such as to forbid its alienation, its separation from the riparian estate, and its enjoyment by others than the occupants of the upland. Its enjoyment need not be in aid of or associated with the use to which the upland is devoted, or for the benefit of the upland as such. Thus it is supposed that one acquiring a mere right of way for the purpose of access over the upland to the shore may acquire the riparian owner's right to occupy and improve the waste land beyond. *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199 [49 Am. Rep. 632]. The upland may be used, and be useful, only for purposes to which the use of the adjacent submerged lands, even after reclamation, would be in no manner accessory. The upland may be owned and used exclusively for the purposes of a residence, a church, a hospital, a bank, or for any purpose wholly unconnected with the advantages incident to the adjacency of navigable water, or of the intervening waste land; and yet the proprietor might undoubtedly erect a wharf, or fill in solid earth, and allow others to use the wharf or reclaimed land. Nor would his right to allow others to use the wharf or made land, or the right of others to use it with his consent, depend upon there being also a license of access to such premises over the abutting upland. We suppose that the landowner might grant to one having no riparian possession in the vicinity the right to use his wharf, or the improved or reclaimed shorelands, for any purpose, whether connected with navigation or not, just as the owner himself might do. No individual whose rights were not prejudiced could complain, and, so long as the public rights are not interfered with, the state is not interested to oppose such use, but rather is interested to encourage and sanction it, without regard to the fact whether or not the use be associated with the use of the upland.

"It has been suggested in some cases that even though such rights cannot be wholly disconnected from riparian lands, and be enjoyed in gross, yet, if the person to whom the rights of the riparian proprietor have been relinquished has access to the premises over the next adjacent estate abutting upon the shore, he may enjoy such rights, although he has no interest in the estate to which they were previously incident (see *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199 [49 Am. Rep. 632]) and this is spoken of as being possible in *Lake Superior Land Co. v. Emerson*, 38 Minn. 407, 38 N. W. 200 [8 Am. St. Rep. 679]. But this would seem to be inconsistent with the doctrine that such rights are not severable from the riparian estate to which they are by nature appurtenant. The whole reason supporting that doctrine is the technical reason that the rights are merely incident and appurtenant to the abutting riparian land. They were not originally incident to other estates than those adjacent to and in front of which only these privileges might be exercised. The owner of a riparian estate had no peculiar privileges in the submerged land lying in front of the next adjacent estate. If it be conceded that these rights may be separated from the parent estate, and be enjoyed by the owner of the next estate abutting upon the shore, there is no room for further contention. If such separation is possible, it matters not whether the means of access and opportunities for enjoyment be through the next estate abutting upon the shore, or the next, or by means of a public highway leading to or past

the premises in question, or by the navigable water, or in any other manner. Any person who may acquire from the riparian owner his right to improve and occupy such premises may always have access to them by means of the navigable water—a common highway. He may acquire other means of access. We think that there is nothing in the matter of access which forbids the existence of these rights separate from the abutting estate.

"In some jurisdictions it is considered that the adjacent riparian owner actually acquires title to the lands improved and reclaimed from the water, although the title was before in the state in actual proprietorship, and that he may then convey the reclaimed premises to persons having no interest in the upland (as in *New Jersey*). See *New Jersey Zinc & Iron Co. v. Morris Canal Co.*, 44 N. J. Eq. 398 [15 Atl. 227, 1 L. R. A. 133]; *Goodsell v. Lawson*, 42 Md. 348, 362; *Nichols v. Lewis*, 15 Conn. 137; *Clement v. Burns*, 43 N. H. 609. We do not wish to be understood as assenting to the proposition that the title of the state may be thus transferred by acts of the riparian proprietor which the state has no particular reason at the time for opposing. It may be doubtful whether the title does not remain unchanged, and whether if, in the future, it should become necessary for the state to broaden the navigable channel so as to embrace the reclaimed land, it would not have the right to do so. However that may be, we deem these decisions to lend some support to the doctrine that the riparian right to fill and reclaim and use the submerged lands for his own private purposes is not necessarily so annexed to his proprietorship of the upland that it cannot be severed. If the right to occupy and use the premises is transferable after they have been improved by the exercise of the legal rights of the riparian proprietor, we see no sufficient reason why his legal right to improve and occupy and use the premises should not also be transferable. If it be said that in the one case he has the legal title and in the other he only has the valuable right of occupancy and improvement, with the power thereby to acquire the legal title, it may be answered that such rights are themselves ordinarily a proper subject of transfer.

"It is remarkable that so few authorities are to be found directly deciding the question of the severability of such riparian rights. The question was directly decided in *Simons v. French*, 25 Conn. 346; it being held that the right of the riparian proprietor to wharf out to navigable water, over the flats (the fee of which was in the state for the purposes of navigation), was not inseparably incident to the upland estate, but was subject to conveyance or reservation by itself. It is claimed that *Simons v. French* was overruled or modified in *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199 [49 Am. Rep. 632]. We do not understand the latter decision to have such an effect. The court was careful to declare that its decision was based upon the peculiar circumstances of that case, and, while there is language suggesting a doubt as to *Simons v. French*, in other parts of the opinion the essential doctrine of that case seems to be reaffirmed. To the same effect as *Simons v. French* is *Parker v. West Coast Packing Co.*, 17 Or. 510, 21 Pac. 822 [5 L. R. A. 61]. In *Yates v. Milwaukee*, 10 Wall. 497 [19 L. Ed. 984], the owner of a lot on a navigable river (*Shepardson*), who had begun to build a wharf in front of it into the river, conveyed to *Yates* the interest he had in the wharf and in front of the lot to the center of the river, with the right of docking out and making a water front on the river. *Yates* built the wharf. His right to maintain it came in question in this action against the city. His right was sustained, although without any discussion of the question of severability. The court said: 'We are of opinion that *Shepardson*, as riparian owner of a lot bounded by a navigable stream, had a right to erect this wharf, and *Yates*, the appellant, whether he be regarded as purchaser or as licensee, has the same right.' The court seems to have regarded it as immaterial whether *Yates'* grantor owned the fee beyond the shore line or not. It would seem that *Yates* had probably a way of access to the premises covered by the wharf by means of a street leading down past the lot to the water; but we do not regard this as of controlling importance. See, also, *Bowman v. Wathen*, 2 McLean, 376 [Fed. Cas. No. 1,740]. In *Massachusetts* the fee of the riparian owner extends to low-water mark, not exceeding 100 rods beyond high-water mark; but it is held subject to the general public

right of navigation, until the premises shall have been so improved as to exclude the public use. *Com. v. Alger*, 7 Cush. [Mass.] 53. And so in Maine. It would seem that the real beneficial interest which the riparian owner enjoys in such premises in those states does not greatly differ from the rights of riparian owners in this state. But it is there held that he may convey his upland without the submerged lands, or the latter without the former. *Storer v. Freeman*, 6 Mass. 435 [4 Am. Dec. 155]; *Barker v. Bates*, 13 Pick. [Mass.] 255 [23 Am. Dec. 678]; *Deering v. Long Wharf*, 25 Me. 51. These authorities may be regarded, at least, as supporting the proposition that there is nothing in the essential nature of the riparian owner's right to improve and occupy such premises which forbids its separation from the riparian estate."

The court then summarizes its conclusions as follows:

"We have thus considered: That the riparian proprietor has the exclusive right—absolute as respects every one but the state, and limited only by the public interest of the state for purposes connected with navigation—to improve, reclaim, and occupy the submerged land, out to the point of navigability, for any private purpose, as he might do if it were his separate estate. That this right, even though it may never have been exercised, is recognized and protected by the law as property, of which he cannot be deprived even by the state without just compensation. That the enjoyment of the right—the use of the premises—need not be associated with the use of the upland. That it is for the interest of the state that such waste lands be improved and rendered profitable, while the state is not concerned as to whether the owner of the adjacent upland, or some person to whom he may release his right, make the improvement and enjoy the private benefit. That the rights of other persons are not involved in the question. That when the land has been reclaimed it may be conveyed, according to most of the authorities, apart from the original upland, and according to the other authorities the riparian right may be transferred to and enjoyed by the owner of the next adjacent riparian estate. From these considerations, as well as from the authorities cited bearing directly upon the question, we think that the quality of alienability should be deemed to belong to this kind of property, as it does to property in general. See opinion of Bramwell, B., in *Nuttal v. Bracewell*, L. R. 2 Exch. 1, 11. The only reason opposed to this is the technical one that the right grows out of, and, until severed, is incident to, a riparian estate. We have come to feel that this is unsatisfactory as a reason why such property should be deemed inseparable from the parent estate and incapable of a separate existence. If the right in question were created out of, or enjoyed at the expense of, some other estate or property, and were measured and limited by the needs or use peculiar to the riparian estate to which it is annexed, there would be ground for others to urge that the right could not be changed or transferred so as to enlarge the scope of a grant or contract, or so as to prejudice the party complaining. But no such conditions exist. The rights of no one are affected by allowing the riparian owner to convey away this part of his property as he may his other property. It is only an abstract question whether the right, originating in custom, and having originally attached as an incident to his riparian lands, may now be sold and conveyed, and be enjoyed by the purchaser. It is for the interest of the riparian owner that he be allowed to dispose of or use his private property at his own discretion. It is for the interest of the public that such property be subject to purchase and use, where the owner may be incapable of improving it. No one is interested in opposing such unrestricted alienability and use.

"Although we have become convinced that the better reason is opposed to our former decision upon this point in *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 38 N. W. 200 [8 Am. St. Rep. 679], we should have deemed it better that a rule of property, although so recently declared, should not be disturbed, were it not that it is supposed that the result of that decision, if adhered to, would be very seriously prejudicial to the tenure of a large amount of very valuable property, which for a long time has been deemed

and treated as alienable and enjoyable apart from the riparian lands, and which, according to our present opinion, was rightfully so treated prior to our decision in the Emerson Case. The case before us shows that in front of the riparian land described in the complaint the reclaimable submerged land extends into the Bay of St. Louis about 850 feet to a dock line legally established under the authority of the state (subsequent, however, to the condemnation by the railroad company), and this condition of things is understood to be very general along the shores of the navigable waters about Duluth. Such lands have been platted and sold to various persons, and have been to a considerable extent improved, and, so far as the state is concerned, have practically become private property. No one but the owners of the original riparian estate can question the rights of the purchasers; and in the case of *Miller v. Mendenhall*, *supra* [43 Minn. 95, 44 N. W. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219], which was submitted and is decided in connection with this case, we hold that, notwithstanding the decision in the Emerson Case, a grantor may be estopped by his covenants from disputing the title of his grantee in respect to such lands. We think that we ought to go further, and hold that the riparian right to improve, reclaim, and occupy such premises is transferable."

The court here recognizes and declares in language too clear to be misunderstood, broadly and independently of the establishment of a dock line: That the owner of lands abutting upon navigable waters, whether they be streams or lakes, has an exclusive estate or interest in the bed of the stream or lake below low-water mark in front of his shore land, subject to the right of the public to use the same for the purposes of navigation, and restricted only by that paramount public right; that he has the exclusive right to reclaim it by artificial means from the shallow water covering it, or to otherwise improve it, by constructing and maintaining suitable landings, piers, and wharves into the water, or by filling in with earth so that it becomes dry land, up to the point of navigability, for his own private use and benefit, as he might do if it were his separate estate, subject only to the limitation that he shall not interfere with the public right of navigation; that this private right of use and enjoyment is not limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right; that "the limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right"; that no one but the riparian proprietor has the right to improve and occupy such premises for private purposes, and it does not concern other persons how or for what particular purposes the reclaimed lands may be used, so long as there is no violation of the public right or of the maxim, *sic utere tuo et alienum non lœdas*; that this right, even before it has been in any manner exercised—the right itself to reclaim, improve, or occupy—is a property right, vested in him, recognized and protected in the law as property, of which he cannot be deprived even by the state without due process of law, and without just compensation, except, of course, for the purpose of protecting, preserving, and improving navigation; that this right, estate, or interest can be severed from his shore land and conveyed to another to be enjoyed by such grantee; that access may be had thereto through the next estate abutting upon the shore, or the next, or by means of a public highway leading to or past the prem-

ises in question, or by the navigable water, or by any other means which he or his grantee may acquire; that there is nothing in the matter of access which forbids the existence of these rights separate from the abutting estate; and that the enjoyment of the right need not be associated with the use of the upland.

And it may be said that here the court seems to be beginning at least to shake off the error into which it had fallen in *St. Paul, etc., R. Co. v. First Division, etc., R. Co.*, above referred to.

In *Wait v. May et al.*, 48 Minn. 453, 51 N. W. 471, in 1854 the occupants of certain government lands caused the same to be platted as a town site, with a street therein laid out upon and along the shore of a navigable lake. The street was stated on the plat to be 99 feet in width, but according to the scale given upon the plat this street, opposite plaintiff's lot, appeared to be 150 feet wide, and extended in width to the waters of the lake. The plat was filed for record in the office of the register of deeds for the proper county June 26th of that year. Thereafter, on April 17, 1856, this town site was entered and purchased, and title thereto obtained, by a judge of the district court, as provided by Act Cong. May 23, 1844, c. 17, § 5 Stat. 657. In the execution of his trust said judge, on July 8, 1856, conveyed to one of the beneficiaries, from whom plaintiff derived title, a lot fronting upon the street before mentioned, describing the same in accordance with the town plat. On October 4, 1880, the village council had by ordinance authorized the Minneapolis & Lake Park Railway Company, its successors and assigns, to construct its tracks, wharves, and depot on the lake shore across the street in front of this lot. The defendant railway company succeeded to these rights, and the other defendants were its tenants. For several years prior to August, 1888, when the action was commenced, defendant railway company had kept and maintained its roadbed and railway tracks on the street along and in front of plaintiff's lot, but not nearer than 75 feet from the front line thereof as traced on the plat, and had erected on the shore, and in and over the water of the lake, a wharf and a pavilion for the use of railway passengers. The action was against Charles May, Frank Bardwell, and the St. Paul, Minneapolis & Manitoba Railroad Company to recover possession of the premises so occupied, with damages for the detention, and, further, to forever restrain the defendant corporation from maintaining its roadbed, tracks, and pavilion thereon, and the question which arose in the case was as to the title of the plaintiff in the part of the street between the center line thereof and the shore, on which the roadbed and tracks were maintained, in front of his lot, and the court held that, under the circumstances of the case, the platting and entry of the town site under the federal statute, the deed of the judge thereunder, and the necessary intentions of the parties platting, and of the judge conveying, the fee title, subject to the public easement, to the entire street to low-water mark, including all riparian rights, passed to the grantee named in the official deed, and also passed to plaintiff, through subsequent conveyances, in which was the same general description, and the judgment of the trial court in favor of the plaintiff was affirmed.

In the case of *Gilbert v. Eldridge et al.*, 47 Minn. 210, 49 N. W. 679, 13 L. R. A. 411, the facts are fully stated in the opinion, and need not be set forth here. The court adhered to its ruling in the case of *Hanford v. St. Paul & Duluth Ry. Co.*, *supra*, and decided: That a riparian owner of lands on the shore of navigable water may legally disassociate therefrom and transfer to another, or reserve to himself, to be enjoyed independent of the shore land, his riparian right to reclaim and use the shallows lying beyond, so that neither he as owner of the shore land, nor his grantee of the shore land, may thereafter claim such rights as incident to such shore land; that this principle is applicable in a case where the owner of shore land platted it, together with the shallows beyond the shore, into town blocks and streets; and that if, after such platting, the owner had conveyed an inland block with reference to the platting, and the water had gradually encroached upon the land until the shore line reached that block, the riparian right to reclaim and use the platted blocks and streets in the water did not attach to the block thus conveyed as incident thereto. The court says, at page 215 of 47 Minn., page 681 of 49 N. W. (13 L. R. A. 411):

"As Rice might have conveyed the rights which he, as the owner of the shore land, had in the submerged land, so, and for the same reasons, he might have conveyed the land above low-water mark, and have reserved the rights naturally incident thereto in respect to the shallows lying beyond the shore; and the grantee, in a deed clearly importing an intention to limit the grant to the land above the shore line, would acquire only such land.

"The proposition thus stated and illustrated, that the owner of the shore land may legally disassociate therefrom and transfer to another, or reserve to himself, to be enjoyed independent of the shore land, his riparian right to reclaim and use the shallows lying beyond, so that neither he nor his grantee of the shore land may thereafter claim such rights as incident to their estate, is applicable to the facts of this case. When Rice conveyed block 108 (through which conveyance the plaintiff's title was derived), he had already made and recorded the plat embracing not only the dry land, but the shallows beyond. Block 110, the land here in controversy, was located partly within the shoal water beyond the shore, and still beyond that other blocks, with intervening streets, were platted. Rice, and no one else (subject to certain public rights which have not been, and probably never will be, asserted, and which do not affect the question before us), then had the exclusive right to appropriate the submerged lands to occupancy, improvement, and use in the manner indicated by the platting—that is, in separate or distinct parcels, as town blocks and streets—wholly independent of the future ownership or use of his shore land. No principle of policy or of law forbade him, as the owner of all this property and of these property rights, from thus doing, however it might result in adding to or impairing the natural advantages of the shore land, or that lying inland from the shore, all of which he owned. Subsequent purchasers from him of the shore land, or of the inland, purchasing with reference to the plat, might well be deemed to take their estates subject to the disadvantages as well as to the advantages resulting therefrom. He might thus restrict or limit the rights incident to his shore land or inland, so as to bind, not only himself, but his grantees. *Yates v. Judd*, 18 Wis. 118. It was said in *Wilder v. City of St. Paul*, 12 Minn. 192, 204 (Gil. 116): "The purchaser of a lot according to such plan acquires a right to every advantage, privilege, and easement which the plan represents. His lot is made valuable by other streets, as well as the one on which it fronts. By the sale of a lot according to such plan there is an implied warranty that the purchaser shall enjoy all the privileges and benefits which it is calculated to secure, and by no private arrangement can he be deprived

of this.' And so it may be said that such a purchaser takes subject to whatever disadvantages may be involved in the platting. For instance, as against the purchaser of block 108, Rice, although he had remained the owner of the riparian block 110, would have been precluded by his platting and conveyance from afterwards appropriating the street platted in the shallow water beyond it to his private use, so as to prevent the improvement and use of it as a street. But the grantee of block 108, conveyed with reference to the plat, would also be precluded from denying to the grantor or to his assigns the right to occupy, improve, reclaim, and use the blocks platted in the shallow water, even though in the course of time the shore line should gradually move inland so as to reach this block 108, as has actually occurred. It was perfectly apparent from such a platting that Rice intended thereby to devote the platted blocks within the shallow water to disposal and use in separate parcels, and wholly independent of the ownership or use of the shore land; and when the plaintiff's grantor purchased and accepted a conveyance of block 108, although the deed was in the ordinary form and included the 'appurtenances thereunto belonging,' it must have been understood that no right or interest in the blocks located in the water passed thereby. Even if the block conveyed had been in fact situate on the shore, it could hardly have been supposed that it was intended that the deed should, in legal effect, include all the platted blocks lying beyond the shore; or that, notwithstanding the platting of the submerged lands, it was intended that, by the conveyance of the shore block alone, with its boundary lines on all sides precisely defined by means of the plat, the ordinary and unlimited rights of riparian ownership should pass with the deed, so that the grantee should acquire thereby the exclusive right to occupy, improve, and use for his own benefit all the platted blocks and streets lying beyond. If, under such circumstances, a conveyance of the block situate on the shore would have been deemed not to have been intended to transfer to the grantee the existing property rights in respect to the platted lands beyond the shore, then, for the same reason, the gradual retirement of the shore line, until the plaintiff's block has come to be on the water front, has been of no effect to vest in him any property rights in respect to such submerged blocks. The conveyance of a platted inland block was as much subject to the effect of the platting as a conveyance of a riparian block would be; and if in the latter case the ordinary riparian rights—that is, the exclusive right to occupy, improve, reclaim, and use the blocks lying in the water—would not pass, then, for the same reason, the gradual retirement of the shore line would not be incidentally attended with the consequence of vesting such rights in the plaintiff. He took his title subject to the existence of rights which, at least as between parties claiming under the common grantor and in accordance with the platting, had ceased to depend upon the location of the shore line, or to be affected or divested by the shifting of that line."

It is well to note that in this case the court has clearly declared that the riparian owner, and no one else, had the exclusive right (subject to certain public rights which had not been, and probably never would be, asserted, and which did not affect the question there, and do not affect the question in the case here at bar) to appropriate the submerged lands, out to the point of actual navigability, to occupancy, improvement, and use, in the manner indicated by the platting—that is, in separate or distinct parcels, as town blocks—wholly independent of the future ownership or use of his shore land, and that he might grant such right to another, as to any one or more of said distinct parcels, by a conveyance thereof according to the plat.

In *Bradshaw v. Duluth Imperial Mill Co.*, 52 Minn. 59, 53 N. W. 1066, the trial court found that defendant was exclusively entitled to reclaim and occupy the submerged land in dispute and to an injunction enjoining plaintiff from asserting any claim thereto, and judgment

was entered accordingly. In the Supreme Court the judgment of the trial court was reversed, and the case remanded, with directions to enter judgment for the plaintiff. The Supreme Court, states the facts as follows:

"The only question presented by this appeal is whether the conclusions of law were justified by the findings of fact. These facts, so far as here material, are that one Orrin W. Rice, being the owner of a peninsula, the whole easterly side of which is washed by the waters of the Bay of Duluth, in December, 1858, executed and filed a town plat thereof under the name of 'Rice's Point.' This platting extended a long distance out into the waters of the bay, dividing it into blocks, streets, and avenues in conformity to the platting on dry land. Block 82, as shown on the plat, was the shore block. In front of this, and wholly in the water, there were platted some 19 blocks, one of which (139) included the lots in controversy. In February, 1859, Rice conveyed these lots, according to the recorded plat, to one Panzi, who subsequently conveyed to the plaintiff. The deed to Panzi was recorded in March, 1865.

"In March, 1873, pursuant to legislative authority, the city established a dock line coincident with the westerly side of Eighth street, as shown on the plat, and between these lots and the shore. In December, 1886, this dock line was, under legislative authority, changed to its present location, coincident with the westerly side of Eleventh street, and outside of the lots in suit. During the interval between March, 1873, and December, 1886, defendant's grantors, to whose rights they have succeeded, acquired title to the shore block 82, and to all of the water blocks in front of it, down to the old dock line on Eighth street. There are other findings as to a replatting of the land by Munger & Peck in 1888, and a conveyance by them to defendants, according to this replatting, of all the submerged blocks in front of the shore block out to the new dock line; but these facts are immaterial, for they could not affect plaintiff's title, derived through the prior conveyance from Rice to Panzi. Defendant must succeed, if at all, in its claim of title, by virtue of the conveyance to it of the shore block as including the riparian rights to all the submerged blocks out to the point of navigability as established by the new dock line, and this we understand to be the contention of defendant's counsel."

It is not necessary to fully quote from the opinion as I have done in *Hanford v. St. Paul & Duluth R. Co.*, supra. It is sufficient to only call attention to certain doctrines which are clearly laid down therein. It adheres to and reaffirms the doctrines and principles laid down in *Hanford v. St. Paul & Duluth R. Co.*, and *Gilbert v. Eldridge*, supra, and emphasizes and makes absolutely clear the holding of the court as to the respective rights or estate of the state and of riparian owners, in this state, in navigable waters and their beds. It again declares that the riparian owner may by his acts and evident intention disassociate his right from the shore land, and that he may convey a parcel of land under the water in front of his shore line, and by such conveyance confer upon his grantee the exclusive right to reclaim and occupy such submerged land, and thus cut off the right of his grantee of a parcel along the shore line to improve and reclaim out beyond the boundaries, as shown by the plat and the evident intention of the grantor, of the shore land conveyed. It further declares it to be the doctrine in this state that the right of a riparian owner to improve, reclaim, and occupy the submerged lands out to the point of navigability is not in the nature of a mere license or inchoate right, which, until exercised, the state may revoke at any time and grant the land under the water to a stranger, but that it is a vested property right which, though subor-

dinate to the public right of navigation, cannot be taken away even by the state for a public use without compensation. Particular attention should be directed to its declaration that:

"The old common-law doctrine, or at least what has been generally assumed to be such, and which was adopted in some of the early American colonies, that the crown had a *jus privatum*, or right of private property, in navigable waters and their shores, which it could alienate to a subject, has no place in the jurisprudence of this state. It is the settled law with us that the rights of the state in navigable waters and their beds are sovereign, and not proprietary, and are held in trust for the public as a highway, and are incapable of alienation."

Particular attention should also be directed to the fact that neither of the dock lines in this case were established until after the conveyance to the plaintiff of his submerged land, and that the first one was inside of his parcel, and the second outside of it, and to the declaration of the court that, while the private right in the soil under the water—the bed of the stream—is subordinate to the public right of navigation, and it is in the power of the state, as trustee for the public, to determine how far these waters are needed for purposes of navigation, and as such trustees to fix the line of navigability, beyond which it would not be permissible for the owner of the shore estate or his grantee to reclaim and occupy for private purposes, yet the establishment of a dock line neither creates nor destroys rights, but merely regulates and limits the exercise of existing rights; and that the rights of property of the riparian owner or his grantee in the soil under the water are not divested by either the location or change of location of the dock line; that so long as the old line remained in force, of course, he could not use the lots for any purpose inconsistent with the right of navigation in the water over them, but when the line was changed this limitation was removed, and the establishment of the new line was authority, as well as an invitation to him from the state, to fill in and build out to that line, or as far in that direction as his property extended. In other words, that while the establishment of the dock line invites the reclamation and improvement of a parcel of submerged land within it, and might thus create in its owner a vested right of occupancy and use which even the state could not afterwards appropriate or destroy, yet even the establishment of such dock line would not divest or take away the rights of a grantee from the riparian owner of a parcel of submerged land beyond such dock line, but would only be a limitation on its occupation and use, and in the nature of a warning that, if he should reclaim and occupy it, it might subsequently be removed, or otherwise dealt with, by the state, or by the general government, in the exercise of their right to preserve, protect, and improve the public rights of navigation.

Now, if all this be true as to the right or title of the riparian owner, suppose an island is made by the water and deposits therefrom on the bed of the stream in front of a riparian owner's shore and between it and the main navigable portion of the stream, or even between it and the middle thread of the stream, and especially where no dock line has been established, would not the riparian owner, or his grantee, have the right to the exclusive use and possession of such island as against all

parties other than the state or the general government, and even as against the state and the general government except in so far as it might become necessary or convenient for them, or either of them, acting by their properly constituted authorities, to exercise their paramount right for the purposes to which such paramount right extends, namely, to protect, preserve, and improve the public rights of navigation? And if the right and title of the state is only in its sovereign capacity, as trustee for the public, for the public uses of the water as such, and one which it cannot alienate, could the state unqualifiedly, and for no purpose connected with the preservation or improvement of the public right of navigation, convey such an island to a private party, and thus divest or deprive the riparian owner, or his grantee, of such right of exclusive use and possession? The answer to each of these questions would seem to be obvious.

It will be noticed that, in all the Rice's Point, or Duluth, cases which have been cited and quoted from above, the rules and principles there declared were with reference to the soil under the water of an arm or bay of Lake Superior, and it would seem that, if they apply to such waters and the soil under them (Lake Superior being, as has been so often decided by the Supreme Court of the United States and other state courts, a great inland sea, and as such to be considered the same as waters in which the tide ebbs and flows), they would *a fortiori* apply to inland streams and lakes.

The case of *Lamprey and Wife v. State of Minnesota et al.*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541, was an action for the partition of real property in which the state was made a party under the statute. The complaint stated that plaintiffs owned $\frac{49}{50}$ of 300 acres of land, describing it, and that Metcalf, one of the defendants, owned the remaining $\frac{1}{50}$ part, and it prayed a partition between them. The complaint further stated that the state of Minnesota claimed some estate or interest in the land adverse to the title of plaintiff, but that the claim was unfounded and void. It also prayed judgment that the state had not title to or interest in the land. The summons and complaint were served upon the Attorney General, and in due time the Governor answered on behalf of the state, claiming that the locus in quo was, in the year 1853, a natural lake, and the title in the federal government; that the surrounding shore was surveyed and the lake meandered in September, 1853, under the direction and supervision of the Secretary of the Interior; that by the act of February 26, 1857, authorizing a state government, the lake was made a common highway forever, free to all citizens, and the title vested in this state; and that it has since continued therein.

The facts of the case, as stated by the court, were as follows: In 1853, at the time of making the United States survey of sections 4, 5, 8, and 9, township 28, range 22, there was in the center of these four sections a shallow, *nonnavigable* (?), lake, comprising about 300 acres, which the government surveyor meandered, in accordance with the rules and instructions of the department, "to meander all lakes and deep ponds of the area of 25 acres and upwards," and in doing so ran the meander lines substantially along the margin of the lake. The lake

and the meanders thereof appear on the official plat of the survey, and were referred to in the field notes. By this survey the lands bordering on the lake were subdivided into fractional governmental subdivisions and lots; the lake forming the boundary thereof on one side. The survey and plat were approved by the Secretary of the Interior in 1854. Subsequently, and prior to 1856, the United States, by patents, conveyed, without reservation or restriction, to various parties, all of these lands, which were described in the patents by their governmental subdivision or lot, according to the plat and survey, which were referred to in, and made part of, the patents. By sundry mesne conveyances from the patentees, the plaintiffs and defendant Metcalf had become the owners of all these riparian lands. Since the survey in 1853 the lake has been, through natural causes, gradually and imperceptibly drying up, until at the time of the commencement of the action the former bed had all become dry land. In 1860, after the lake had partially dried up, the United States Land Department caused a survey to be made of the land constituting that part of the former bed of the lake situated between the original meander line and the then existing margin of the lake, and in 1873 assumed to issue a patent therefor to one Gilmore, who subsequently conveyed to plaintiffs and Metcalf, who asserted title to the former bed of the lake both as grantees of the riparian lands according to the original survey of 1853, and also, in part, under the Gilmore patent. The state, on the other hand, claimed that the Gilmore patent was void, and that the patents, according to the original United States survey, only conveyed the land to the margin of the lake, as it thus existed, and that the former bed of the lake belonged to the state in its sovereign capacity. In the pleadings the state also asserted title under the swamp land grant from the United States; but this claim was abandoned on the trial, and, as the court said, very properly so, because, for manifest reasons, it was entirely untenable.

After stating the facts as above, the court goes on to say, at page 191 of 52 Minn., page 1140 of 53 N. W. (18 L. R. A. 670, 38 Am. St. Rep. 541):

"It will thus be seen that the question presented is: What rights in or to the soil under water does the patentee of land bounded by a meandered inland lake acquire by his patent?"

Then, after calling attention to the importance of the question both to the public and to riparian owners, and stating that the question ought to be approached and considered from a practical as well as legal standpoint, and that as the common law is a body of principles, and not mere arbitrary rules, the effort should be to apply the spirit and reason of those principles to the state of facts presented, the court says:

"There are certain matters which are so well settled that they may be summarily disposed of at the outset. Without troubling ourselves to consider what were the rights of the United States in these waters before they conveyed the lands bordering on them, it is well settled that, having disposed of lands bordering on a meandered lake by patent, without reservation or restriction, they have nothing left to convey, and consequently the land department was thereafter without jurisdiction, and the Gilmore patent, issued in

1873, was inoperative and void; also, that a meander line is not a boundary, but that the water whose body is meandered is the true boundary, whether the meander line in fact coincides with the shore or not; also, that grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed according to the law of the state in which the lands lie; and, consequently, whether the land forming the beds of these lakes belongs to the state, or to the owners of the riparian lands, is a question to be determined entirely by the laws of Minnesota. In support of these propositions, we need only cite *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838 [35 L. Ed. 428], and *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840 [35 L. Ed. 442].

"In *St. Paul, S. & T. F. R. Co. v. St. Paul & P. R. Co.*, 26 Minn. 31, 49 N. W. 303, this court was led, from certain dicta in *Railroad Co. v. Schurmeier*, 7 Wall. 272 [19 L. Ed. 74], to suppose that the Supreme Court of the United States meant to hold otherwise as to patents of public lands bordering on navigable streams; but that no such doctrine has been adopted by that court is evident from *Barney v. Keokuk*, 94 U. S. 324 [24 L. Ed. 224], and subsequent cases."

It will be seen, from the last paragraph of the quotation above cited, that the court here finally, as indeed it had already begun to do in *Hanford v. St. Paul & Duluth R. Co.* and the other similar cases, shakes off and abandons the error hereinbefore referred to into which it had fallen in *St. P., S. & T. F. R. Co. v. First Division of St. Paul & Pac. Ry. Co. et al.*, 26 Minn. 31, 49 N. W. 303.

The court then, after considering various decisions of other states, wherein a distinction is made between the title and rights of riparian owners in lands on running streams and on bodies of still water such as inland lakes, goes on to say:

"Our conclusion therefore is that upon both principle and authority, as well as considerations of public policy, the common law is that the same rules as to riparian rights which apply to streams apply also to lakes, or other bodies of still water.

"In this state we have adopted the common law on the subject of waters, with certain modifications, suited to the difference in conditions between this country and England, the principal of which are that navigability in fact, and not the ebb and flow of the tide, is the test of navigability, and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use.

"In accordance with the rules of the common law, we therefore hold: That, where a meandered lake is nonnavigable in fact, the patentee of land bordering on it takes to the middle of the lake; that, where the lake is navigable in fact, its waters and bed belong to the state, in its sovereign capacity; and that the riparian patentee takes the fee only to the water's edge, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed or produced in front of his land by the action or recession of the water. Of course, it is a familiar principle that these riparian rights rest upon title to the bank or shore, and not upon title to the soil under the water."

Of course, this last sentence should be read and construed in view of what is said in *Hanford v. St. P. & D. R. Co.* and *Bradshaw v. Duluth Imperial Mill Co.*, *supra*.

The court then goes on further to say, as to the definition or test of "navigability," as follows:

"What has been already said is sufficient for the purposes of the present case; but, to avoid misconception, it is proper to consider what is the definition or test of 'navigability,' as applied to our inland lakes. The division of

waters into navigable and nonnavigable is but a way of dividing them into public and private waters, a classification which, in some form, every civilized nation has recognized; the line of division being largely determined by its conditions and habits.

"In early times, about the only use—except, perhaps, fishing—to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed. Hence the common law very naturally divided waters into navigable and nonnavigable, and made the ebb and flow of the tide the test of navigability. In this country, while still retaining the common-law classification of navigable and nonnavigable, we have, in view of changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs, at certain seasons of the year. Most of the definitions of 'navigability' in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered, as well as boating for mere pecuniary profit.

"Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic use, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. When the colony of Massachusetts, 250 years ago, reserved to public use her 'great ponds,' probably only fishing and fowling were in mind; but, as is said in one case, 'with the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others, which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise. *West Roxbury v. Stoddard*, 7 Allen [Mass.] 158.

"If the term 'navigable' is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature, and adopt the classification of public waters and private waters. But, however that may be, we are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule. When the waters of any of them have so far receded or dried up as to be no longer capable of any beneficial use by the public, they are no longer public waters, and their former beds, under the principles already announced, would become the private property of the riparian owners."

It will be noticed that I have italicized and put a question mark after the term "nonnavigable" used by the court in its statement of facts in reference to this lake. I have done this because it is very difficult, indeed quite impossible, for me to understand how, in view of what Judge Mitchell has said in the part of the opinion last above

quoted by way of explanation and definition of the term "navigable," any meandered lake could be nonnavigable in fact; for, certainly, if it were a lake at all, it would be capable of use for boating for pleasure, or for fowling, or for cutting ice, or for skating. This part of the opinion, it seems to me, should therefore be regarded as a mere dictum, and for a proper definition of the term "navigable" or "navigability" we should refer to the case of *Union Depot Co. v. Brunswick et al.*, *supra*. But, however that may be, this was a case of reliction or recession of the waters, and it is only valuable here because of its general declaration that the common law on the subject of waters is the law of this state, with certain modifications, suited to the difference in conditions between this country and England, the principal of which is that navigability in fact, and not the ebb and flow of the tide, is the test of navigability, and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, or their beds, but that it holds them in its sovereign capacity, as trustee for the people, for public use; and because it declares that under the common law the same rules as to riparian rights which apply to streams apply also to lakes, or other bodies of still water; and because it declares that, where a meandered lake is nonnavigable in fact, the patentee of land bordering on it takes to the middle of the lake, but, where the lake is navigable in fact, its water and bed belong to the state, in its sovereign capacity, and the riparian patentee takes the fee only to the water's edge, but with all the rights incident to riparian ownership on navigable waters.

As there is nothing in the opinion indicating any intention to modify anything that was said in *Hanford v. St. Paul & Duluth R. Co.*, or in *Bradshaw v. Duluth Imp. Mill Co.*, or in *Gilbert v. Eldridge*, we should refer to those cases to ascertain what "the rights incident to riparian ownership on navigable waters" are, and, having done this, the only conclusion that we can draw is that, when the court says that the riparian patentee of land bordering on a navigable lake takes the fee only to the water's edge, it means only that he takes the absolute and unlimited title in fee to that line, and cannot mean that he has no title to the soil under water beyond that line.

In the case of *Webber v. Axtell et al.*, 94 Minn. 375, 102 N. W. 915, 6 L. R. A. (N. S.) 194, the majority of the court, speaking by *Lovely, Justice*, say:

"Plaintiff in this action seeks to recover an island in one of the smaller lakes of Martin county, about 15 rods distant from four government lots which he entered and patented under the homestead laws of the United States. The cause was tried to the court, who, upon findings of fact, held as a conclusion of law that plaintiff was entitled to judgment declaring him to be the owner of the land in suit, and ordered judgment in his favor. This appeal is from an order denying amended findings and for a new trial.

"We are of the opinion that this cause must be determined upon the facts as found by the court; but it is necessary to premise, before calling particular attention thereto, that the original survey of township 103, range 32 (Martin county), was made by the United States in 1857, that partly located in this township is a small meandered body of water about $3\frac{1}{2}$ miles in length and one-half or three-fourths of a mile in width, known as Fox Lake, on the northwest shore of which is located a tract of land surveyed and platted by

the government as lots 2, 3, 5, and 6, in section 31, town 103, range 32. About 15 rods from the shore of this lake, and opposite the government lots referred to, is the tract of land in controversy. In making the original survey it was marked on the plat and indicated in the field notes as an island containing two acres, with good timber of oak, ash, and hackberry; but no actual survey was at that time made of such island, nor was it designated in any way as a specific part of the public domain, nor was there any indication on the plat that it was reserved as a part thereof. In 1865 plaintiff settled upon and entered lots 2, 3, 5, and 6 as a homestead, and then claimed that this so-called island was a part thereof; and the evidence supports the view that he occupied it as such until the fall of 1885, when, upon the application of a third party, one McConville, the United States caused the alleged island to be surveyed, platted, and designated it as lot 10, then accepted McConville's entry. McConville made some improvements on the land, but did not continue his settlement, when, in 1887, one Rice made an entry to this tract under the homestead laws. February, 1873, a patent was issued to the plaintiff for lots 2, 3, 5, and 6, and in 1891 a patent was issued to Rice for lot 10, being the so-called island, which had, by recession of the water grown in size considerably. The defendants claim under Rice's entry by purchase. During a considerable portion of the time after Rice made his entry, the so-called island was occupied either by him or his tenants, and the question of adverse possession was litigated by the defendants under this contention. The substantial basis of plaintiff's claim to the land in controversy, however, rests upon asserted rights accruing to him under his homestead entry of 1865. Defendants claim the island under Rice's entry and the patent issued to him in 1891. It is likewise insisted in defendant's behalf that, by the acts and representations of plaintiff himself, he is now estopped from asserting any interest therein.

"The material facts above stated we do not regard as open to dispute, but at the trial evidence was received to show that from the time plaintiff settled upon his homestead there was attached to the so-called island (lot 10) two sand bars which at ordinary stages of water permitted access to it by teams at certain periods of the year, and it was found by the court, when the suit was brought, that the shore where plaintiff's lots were situated was connected to such island in times of ordinary low water by this means, and in times of high water submerged. This was contested. The claim that defendants held under adverse possession was clearly a question of fact, and the court held, upon sufficient evidence to justify its findings in that respect, that it had not been established. The court also declined to hold, upon application for amended findings, that the plaintiff was estopped from asserting his title to the land in controversy.

"Had the trial court determined as a matter of fact that at the time of the patent to plaintiff either one of the sand bars referred to connected the island with the shore line of his lots, there could be no doubt but that it would be our duty to hold that the decision of this case would be controlled by *Schurmeier v. St. Paul & Pacific R. Co.*, 10 Minn. 89 (Gil. 59), 88 Am. Dec. 59, wherein it was held that the water, instead of the meander line, must be regarded as the proper boundary of such tract. The decision of this case was sustained by the Supreme Court of the United States on writ of error (7 Wall. 272, 19 L. Ed. 74), where it was decided that the meander lines on fractional tracts adjacent to public waters are designated in the field notes, not as boundaries, but for the purpose of ascertaining the quantity of land in the fraction, and also that the riparian owners retain their rights to construct suitable landings, wharves, etc., for the convenience of commerce and navigation, to the same extent as such proprietors on navigable streams affected by the ebb and flow of the tide at common law. But counsel insists that the facts as found by the trial court indicate that it did not give decided or sufficient significance to the time when the sand bars appeared between the plaintiff's lots and the island, and that such bars should have been formed previous to the commencement of the suit, and have been existing when plaintiff received his patent, to bring plaintiff's rights within the benefit of the *Schurmeier Case*. Counsel argues that since the court did not find that

the sand bars existed before the suit was commenced, or before the subsequent survey and patent to Rice in 1891, therefore the patent to the latter could not cut off the rights of Rice or those claiming under him. The decision in the Schurmeier Case, both in the state and federal courts, impress us very strongly that it was the accepted view that the riparian rights of the first proprietor vested in him a contingent interest in all accretions and relictions, which would necessarily involve the sand bars and adjacent island; for, if it be true that the right of the shore owner in a body of navigable water carries with it a dependent interest to accretion and relictions, which became established at the time of his patent, an attempt on the part of the government to interfere with such rights afterwards would be ineffectual to take from him such right or interest. See cases cited in *Sage v. Rudnick*, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106.

"There has been much discussion as to the distinction between navigable and nonnavigable lakes, so called, which arises from the relative rights of the public and shore owners to use the waters therein; but if Fox Lake was a navigable body of water, as must be conceded, the shore owner became vested with a contingent interest in such accretions as might be added to his land. It would follow as an incident thereto, and become his property. If the island between the shore and the center of the lake when the patent was first issued was unsurveyed, without any expressed intention on the part of the government to treat it as a portion of its dominion, it would accrue to plaintiff. We are very clear that this rule has been laid down in the case of *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541, where the distinction between navigable and nonnavigable lakes is considered and defined, and where it was held that the shore owner of a navigable stream or body of water is entitled to the riparian right of accretions, even though larger than the parent estate, which is an incident to all riparian ownership, and that this rule rests upon the broad principle that, to preserve the fundamental riparian right, viz., access to the water, upon which all others depend, and which may constitute its principal value. This establishes the contingent interest to such accretions as would include the sand bars and appurtenant island in this case. The reasons for this view are fully considered and discussed in *Lamprey v. State*, supra, and, applying the rule there laid down to the fact that as to this small island, at the time of the government survey and patent to plaintiff, the government of the United States made no claim, but treated it as the bed of the lake, which belonged to the state, subject to the rights of riparian owners, it fully sustains the learned trial court in the conclusion that plaintiff's interest became vested at the time of his patent, and established his ownership thereto."

It would seem from the opinion of the court that the trial judge did not find as a fact that at the time of the patent to plaintiff, or before the subsequent survey and patent to Rice, either one of the sand bars referred to connected the island with the shore line of plaintiff's lots; but it would appear from the dissenting opinion of Judge Lewis that such was not the fact at the time of the second survey and patent to Rice, and that prior to that time there was a well-defined, open, and navigable portion of the lake between the shore and the island. It would seem, however, that the majority of the court attached no particular importance to this fact, but treated the island as an accretion or reliction and held that, inasmuch as the government of the United States at the time of the government survey and patent to plaintiff made no claim to the island, but treated it as the bed of the lake, which belonged to the state, subject to the rights of riparian owners, the riparian right of the shore owner vested in him at the time of his patent a contingent interest in such accretions and relictions as might be added to his land; that such con-

tingent interest would include the sand bars when formed, and, as they express it, the "appurtenant island"; and that it would follow as an incident thereto and become his property.

Thus the decision seems to rest upon the doctrine of accretion or reliction, and to hold that under that doctrine the riparian owner acquires under his patent to the shore land a contingent interest in and to an island in front of his land and between it and the middle of the lake, which, upon the occurrence of certain conditions, as for instance the recession of the waters or the formation of connecting sand bars, would make it become his absolute property. Why it was necessary to announce, and rest the case upon, this vague doctrine of a contingent interest, I am unable to understand, in view of the declaration by the court, which is in accordance with the former decisions to which I have referred, that:

"If the island between the shore and the center of the lake when the patent was first issued was unsurveyed, without any expressed intention on the part of the government to treat it as a portion of its dominion, it would accrete to the plaintiff."

And the further declaration that, applying the rule laid down in *Lamprey v. State* "to the fact that as to this small island, at the time of the government survey and patent to plaintiff, the government of the United States made no claim, but treated it as the bed of the lake, which belonged to the state, subject to the rights of riparian owners, it fully sustains the learned trial court in the conclusion that plaintiff's interest became vested at the time of his patent, and established his ownership thereto." This island was so small that the government surveyor, acting in absolute good faith, might, as he evidently did, treat it as what the Supreme Court of the United States has called a "negligible fraction," and there was nothing in the circumstances of the survey, as in *Harding v. Minneapolis & Northern Ry. Co.*, 84 Fed. 287, 28 C. C. A. 419, or otherwise, to indicate that the government intended to make any reservation thereof, or to in any way treat it as a part of the public domain. Under these circumstances, the government could not, under the decisions cited, assert any dominion over it or any title thereto, except to assert and exercise in the case of interstate waters its paramount right to protect and improve the public right of navigation, and consequently not only would the patentee under the subsequent survey take nothing, but the island would accrete to the original patentee of the shore land. There may be some doubt under the Minnesota cases which I have cited as to the question whether or not the state, or the general government, might, without compensation to the riparian owner, take possession of, dig away, or otherwise deal with, such an island in a navigable stream or lake—that is, one already permanently there at the time of the survey—for the purpose of preserving, protecting, or improving navigation; but, however that may be, until such right is exercised by the state or federal government, the entire beneficial title and ownership of such island would be in the riparian proprietor, and no other person could have, or acquire, except from such riparian proprietor, any title or right thereto.

In *Harding v. Minneapolis & Northern Ry. Co.*, supra, the court, speaking by Judge Thayer, says:

"The plaintiff lays claim to Boom Island on the ground that the failure of the government surveyors to disclose the island by the survey made prior to March 25, 1849, to which reference was made in the patent to Bottineau, estopped the United States, after the grant to Bottineau, from thereafter surveying the island or asserting a title thereto. The plaintiff claims: That the island, being undisclosed by the first survey, passed to Bottineau by virtue of his patent; that, by failing to plat the island, the government surveyors in effect declared that it was of no value, and of no more importance than an equivalent portion of the bed of the stream, and that the riparian proprietors on the east bank of the river are therefore entitled to claim such parts of the island as lie on their respective fronts, precisely as they might claim it if it was an accretion formed in front of their respective properties by the action of the currents of the river since the survey was made. It may be conceded to be the general rule that where a government survey along the banks of a navigable stream is made, and the banks of the stream are meandered, but the survey fails to disclose a small island contiguous to the shore, the riparian proprietor holding the adjacent shore land under a grant from the government is entitled to such land as appurtenant to the grant. This rule rests upon the ground that the failure to survey small islands contiguous to either shore is evidence of an intent on the part of the government to surrender all claim thereto in favor of the adjoining riparian proprietors. *Railroad Co. v. Butler*, 159 U. S. 87, 15 Sup. Ct. 991 [40 L. Ed. 85]; *Butler v. Railroad Co.*, 85 Mich. 246, 48 N. W. 569 [24 Am. St. Rep. 84]; *Middleton v. Pritchard*, 3 Scam. [Ill.] 510, 520 [38 Am. Dec. 112]; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838 [35 L. Ed. 428]. But as the rule last mentioned for the construction of grants is founded upon the presumed intent of the government to relinquish its title to islands which are contiguous to the bank of a stream, and are not surveyed or platted, the rule in question ought not to be applied when the circumstances are such as to rebut that presumption. If, when the bank of a stream is surveyed and meandered, good reasons exist for not indicating on the survey the existence of an island contiguous to the shore, the mere failure to indicate it ought not to be given the effect of divesting the government of its title thereto. In the case at bar we think that reasons did exist when the first survey was made for not platting Boom Island, and that they are sufficient to overcome the presumption, which would otherwise arise from the survey, that the government intended to relinquish its title to the island. It has already been shown that the survey to which reference was made in the Bottineau patent was neither a complete survey of the river nor a complete survey of township 29 north, of range 24 west, because a considerable portion of the township was on the west bank of the river, in what was then Indian country. Furthermore, it will be observed, by reference to 'Exhibit E,' that four sections of the township, to wit, sections 14, 15, 22, and 23, cornered on the island about in the center thereof, two of which sections were in the fractional part of township 29, which was surveyed in the year 1853, after the Indian title thereto had been extinguished. When the survey of the township was completed, Boom Island was duly surveyed and platted, and shortly thereafter the land forming the island was exposed for sale, and was sold to Hirman Saunders, under whom the defendant claims. It is fair to infer from these facts that the surveyors who made the first survey of a fractional part of the township on the east bank of the river omitted Boom Island from the plat of that survey, because a part of the island lay in sections of the township which could not at that time be surveyed. It is most probable that they did not survey and plat the island, because they did not deem it expedient to do so until the residue of the township lying west of the river was surveyed and platted. In view of all the circumstances of the case, and in view of the fact that the government, as early as 1853, caused the island to be surveyed, it is most likely, we think, that the government surveyors omitted to note the location, contour, and area of the island on the first plat, for the reasons

last suggested, rather than for the reason that they deemed the island of no importance, and properly appurtenant to shore land which fronted the island.

"In further support of the view that the facts in the case do not warrant an inference that the government intended to relinquish its title to Boom Island when it made the first survey, it may be said that the evidence contained in this record fails to show that Bottineau, or any of those claiming under him, except the plaintiff, ever took possession of Boom Island as appurtenant to the grant, or asserted a title thereto under the patent of March 25, 1849. They appear to have recognized the government's right to survey the island as a part of the public domain subsequent to the date of that patent, as well as its right to sell the land to Saunders; for, so far as the evidence shows, they never took any steps, until the present suit was filed, to challenge the survey or patent, or to prevent a sale. The conduct of Bottineau, and those claiming under him, for more than 40 years, has been in the nature of an admission that the claim, made by the government in 1853, that Boom Island was still a part of the public domain, was a lawful claim. In this latter respect the case at bar differs essentially from the case of Railroad Co. v. Butler, supra, on which much reliance was placed on the argument by the plaintiff's counsel. In that case a survey of land on the river bank which failed, as in this case, to disclose an island contiguous to the shore, was made in 1831; and the land on the bank was entered by those under whom the plaintiffs claimed, in the following year (1832). In the year 1837 the opposite bank of the river was also surveyed, and certain islands in the river were disclosed and surveyed; but the one in dispute was not then surveyed or disclosed, and no survey of said island was made until 1855. When the government patented the island in controversy to a third party under the survey made in 1855, and the grantee filed his patent for record, the plaintiffs, opposite to whose land the island lay, immediately commenced a suit to cancel and annul the patent as a cloud upon their title. In that case there was no pretense that the riparian proprietors ever acquiesced in the claim made by the government that the island remained public property, notwithstanding the first survey, while in the case at bar the evidence indicates such acquiescence for at least 36 years; that is to say, since the island was patented to Saunders, on May 3, 1859.

"Without pursuing the subject at any great length, it is sufficient to say that, upon the state of facts disclosed by the evidence, we think the Circuit Court did right in instructing the jury, at the close of all the evidence, to return a verdict for the defendant company; and the judgment entered upon said verdict is therefore affirmed."

This case was decided upon its own peculiar facts. But the court declares that it may be conceded to be the general rule that where a government survey along the banks of a navigable stream is made, and the banks of the stream are meandered, but the survey fails to disclose a small island contiguous to the shore, the riparian proprietor holding the adjacent shore land under a grant from the government is entitled to such land as appurtenant to the grant. The court makes special reference to the case of Grand Rapids & Indiana Ry. Co. v. Butler, 159 U. S. 87, 15 Sup. Ct. 991, 40 L. Ed. 85, which was ruled by the decisions of the Supreme Court of Michigan, where it has always been the recognized rule that a grant of land bounded in the deed of conveyance by a stream, whether navigable in fact or not, carries title in fee to the land under the water to the middle thread of the stream, subject to the public easement, in the absence of an express reservation. It seems to have assumed that, but for the peculiar facts of the case, the rule would be the same in Minnesota; but it cannot be said that such was its decision, as it was not necessary to

the proper determination of the controversy, and the case was determined on other grounds, namely, that under its facts there was no presumption that the government intended, in omitting the island from the first survey, to relinquish its title thereto, in favor of those who should become the owners of the river frontage opposite to which the island was, but that, indeed, the facts showed quite the contrary, and that plaintiff had by his conduct acquiesced therein. I think, however, that no other deduction can be drawn from the Minnesota decisions which I have cited than that, where, in a government survey of a stream and the contiguous land, a small island is in good faith omitted, and there are no facts and circumstances indicating an intention on the part of the government to reserve the same as a part of the public domain, it passes to the patentee of the shore land opposite to which it lies on the same side of the thread of the stream, and this was evidently the view of the federal court in this case. There may be a doubt as to the patentee's title in such an island, that is, one existing at the time of the survey, being subject to the right of the state, or of the federal government where the stream can be used for purposes of interstate commerce, to exercise dominion over it, without compensation to the patentee or his grantee, for the purpose of preserving, protecting, and improving the navigation of the stream; but as to an island made, by reclamation either by the patentee or his grantee, or by the action of the currents of the river, there can be no doubt but that the right to exercise such dominion does exist.

In *Railroad Co. v. Butler*, *supra*, the Supreme Court of the United States says:

"The inquiry is reduced then to this: Did the court err in holding as a matter of law, upon this record, that the grant vested in Lyon and Hastings the title to the particular land in controversy?"

"In *Hardin v. Jordan*, 140 U. S. 371 [11 Sup. Ct. 808, 838, 35 L. Ed. 428], it was held that the grants by the United States of its public lands, bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies, and the following from the opinion of Scates, J., in *Middleton v. Pritchard*, 3 Scam. [Ill.] 510, 520 [38 Am. Dec. 112], was quoted with approval: 'Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. What will pass, then, by a grant bounded by a stream of water? At common law, this depended upon the character of the stream, or water. If it were a navigable stream, or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the center thread of the current. * * * At common law, only arms of the sea, and streams where the tide ebbs and flows, are deemed navigable. Streams above tide water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these riparian proprietors bounded on or by the river could acquire exclusive ownership of the soil, water, and fishery, to the middle thread of the current, subject, however, to the public easement of navigation. And this latter, Chancellor Kent says, bears a perfect resemblance to public highways. The consequence of this doctrine is that all grants bounded upon a river not navigable by common law entitle the grantee to all islands lying between the mainland and the center thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right. * * * The United States have not repealed

the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon, the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the land may lie. We have adopted the common law, and must therefore apply its principles to the interpretation of their grant.'

"*Hardin v. Jordan* was a case from Illinois, and the question was as to the effect of the title granted by the United States along a small lake, in respect of the bed of the lake in front of the land actually described in the grant, and we said, page 380 [of 140 U. S., page 811 of 11 Sup. Ct. (35 L. Ed. 428)]: 'This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the state of Illinois. If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the state, extending either to the margin or center of the stream, according to the rules of that law. It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted; no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.' And see *Packer v. Bird*, 137 U. S. 661 [11 Sup. Ct. 210, 34 L. Ed. 819]; *St. Louis v. Rutz*, 138 U. S. 226 [11 Sup. Ct. 357, 34 L. Ed. 941]; *Shively v. Bowlby*, 152 U. S. 1 [14 Sup. Ct. 548, 38 L. Ed. 331].

"In Michigan the common law prevails, and the rule is sustained by an unbroken line of authorities that a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof. *Norris v. Hill*, 1 Mich. 202; *Lorman v. Benson*, 8 Mich. 18 [77 Am. Dec. 435]; *Rice v. Ruddiman*, 10 Mich. 125; *Ryan v. Brown*, 18 Mich. 196 [100 Am. Dec. 154]; *Watson v. Peters*, 26 Mich. 508; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403 [6 N. W. 857]; *Fletcher v. Thunder Bay, etc., Co.*, 51 Mich. 277 [16 N. W. 645]; *Turner v. Holland*, 65 Mich. 453 [33 N. W. 283]; *City of Grand Rapids v. Powers*, 89 Mich. 94 [50 N. W. 661, 14 L. R. A. 498, 28 Am. St. Rep. 276]; and many other cases.

"In *Mitchell v. Smale*, 140 U. S. 406, 412, 413, 414 [11 Sup. Ct. 819, 840, 35 L. Ed. 442], a similar question to that disposed of in *Hardin v. Jordan* arose, and Mr. Justice Bradley, speaking for the court, said: 'We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation, which ought not to be created or sanctioned. * * * We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the government would have the right to recall the survey, and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government. Nor do we mean to say that, in granting lands bordering on a nonnavigable lake or stream, the authorities might nor formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective states of all swamp and overflowed lands therein, this cannot be done. In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed by the surveyor who made the survey of 1834-35.'

"We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the government has never taken any steps predicated on such a theory, and did not survey the so-called Island No. 5 until 25 years after the survey of 1831, and nearly 20 years after that of 1837."

The court here declares what the common-law doctrine is as to streams above tide water, although navigable in fact at all times, and in that connection quotes with approval, as it had already done in *Hardin v. Jordan*, from the opinion in *Middleton v. Pritchard*, which, after quoting the declaration of Chancellor Kent that the rule bears a perfect resemblance to the rule as to owners whose lands abut on public highways, says that:

"The consequence of this doctrine is that all grants bounded upon a river not navigable by common law entitle the grantee to all islands lying between the mainland and the center thread of the current."

Now, if the state of Minnesota has adopted the common law on this subject, except in so far as it must be modified by conditions in this country, as it certainly has (*Lamprey v. State*, *supra*), a riparian owner would be entitled to an island in the Mississippi river lying between his shore line and the center thread of the stream, which had not been surveyed, but had been treated by the government surveyor, without fraud or palpable mistake, as a negligible fraction; and would also be entitled to an island subsequently formed between his shore line and the center thread of the stream by gradual deposits made by the water and rising from the bed of the stream. In the latter case certainly, and in the former possibly, his title would be subject to the right of the state or general government, acting for the purpose of preserving, protecting, or improving the public right of navigation, to remove or otherwise appropriate said island without compensation to him.

I have thus gone over with great care the Minnesota decisions bearing upon the question here under consideration, and have quoted therefrom at length, perhaps at too great length, because it has seemed to me necessary to a full and clear understanding of them. From such examination I have been led inevitably to the conclusion that the following is the established rule or doctrine in this state: That where there is no reservation, express, or from the circumstances necessarily implied, in a grant of lands bounded by a stream navigable in fact, like the Mississippi river, the grantee takes the absolute title in fee to high-water mark, or at furthest to low-water mark. That the state has title to the soil or land under the water, between the edge of the stream and the middle thread thereof, in its sovereign capacity, in trust for the public, for the purpose of preserving, protecting, and improving the public right of navigation. That such right or title of the state is paramount for that purpose, but is not proprietary, or one under which it can alienate or convey any portion of said soil or land under water, or any island formed thereon, to a stranger, but is a limited title or ownership—limited to that purpose, and extending no further. That the riparian owner has also a right or title to such soil or land under water opposite his shore land, between the edge of the

stream and the middle thread thereof, which, though subject and subordinate to this title of the state, is proprietary, and exclusive as to all others than the state, or the general government, and even as to the state or general government exclusive except as they may act by their properly constituted authorities in protecting, preserving or improving said public right, and which he can convey to another either in whole or in part. That the limit to this private right is imposed by the public right, and by that only, and the private right exists up to the point beyond which it would be inconsistent with the public right, and with that only. That under this right or title the riparian owner, or his grantee, has the exclusive right to reclaim, occupy, and use, for any purpose not inconsistent with such public right, such soil or land under water, or any part thereof, out to the middle thread of the stream, or certainly to the main navigable channel thereof, subject only to such paramount right of the state, or of the general government. That under this right or title such riparian owner, or his grantee, has the exclusive right, subject only to such paramount right of the state or general government, to occupy and use, for any purpose not inconsistent with such public right, any island, or part thereof, between his shore line and the middle thread of the stream, whether such island exists at the time of the survey and is omitted therefrom in good faith and without palpable mistake, or is afterwards formed by the gradual action of the waters, and, as against all others than the state or the general government, acting under the paramount authority above referred to, he has the exclusive right to the possession thereof.

In other words, it seems to me that the Supreme Court of Minnesota has in effect, and for all practical purposes, finally adopted the common-law rule so clearly laid down by Judge Wilson in the Schurmeier Case; that is, of a qualified fee ownership in the riparian owner of the bed of the stream to the middle thread thereof—a rule just, simple, and easy of application. And I am fully persuaded from my consideration of its decisions that but for the error to which I have called attention, and of which it seems to have been difficult for the court to entirely divest itself, it would never have departed, or seemed to depart, therefrom. A careful examination of the cases will show that the same result would have been reached in each one of them, except the one which was subsequently overruled, by applying that rule; and, indeed, that under that rule the conclusion reached would have been obvious from a mere statement of the facts, and that thus the many long and sometimes seemingly inconsistent discussions, and the somewhat attenuated distinctions which have been attempted to be drawn, would have been avoided.

From the foregoing considerations, it necessarily follows that the plaintiff is entitled to the possession of the portion of the island here in question in front of her riparian premises, and judgment has therefore been ordered accordingly.

GAGNON v. KLAUDER-WELDON DYEING MACH. CO.

(Circuit Court, N. D. New York. December 6, 1909.)

1. MASTER AND SERVANT (§§ 155, 190*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DANGEROUS METHOD OF DOING WORK.

When there are safe ways or methods of doing work which an employé is directed by the master to do, and also dangerous ways or methods, and the dangers are not obvious, but latent, and the servant is ignorant of them as the master knows, it is the duty of the master to warn the servant of such dangers; and, if the master has delegated the general control and management of the business to a superintendent, it is his duty as representing the master to so warn a servant who is under his orders, and his negligence in failing to do so is the negligence of the master, and renders him liable to an employé for an injury of which such negligence is the proximate cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 310, 427-435, 449-474; Dec. Dig. §§ 155, 190.*]

2. MASTER AND SERVANT (§ 226*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMED RISKS.

An employé never assumes the risk of the negligence of the master, and, if he is injured through the concurrent negligence of the master and co-employé, the master is liable therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

3. MASTER AND SERVANT (§ 190*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DANGEROUS METHOD OF DOING WORK.

Defendant corporation operated a plant for the manufacture of machinery, one of the buildings being a blacksmith shop in which plaintiff was employed as head blacksmith, and where he was injured by the explosion of a piston head which was being heated by him and another employé for the purpose of being shrunk on to a new piston rod. The head was hollow, and it was dangerous to heat it without drilling a vent for the escape of moisture from the inside, but plaintiff did not know the danger. The entire plant was under the management of a superintendent who employed and discharged the men, and directed their work. There was evidence that he sent the other employé with the piston to the blacksmith shop with directions that it be heated, although there were other safe ways of attaching the rod without heating, and, although he knew the danger unless a vent was made and that plaintiff did not, he gave no warning nor directions as to how the work should be done. *Held*, that his negligence in that regard was that of the master, and the evidence was sufficient to sustain a verdict finding defendant liable for plaintiff's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

Duty of master to promulgate rules as to methods of work, see note to St. Louis, K. C. & C. R. Co. v. Conway, 86 C. C. A. 8.]

4. DAMAGES (§ 132*)—PERSONAL INJURY—EXCESSIVE DAMAGES.

An award of \$4,000 damages for a personal injury to plaintiff, by which he lost two fingers and a part of his right hand, but had not suffered any loss of wages at his trade of blacksmith, *held* excessive, and required to be reduced to \$3,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Action by Simon Gagnon against the Klauder-Weldon Dyeing Machine Company. Motion for new trial. Motion overruled.

See, also, 166 Fed. 286, 92 C. C. A. 204.

Henry V. Borst, for plaintiff.

Duell, Warfield & Duell, for defendant.

RAY, District Judge. This action is to recover damages which the plaintiff claims to have sustained by reason of the negligence of the defendant. The jury rendered a verdict in his favor for the sum of \$4,000, which is alleged to be excessive in any event.

The evidence in the case shows or tends to show the following facts:

(1) The plaintiff is a machinist's blacksmith and a resident of the state of New York. The defendant is a corporation organized under the laws of the state of Pennsylvania, but at the time of the transactions in question was doing business in the state of New York, and engaged in the manufacture of machinery at Amsterdam, N. Y. It had at least one engine for running its manufacturing machinery. Shortly before the accident or transaction complained of, it purchased another engine, a secondhand one; this was being installed or set up for use in the defendant's machine shop, and in some of its parts needed repairs.

(2) The blacksmith shop was separate from the machine shop, but a part of the same general plant. The plaintiff, Simon Gagnon, was the head blacksmith and in general charge of the work in that shop, having an assistant. All the repairing and all the forging were done there. The company was also doing general jobbing.

(3) John C. Evenden was the superintendent or general foreman of the defendant company and of its shops above referred to. Gagnon says he was superintendent, and hired and discharged the men, and directed the work, what was to be done. It was customary for Evenden to instruct the men as to the manner in which he wanted the work done and to work with them at times, and at the times in question he had general charge of the men and work.

(4) Shortly before that some trouble had arisen between Jackson, one of the men, and Gagnon, because Gagnon did not do some work he, Jackson, had taken into the blacksmith shop for Gagnon to do as promptly as he wished, and he reported to Evenden. Evenden went in to the blacksmith and told Gagnon, as Gagnon says: "Sime, hereafter whenever I send any men to the blacksmith shop to have any work done, you have got to do it, or else drag yourself out." This was denied by Evenden. Jackson testified Evenden said to Gagnon: "'Hereafter when I send men out here to get their work done, you do it right away or get out or strike out'—something similar to that."

(5) James Spore, an employé of the defendant, was an experienced machinist whose work and duties were in the machine shop, not in the blacksmith shop.

(6) Gagnon had had some experience with absolutely solid piston heads, but none with hollow piston heads like this, and had no knowledge or information of their liability to explode when heated without

being vented, if old, or had laid around in damp places, or under any conditions. There was some evidence that defendant knew this.

(7) The making, repairing, or handling of engines or piston heads was no part of the manufacturing business of the defendant company or of its general business except as it became a part of its business to repair this old engine referred to for the purpose of installing it as a part of and an addition to its manufacturing plant, and of which the piston head in question here was a part.

(8) There are at least four ways of repairing a piston head as this was being repaired in the respect material here; that is, by taking out the old piston rod and replacing it with a new one, viz., pressing in the new rod by hydraulic pressure; driving it in by heavy blows; expanding the piston head by heat, then putting in the cold rod and letting the head cool, which process is called shrinking it on; drawing the head on with a nut, partly driving and also drawing with the nut; driving on or drawing the rod in tight by means of a slot and tapering key. Putting in the new rod by hydraulic pressure is best, by the shrinking process next best, and by driving next best.

(9) An old piston head such as this was will gather more or less moisture in the cavity in its interior, and, if heated without being first vented, will explode. There is evidence that defendant knew this.

(10) On the day in question, February 22, 1906, the defendant company was engaged in putting a new piston rod into this old piston head of this old engine then being installed in defendant's plant, the work being done under the general direction of Evenden.

It was first taken into the machine shop, where considerable work was done by Spore under the general direction of Evenden. Just what directions were given him by Evenden is a disputed question, and, as Spore was killed in the afternoon by the explosion which will be referred to, the plaintiff relies to some extent on inferences to be drawn from certain facts. In the afternoon Spore rolled the head into the blacksmith shop and gave Gagnon some directions, but what was said was ruled out under a decision of the Circuit Court of Appeals in this case on appeal from a judgment for the plaintiff entered on the verdict of a jury on a former trial had before Judge Holt. 166 Fed. 286, 92 C. C. A. 204. The piston head was placed on the fire by Gagnon and heated on one side, Spore standing by with the new rod, and, as Gagnon was in the act of turning the head on the fire, it exploded with great force, and Spore was killed, and Gagnon injured in one leg and in one hand, losing the first and second fingers of his right hand by the flying fragments. The head was heated without being vented. This venting could have been done by drilling a hole to the interior or by taking out one of the plugs.

The plaintiff gave evidence by one Kehoe that he heard Evenden say, when giving directions to Spore in regard to the piston head, "be careful, Jim, when you take that out, don't let Sime burn it." Evenden denied that he said this, and claims that he gave Spore positive directions to put in the new rod by the cold or driving process. He, in turn, was contradicted or sought to be discredited on this point by witnesses who said that, after the explosion, they heard him say, "We

forgot to vent it." The defendant on this state of facts says there is no evidence to sustain the verdict; that the plaintiff was guilty of contributory negligence in not tapping the piston head; that the proximate cause of the injury was the negligence of a fellow servant, Spore, in not having the head tapped; that there is no evidence connecting Evenden with the accident; that there is no evidence that Evenden gave Gagnon any directions as to putting in the new rod; that the plaintiff assumed the risk of the negligence of Evenden in directing the men and the work and the mode and manner of doing it if he gave any as to heating the head; that the evidence is conclusive that Evenden told Spore to put in the rod cold, and the proximate cause of the accident and injury was the disobedience of these orders by Spore; that Evenden was a competent man and a competent superintendent or foreman, and, as there was more than one way or mode of doing the work, three safe ones and only one dangerous one, the defendant company had the right to assume that Evenden would select the safe method or one of them, and that, even if he was negligent in selecting the dangerous method and directing it to be done by that method and neglected to direct the head to be vented, the defendant is not liable for such negligence; and that under the circumstances, assuming that the method adopted by Evenden and directed by him to be followed was unsafe, or accompanied by latent dangers of which the plaintiff, Gagnon, was ignorant, and of which defendant knew he was ignorant, the defendant was under no obligation to instruct him as to or inform him of such danger as it had no reason to suppose it would be incurred, and was not negligent in not instructing him or informing him of such danger—that is, the danger of shrinking a piston head on a new rod by the heating process without venting. While the repair of this engine and the repair of this piston head in the respects mentioned was not a part of the general manufacturing business in which the defendant was engaged, it was a part of its business as it was repairing and enlarging its plant and manufacturing facilities by putting in additional machinery and manufacturing facilities. It was the business of the defendant. Evenden was superintending and directing it and had general control over it and the men engaged in doing the work. He represented the defendant. The plaintiff claims that, so far as Gagnon was concerned on the occasion in question, Evenden was not a co-employé or fellow servant of Gagnon. Evenden was not in the shop, or giving orders there, at the time or assisting in doing the work. In sending the piston head and rod into the blacksmith's shop to have the head shrunk onto the rod by the heating process, if he did, he spoke for and represented the defendant company, and his act and his order, so far as Gagnon was concerned, were the act and order of the defendant company. If this be true, and there was danger, a latent danger, in putting that rod in that head by that process, and defendant company knew it and plaintiff Gagnon did not and defendant knew he did not, then, plaintiff claims, it was the duty of the defendant company to inform Gagnon of, or instruct him as to, the danger; and, if there was a safe way to do the work and avoid the danger, it was the duty of the defendant company to instruct or advise him of the safe way or mode if it required him to do the work at all.

On this subject the court charged the jury, and on this theory the case was submitted to the jury, for on no other theory could the plaintiff recover. The question was brought up sharply and distinctly by requests to charge and the responses of the court thereto. The defendant requested the court to charge:

"If the jury find that Gagnon, the plaintiff, knew or had cause to know that it was dangerous to heat this piston head without a vent in it, they must find for the defendant."

The court in response said:

"That, of course, is true, gentlemen. As I told you in very emphatic language the negligence in this case if any is in the failure of the defendant company to inform Gagnon of the danger of heating that head without a vent in it. But, of course, if he knew the danger he didn't need, as I have told you, any information on the subject. He knew better than to do it, and it was his own negligence, his own fault."

The court was requested to charge, and charged, as follows:

"If the jury disbelieve the testimony of Kehoe, there is no evidence in the case of Evenden directing a heating process, and they must find for the defendant. That is true. If there is no evidence of his directing the heating process, they must find for the defendant. But still, gentlemen, if Mr. Evenden, representing this defendant company, sent that in there to be changed at the discretion and will of this plaintiff, as he might see fit to do it, in the ordinary way, without instructions as to the danger of doing it without a vent, then this defendant might be liable. If he sent it in there without any instructions at all, but simply told him to do it, and didn't tell him of the danger, there being more than one way of doing it, one being dangerous, and left it to him to do it in either way, he not knowing—if the plaintiff didn't know that either was dangerous, then you might say it was negligence not to inform him of the danger of doing it in one of those ways."

The court was requested to charge, and charged, as follows:

"If the jury believe that Evenden, the foreman, knew of the danger of heating this head without a vent and directed the heating to be done in this way—that is, by heating, without a vent—when he knew a perfectly safe way, that was negligence in the manner of directing the work to be done as to which the plaintiff assumed the risk, and for which he cannot recover. For that particular negligence, gentlemen, he could not recover. But that would be the negligence of a co-servant, a co-employé, and he assumed the risk; that is, the plaintiff Gagnon, assumed the risk when he entered the employment of the negligence of his co-servants, co-laborers, and co-employés. But, gentlemen, he did not assume the risk of the negligence of the company itself. It was the duty of the company if there were latent dangers in the work they set him to do through this representative Evenden, the foreman, to inform him of those latent dangers, and, if they left that duty to Evenden, to inform Gagnon of those dangers, and Evenden, knowing the dangers, failed to perform the duty intrusted to him by the defendant company, and failed to give him notice, while that was negligence, in not giving notice, on his, Evenden's, part, there was a concurrent negligence in not conveying information to Gagnon of the danger of doing it—there was a concurrent, co-acting negligence of the defendant, and so the defendant could not escape liability because they failed to give information of the danger to the plaintiff in this case.

"(Exception.)

"But for this particular negligence that they point out, standing alone, of course, he could not recover."

The jury was instructed that plaintiff could not recover if Evenden directed the rod to be driven in cold and Spore disobeyed that instruction and used the heating process; also, that Evenden's instructions

to Gagnon to do the work of the men when sent in to the blacksmith shop did not make the defendant responsible for a negligent direction by Spore as to a negligent method of doing the work.

The court was requested to charge, and charged, as follows:

"If they find that there would be no latent danger in properly heating the head with a vent in it, that they are entitled to the presumption that the foreman Evenden and the fellow servant, Spore, would use the proper method of directing the work to be done.

"The Court: Of course, that is all true. At the same time, gentlemen, it was the duty of the defendant, if there was a latent danger and it knew it, to inform the man who was to do the work of that latent danger. If the defendant failed to perform that duty, and that was the proximate cause—of course, that comes in here everywhere—if it was the proximate cause of the accident and injury, then, of course, there could be a recovery.

"(Exception.)

"There can be no recovery in this action for the negligence of a co-servant or co-laborers; not that alone. There must be behind that a concurrent negligence of the defendant itself in failing to inform plaintiff of the latent danger, providing, of course, you find that he didn't know of the latent danger.

"Mr. France: I request that in this form: That there could be no latent danger if this head were heated with a vent in it; that the defendant was entitled to presume that Evenden and Spore would direct its being heated if at all with a vent in it; and that the jury must find for the defendant.

"The Court: I decline to direct a verdict for the defendant.

"(Exception.)

"It is for the jury to say whether this was negligence or not in not informing him of the latent danger if there was one, providing they find the plaintiff was ignorant of that latent danger."

The court was also requested to charge and charged:

"Evenden, the foreman, so far as this case is concerned, represented the defendant only as to its duties to furnish a safe place, safe machinery, and implements and competent fellow servants. As to his directions as to methods of work, the plaintiff assumed the risk, and for negligence in that regard he cannot recover. I have told you several times, and I tell you now, that Evenden, the foreman, so far as this case is concerned, represented the defendant only as to its duties to furnish a safe place, safe machinery, and safe implements and competent fellow servants; but if he was in charge there, gentlemen, of those shops, the blacksmith shop and machine shop, if he was the man in charge there and in control, then it was his duty if he set this plaintiff to do a dangerous piece of work, which was the work of the defendant, which the defendant authorized to be done, and there were latent dangers in that work, then it was a part of the duty of Evenden, representing the company, to inform Gagnon of those dangers."

The court was requested to charge, and charged, as follows:

"If the jury find that there was a safe way and an unsafe way in which this work could be done, and that the safe way was known to Evenden, the foreman, the defendant was entitled to the presumption that Evenden would direct the safe way and was not called upon to warn the plaintiff of any latent dangers.

"That I decline to charge.

"(Exception.)

"It was its duty if there were latent dangers of which the plaintiff was unaware, and these latent dangers were known to the defendant company, and it set this plaintiff on a dangerous job, and there was a safe way and an unsafe way, then it was its duty to inform the plaintiff here of the safe way of doing the work. And if it intrusted that duty to Evenden or anybody else, and Evenden or that other person failed to perform that duty, while they were negligent in not performing the duty intrusted to them, still that negligence would not exonerate the defendant company, for the reason that it

would remain a fact that the defendant company hadn't performed its duty of warning the plaintiff. * * *

"(Exception.)

"The Court: I don't know exactly what you mean. If this defendant, desiring to have that change made, if this defendant entrusted it to Spore and told him to make the change by the heating process, and he knew all about it, and he went and got somebody else to do it, and Spore was negligent about it, and didn't obey instructions, why then that would be the negligence and disobedience of orders of course by Spore, for which this defendant would not be responsible at all.

"If that job was entrusted to Spore as Evenden says it was, and you so find, and was told to do it, I don't care how he was told to do it, whether by one process or the other, if it was entrusted to him to do, and he should get somebody else to do it without authority of the defendant company, in violation of its orders, why, of course, he was not authorized to employ Gagnon, and the defendant company would not be liable for what occurred."

So the jury was emphatically told that if Spore was directed to make the change and repairs and to use the cold process, and that was all the defendant company authorized to be done, and Spore then took it to the shop and had the heating process used, the plaintiff could not recover, and the court further added:

"As I told you before, you have to find the company itself sent that thing into the blacksmith shop; that the defendant itself put it into the hands of Gagnon; that the defendant itself—that is, of course, acting through its agents and servants, and it was by its authority given out through Evenden—and that, having put it into the plaintiff's hands, they didn't tell him that he must do it in a particular way—that is, that they didn't inform him of the danger of heating it without a vent; let him do any way he pleased—if he was ignorant, of course, and they didn't properly warn him, and he got hurt through the existence of that latent danger in the thing they put into his hands and sent out there for him to do, then you see that it was their negligence in not warning him, and they are responsible for that negligence, but not under any circumstances for the negligence of any of these co-servants or co-employees."

The court later charged, and no exception was taken:

"As for instance, if you find that the defendant itself was negligent, if you find that it was negligent in not informing the plaintiff of the latent danger, if you find that there was latent danger in repairing that or heating it without a vent, if you find that Gagnon was ignorant of the latent danger, and if you find that the defendant company sent that iron into the shop there to be repaired and fixed by Gagnon, and then didn't inform him of the danger, or give him any special instructions, but left it to him to do as he saw fit about it, and he did as he saw fit, unaware of the danger, and because of this negligence of the defendant in not informing him of the danger he was injured, then that would be the negligence of the defendant, and the proximate cause of his injury for which they would be liable. Of course, the defendant company is only liable here for negligence which was the proximate cause of the injury. If there was a remote cause, some other negligent cause intervened, then the defendant is not liable for that injury. It must be proximate. It must have been the negligence of the defendant. The defendant under those circumstances is not liable for the negligence of either one of these servants or co-employees. Remember that. You cannot base any finding here against the defendant company on the ground of the negligence of any of these co-employees. You must find negligence of the defendant in the particulars I have pointed out. You must find that was the proximate cause of the injury. If you find all that, then you would come to the question of damages and only then."

Whether we consider Evenden as the defendant's general superintendent or general foreman, under the evidence in this case, he rep-

resented the defendant in conducting all this work carried on in these shops, and in managing and directing the men, with power to employ and discharge them. He had power to direct what was to be done in the blacksmith shop, and to send work in there to be done. If he told Spore, in effect, to take the piston head into the blacksmith shop and be careful, and not let Sime, the plaintiff, burn it, the jury had the right to infer that his instructions to Spore were to take it out into the blacksmith shop for the purpose of having the head shrunk on to the rod by the heating process. Spore took it out there, and that is what Gagnon was doing in the presence and with the aid of Spore. It was plaintiff's duty, in view of what Evenden had said to him before, to go on and do the work—not something he knew to be dangerous however—but to do the work if ignorant of the danger, and not informed of it. If he vented it and then heated it, there was no danger. If he heated it without vent, there was danger. Gagnon was ignorant of the danger of heating it in the condition it was when taken to him, and he was not informed of the danger. In sending it there Evenden represented the defendant company. It was the defendant's act. Evenden did not accompany the head. He was not assisting in doing the work. He was not at the time or in the heating of the head a co-employé in that matter with Gagnon. When an employé is put at dangerous work by the master, and the dangers are not obvious, but latent, and there are dangerous ways or methods of doing the work and safe ways or methods, and the employé is ignorant of such dangers and the master knew it, it is the duty of the master to inform the servant of the danger so he may avoid it. And, if the master has delegated the general management and control of its business and work and employé to some one person, whether it be a general superintendent or a general foreman, it is the duty of that person representing the master to inform the employé of latent dangers in doing work he has authority to direct him to do and sets him at. And, if the foreman fails to give the necessary information or instructions, it is the negligence of the master, and the employé, if injured, as the proximate result of the danger of which he was not informed, is entitled to recover. This is for the reason the master has failed in its duty, not that the foreman failed in his. He does not recover for the negligence of the foreman, but for the negligence of the master. *Mercantile Trust Company v. Pittsburgh & W. Ry. Co.* (Lake, Intervener), 115 Fed. 475, 53 C. C. A. 207; *Simone v. Kirk*, 173 N. Y. 7, 13, 16, 65 N. E. 739, reversing 57 App. Div. 461, 67 N. Y. Supp. 1019; *O'Brien v. Buffalo Furnace Co.*, 183 N. Y. 317, 321, 322, 76 N. E. 161, reversing 94 App. Div. 609, 87 N. Y. Supp. 1142, 26 Cyc. 1167, 1168, and cases there cited; *Peters v. George*, 154 Fed. 634, 83 C. C. A. 408; *Pennsylvania R. R. Co. v. Hartell*, 157 Fed. 667, 85 C. C. A. 335; *Railroad Co. v. Fort*, 17 Wall. 553, 559, 21 L. Ed. 739.

The principle is thus stated in *Mercantile Trust Co. v. Pittsburgh*, etc., *supra*, 115 Fed., at page 481, 53 C. C. A., at page 212:

"The duty of informing a servant of special or extraordinary risks connected with his service is a primary duty of the master, when they are known to him and the delegation of such duty to any other servant, whether higher

or lower in the scale of employment than the one exposed to the peril, cannot relieve him of the responsibility imposed on him by the law."

In *Pennsylvania R. R. Co. v. Hartell*, supra, *Coxe, C. J.*, in giving the opinion, held:

"It is the duty of a master to provide, not only suitable machinery, means, and appliances, but competent fellow servants and a sufficient number to do the work in hand; and, where there are peculiar dangers incident to the business, the servant, if inexperienced, must be warned in advance of their existence."

In *Peters v. George*, supra, *Gray, C. J.*, in giving the opinion, held:

"Under the modern rule of the federal courts, the theory of vice principal as determining the liability of a master to a servant for the negligence of another employé has been largely discarded, and the distinction between negligence which is to be imputed to the master and that which is to be considered as merely and solely the negligence of a fellow servant, turns rather on the character of the act than on the relation of the employés to each other. * * * The duty to warn and instruct an employé who is set to perform a dangerous work with which he is unacquainted is a primary and absolute duty of the master to the servant, and he cannot relieve himself of liability for its nonperformance by delegating or intrusting it to a subordinate or to a fellow servant of such workman. Nothing short of actual notice of the danger to the workman who is to encounter it, with such cautionary explanation as may enable him to avoid it, will satisfy the requirement of the law, and the default of an intermediary, whether he be the highest officer in control or merely a fellow workman of the one exposed to the danger, is the default of the master."

In 26 Cyc. 1167, citing many cases, the rule is stated thus:

"The duty of warning and instructing a servant is a primary duty of the master, and the delegation of such duty to another servant, whether higher or lower in the scale of employment than the one exposed to danger, cannot relieve him of the responsibility imposed on him by the law."

So, "where a servant is directed to do work outside the scope of his regular employment, the master is under the same obligation to warn and instruct him as though he were engaged in his regular employment." 26 Cyc. 1172, and many cases cited; *Dyer v. Brown*, 64 App. Div. 89, 71 N. Y. Supp. 623. It is undoubtedly true that a master who employs competent superintendents and foremen may leave the execution of the details of the work to them, and is not required to oversee the details, and that, where there are different methods of doing certain work, it may leave it to them to select the method; but if some methods or processes are dangerous, and others not dangerous, and this is known to the master and the selection of method is left to the foreman in charge, and he is at liberty, as was the case here, to adopt either method, and he adopts the dangerous one and directs the work to be done in that way, he represents the master in so doing, and the selection of mode or method is the act of the master as much as if he were personally present and made the selection, and, as it would be negligence for the master to set the ignorant workman to the execution of the work in that manner without warning or instructions, so it would be his negligence should the vice principal or foreman set the ignorant employé to do the work according to the dangerous method without warning or instruction as to the danger. See generally, 26

Cyc. 1151-1155. "As a general rule, the master will not be held responsible for injury to a servant in the course of his employment where the usual and customary methods of work are employed, provided such such methods do not disregard the safety of the servant." *Allen v. Burlington, etc., R. Co.*, 64 Iowa, 94, 19 N. W. 870; 26 Cyc. 1155.

This principle is well illustrated in *O'Brien v. Buffalo Furnace Company*, *supra*. There the defendant by its employes was engaged in breaking up slag by blasting with dynamite. The work of blasting had been confided to one Minor, a competent man. Bachman was the general foreman of defendant. A coil of pipe was incased in the slag. Plaintiff's intestate was called from his usual work to assist Minor by cutting up a stick of dynamite and dropping the pieces in the pipe. As plaintiff's intestate dropped in the pieces of dynamite, Minor pushed them down, using a steel rod for the purpose. It was a dangerous method to push the explosive down with the steel rod. A wooden one should have been used. The dynamite exploded, and O'Brien, plaintiff's intestate, was killed, and Minor severely injured. Bachman, the general foreman of defendant company, was present up to a few minutes before the explosion, but did not interfere. He returned shortly before the explosion, but did not interfere. He saw the dangerous method in which the work was being done. He had power to stop it. The court said:

"The explosion was caused by the negligence of Minor in using a rod of steel instead of one of wood. This was the negligence of a fellow servant in the performance of a detail of the work."

It then refers to the presence of Bachman, who was the alter ego of defendant, and continues:

"Had Bachman, on discovering that Minor was doing the work in a dangerous manner, promptly intervened, the accident would not have occurred, or had he even told the deceased, to whom he had previously said that there was no danger, that the work as then conducted was dangerous, the deceased might have fled from the danger, and, at least, the injury to him been avoided. The learned Appellate Division, while assuming that the jury might have found negligence on the part of Bachman, was of opinion that it was negligence in the performance of a duty by an operative in respect to a detail of the work, for which the master was not responsible, and cited *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521, and *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905. We entertain a different view. As already said, Bachman was the manager of the corporation, and therefore its alter ego. He was, for the purposes of this case, the master. The detail of the work, which was the servant's duty, was done in this case, not by him, but by Minor. In this respect the case radically differs from those cited by the Appellate Division. It is the duty of the master to use reasonable care to so conduct his business as not to subject servants to unnecessary danger in the prosecution of their work. * * * Ordinarily, so far as liability to his servants is concerned, that duty is performed when he selects competent fellow servants. But, when he sees that one servant is so negligently doing his work as to occasion danger to a fellow servant, it is his duty to interpose, and direct that the work be properly done. *Dolng v. N. Y. Ont. & W. Ry. Co.*, 151 N. Y. 579, 45 N. E. 1028; *Dowd v. Same*, 170 N. Y. 459, 63 N. E. 541."

The court then holds defendant liable because of the negligence of Bachman, which it holds was defendant's negligence. Now, suppose that Bachman, instead of negligently allowing the work to proceed by that improper and dangerous method, or in that improper and danger-

ous manner, had actually directed it to be done in that way without warning of the danger, would the defendant company have been any the less liable? Clearly not.

The point is that Evenden, the general foreman, having all the power and authority described, represented the defendant, was its alter ego, and he, as the jury found, sent the unvented head to Gagnon, the plaintiff, with the new rod to have it shrunk on by the heating process without any warning of the danger, or instructions as to what was to be done to avoid danger. While this was negligence on his part, of course, it was the act of the defendant, and negligence on its part. The duty of giving warning of dangers in an employment or instructions as to such dangers and the proper methods of doing the work in order to avoid them and the duty of inspection are duties resting on the master and cannot be delegated so as to exonerate the master in case they are not performed. This is the law of the Supreme Court of the United States as well as of the state of New York. *Simone v. Kirk*, 173 N. Y. 7, 13, 14, 16, 65 N. E. 739, reversing 57 App. Div. 461, 67 N. Y. Supp. 1019; *Koehler v. New York Steam Company*, 183 N. Y. 1, 75 N. E. 538, reversing 93 App. Div. 612, 87 N. Y. Supp. 1139. In *Koehler v. New York Steam Company*, supra, the court, at page 4 of 183 N. Y., page 539 of 75 N. E., said:

"To state it in a different form, the court held that, although the evidence warranted the jury in finding that a defective condition existed which could have been discovered by a careful inspection, yet the defendant was not liable, since it had provided for an inspection by competent employes. In this conclusion we think the learned court below clearly erred. It has become one of the axioms of negligence law that the duty of inspection is the master's duty, and one that cannot be delegated so as to relieve the master from responsibility. If a servant perform this duty, he is the alter ego of the master and for any negligence in its discharge the latter is liable. * * * 'Reasonable care involves proper inspection, and negligence in respect to it, in such cases as this, is the negligence of the master, and none the less so when the inspection is committed to a servant.' The rule thus set forth is established by a long line of cases in this court, of which we cite only a few. *Bailey v. R., W. & O. R. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Durkin v. Sharp*, 88 N. Y. 225; *Simone v. Kirk*, 173 N. Y. 7, 13, 65 N. E. 739; *Byrne v. Eastmans Co.*, 163 N. Y. 461, 465, 57 N. E. 738; *Eastland v. Clarke*, 165 N. Y. 420, 429, 59 N. E. 202, 70 L. R. A. 751."

In *Simone v. Kirk*, supra, the court said, at pages 13, 14, and 16 of 173 N. Y., pages 741, 742 of 65 N. E.:

"Certain work is inherently dangerous, and yet the master has the right to hire servants to do it. In such cases, however, unless the danger is obvious to an ordinary observer, it is his duty to give them due warning, so that they may refuse to work if they do not wish to run the risk, and proper instructions so that if they enter upon the work they may be able to take care of themselves. *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368, 2 N. E. 24; *Benzing v. Steinway & Sons*, 101 N. Y. 547, 5 N. E. 449; *McGovern v. Central Vermont R. R. Co.*, 123 N. Y. 280, 25 N. E. 373; *Gates v. State of N. Y.*, 128 N. Y. 221, 226, 28 N. E. 373; *Eastland v. Clarke*, 165 N. Y. 420, 428, 59 N. E. 202, 70 L. R. A. 751; *Finn v. Cassidy*, 165 N. Y. 584, 59 N. E. 311, 53 L. R. A. 877; *Dowd v. N. Y., Ont. & W. Ry. Co.*, 170 N. Y. 459, 63 N. E. 541. There is no complaint in this action as to want of care on the part of the defendants in furnishing suitable appliances for their servants to work with. The crucial question is whether the defendants used due diligence to furnish a safe place, in so inspecting it so as to keep it reasonably safe, and in properly warning the plaintiff's intestate. These duties were for the defendants

to discharge as masters, and they could not delegate them even to a competent foreman without being responsible for the manner in which they were performed. Whoever, in fact, performed or attempted to perform them, stood for the defendants as their alter ego, and what he did had the same effect in law as if they had done it in person. * * * He had the right to a reasonably safe place, in view of all the circumstances, and to assume that the place furnished was reasonably safe when he began to work, or else due warning should have been given so that he could protect himself, or refuse to work. This was not done, and yet this was the work of the defendants, as masters, which the law does not permit them to delegate to a foreman, unless the latter does it without negligence. When the foreman employed Simone and set him at work on that pile without warning, it was the same in legal effect as if one of the defendants in person had done it knowing of the danger as it then existed."

In these cases the doctrine of details of the work and competent foremen and employes was invoked and prevailed in the Appellate Division, but was held by the Court of Appeals not to apply, for the reason the duty of the master to the servant injured had not been performed. In all these cases there was negligence of the co-servant, or co-employé, or foreman, but this did not exonerate the master or employer for the reason the master's duty had not been performed. See the reasoning of Mr. Justice Brewer in *B. & O. R. R. Co. v. Baugh*, 149 U. S. 386-390, 13 Sup. Ct. 914, 37 L. Ed. 772, and cases cited. *Alaska Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390, has no application here, for the reason that there the "foreman or boss of a gang of men" under a general manager of the company who was in control did not represent the master, and the rules stated extend to methods or ways of doing the work. Says Thompson on Negligence, vol. 7 (2d Ed.) p. 313, § 4101:

"Where the work which a servant is set to do may be done in different ways, one of which is dangerous while the other is safe, an employer is under the duty of instructing his servant as to the safe method of doing the work."

I do not need to say that the risk of this danger was one not assumed by Gagnon. The employé never assumes the risk of the negligence of the master. So, if injury results from the concurrent negligence of master and co-servant, the master is liable to the one injured. The jury was repeatedly told that in this case the plaintiff could only recover for the negligence of the defendant itself in failing to inform him of the danger; in no event for the negligence of Evenden or Spore; that, if Spore took the piston head into the shop in disobedience of orders, or without orders, that plaintiff could not recover; that plaintiff could not recover unless they found Evenden directed the head to be taken in to the blacksmith shop and the heating process used and information of the danger not given in case Gagnon was ignorant of it. This was repeated so many times that there was no misunderstanding.

I think the evidence was sufficient to justify and require a submission of this question of the orders given by Evenden to the jury. The credibility of Kehoe was for the jury. Spore was dead. Whether Kehoe was in that machine shop when Evenden and Spore took out the old rod and had conversation as to the work and heard Evenden say

to Spore, "Be careful when you take this out, and not let Sime," referring to the plaintiff, "burn it," was for the jury to determine. As nothing remained to be done except shape the new rod and put it in by some process, and the hydraulic pressure process was not available, only the cold driving process and the heating process remained. The nut drawing process was eliminated. There was no necessity for taking the head to the shop for the driving process and no danger of burning in the driving process. Hence, in view of what Spore and Gagnon did, it was a fair inference that Evenden directed the head and new rod to be taken to the shop and united by the heating process. It is not presumed that Spore exceeded or violated his orders. I think the fair presumption is he acted within his orders. Evenden, as stated, testified that he directed Spore to put in the rod cold in the machine shop and that facilities were there for doing it, but his credibility on this point is questioned as witnesses say, he said shortly after the explosion, "D—n it, we forgot to tap it," or words to that effect. If he made these statements, they were inconsistent with his testimony on the trial that he directed Spore to use the cold process, as no tapping is employed in that manner of putting in a new piston rod. The credibility of these witnesses was for the jury as was that of Evenden.

As to the damages, there was no evidence that Gagnon has received less wages since his injury than he did before. He was out nothing. His wages were continued while laid up, and then he was given employment by defendant and later by others at no less wages than he had been receiving. But he suffered pain and permanent disfigurement of one hand. He lost two fingers and that part of the hand immediately below or behind them. His power to lift and handle things is interfered with and lessened. In some stations or businesses his earning power or ability to perform his duties would not be interfered with at all; in others it would be materially. What his future will demand of him cannot be foretold. As a mechanical blacksmith his ability to do work, handle things, is impaired. I do not think the jury was affected by passion or prejudice against corporations. They were carefully cautioned against this. While damages in such cases are largely discretionary with a jury, still that discretion is always within the control of the court. The pain and suffering in this case was not of long continuance, the disfigurement is confined to the one hand, the arm is not injured, the plaintiff can pick up and handle articles and handle all ordinary tools. I am of the opinion that the damages were excessive, all things considered, and that they should be reduced to \$3,000.

If the plaintiff files a stipulation within 20 days so reducing the damages, the motion for a new trial is denied; otherwise granted.

In re RINKER.

(District Court, M. D. Pennsylvania. November 26, 1909.)

No. 1,472, in Bankruptcy.

1. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD UNDER CONTRACT—LEASE OR CONDITIONAL SALE.

An instrument under which a cash register was delivered by the maker consisted of a printed form, with blanks, some of which were filled in and others not. It purported to be a lease, and bound the lessee to give his note, payable in installments, for the declared value of the register, less certain payments made and credits given, to secure the payment of rental to the same amount. It also provided that at the expiration of the lease, if its terms had been complied with, he should surrender the register in good condition and receive back the amount paid, with the option of purchasing the register for such amount; but no term for the lease was designated, the provision therefor in the form being left blank. *Held* that, without such term being fixed, the instrument was not a lease, and that the delivery of the register thereunder was not a bailment, but a conditional sale, which under the law of Pennsylvania was fraudulent as against creditors, and that the seller could not reclaim the property from the purchaser's trustee in bankruptcy; the property being under levy on execution, which was continued for the benefit of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—ATTEMPT BY BANKRUPT TO RECONVEY PROPERTY TO SELLER.

A sale of property under which it has been delivered and partial payments made on the price cannot be changed into a lease, after the purchaser has become insolvent, so as to revert title in the seller as against the purchaser's creditors in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

3. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD UNDER CONTRACT—LEASE OR CONDITIONAL SALE.

A soda water apparatus was delivered to bankrupt under a contract or order which stated that it was "sold" by an agent. It further stated the "price" of the apparatus, that a credit was to be allowed the bankrupt thereon of a certain sum on account of a secondhand soda fountain, and then provided that the apparatus was leased to him for a term of three years at a rental aggregating the remainder of the price, to be paid monthly. At the end of the lease he was to return the apparatus or to have the option to purchase it for \$1. *Held*, that the transaction was a conditional sale, and, being under execution at the time, that the seller under the law of Pennsylvania could not reclaim the property from the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

4. SALES (§ 5*)—LEASE OR CONDITIONAL SALE—WRITTEN TERMS OF SALE ON PRINTED BLANK.

Where an order for certain specified ice cream apparatus was given, with distinct prices named for each piece, on 30, 60, and 90 days' credit, this cannot be regarded as other than a sale, which is not affected by the fact that it is written upon a blank form in which the party nominally agrees to lease the property for a specified term of three months at a total rent equal to the net price of the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 12; Dec. Dig. § 5.*]

In the matter of Harry Rinker, bankrupt. On petitions to reclaim property. Petitions dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. C. Yetter and W. H. Rhawn, for claimants.
 Clinton Herring, A. W. Duy, and John G. Harman, opposed.

ARCHBALD, District Judge. These are petitions by different parties asking for the reclamation of certain articles of personal property in the possession of the bankrupt and comprising practically the whole of his estate, which are alleged to have been held by him on bailment. This property had all been levied on by the sheriff on execution against the bankrupt, before his bankruptcy, and the levy was directed by the court to be preserved for the benefit of the estate, the trustee being subrogated to the rights of the execution creditor, so that, if held on conditional sale, as contended by the trustee, instead of on bailment, the property is to be treated as belonging to the bankrupt; such sales in Pennsylvania being constructively fraudulent as to creditors.

1. The first petition is that with respect to the cash register. This register was ordered by the bankrupt September 23, 1908, at the solicitation of an agent of the National Cash Register Company, the petitioners, and the price—or, as it was expressed in the order, the value—was to be \$620; it being arranged that the bankrupt should make a certain payment down and receive a credit of \$105 for an old machine which he had on hand, which was to be taken in exchange, the rest to be taken care of in certain monthly installments. After making the bargain, however, he repented of it, doubting his ability to meet the deferred payments, and he tried to get out of it in consequence, but was not allowed to. A few weeks later the cash register came, and after some demur was accepted by him, a cash payment of \$40 being made October 10, 1908, which, with the credit allowed for the old machine, raised the amount to \$145, leaving a balance of \$475. Other payments were subsequently made to the amount of \$60, but, not having been kept up, as called for by the agreement, on April 30, 1909, it was canceled, and a new one entered into, by which it was held at the time of the alias execution. It may be conceded that the first arrangement constituted a bailment, it having been so decided, under the local law, with regard to a contract in all respects similar, in *National Cash Register Co. v. Shurber*, 41 Pa. Super. Ct. 187; and so long as that arrangement continued the property, therefore, belonged to the petitioners. But this is denied as to the one which superseded it, which is asserted and relied on in these proceedings, and the question, therefore, is as to its character. The same printed form is used in both, but there are omissions in the second which are claimed to materially modify it.

As will be seen by the contract, a copy of which is given in the margin,¹ the value of the property was fixed as before at \$620, on which

¹ City, Bloomsburg. County, Columbia, Pa.
 Date, 4/30, 1909.

The National Cash Register Co., Dayton, Ohio:

Please ship to the undersigned at No. Main Street, Bloomsburg City. Mailing Address, Main Street, Bloomsburg City, as soon as possible, one of your No. 562-6 F. E. Oak Registers, valued at \$620.00. Case to be C. Denominations of keys to be Special Register #652966 Delivered. This register to be used on the counter config soda business, and we agree to lease it from you for the term of months, for the rental of \$415.00. We

\$205 was credited, leaving \$415, at which figure as rental the bankrupt agreed to lease it. No term, however, was designated, the provision for this being left blank, and there being no other means by which to determine it. And the mere agreement to lease, and the calling of this amount rental, did not necessarily give any such character to the arrangement. *Farquhar v. McAlevy*, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497; *Morgan Electric Co. v. Brown*, 193 Pa. 351, 44 Atl. 459; *Kelly Road Roller Co. v. Spyker*, 215 Pa. 332, 64 Atl. 546. A down payment of \$30 was also called for, and evidently made, which reduced to \$385 the amount for which the bankrupt was to be liable, and a promissory note was given for this and made payable in twelve monthly installments, eleven at \$30 each and one of \$55. This, without more, would make out a sale, a value or price being put on the property and a definite undertaking given for its payment; and the only question is how far this is controlled by the other provisions.

No term being fixed, and there being no way of arriving at it otherwise, the agreement to lease was absolutely nugatory, and with it fell whatever depended upon it. It is true that there may be a bailment without provision for a term. *Stiles v. Seaton*, 200 Pa. 114, 49 Atl. 774. But there certainly can be no lease unless a term is provided for.

agree to give you our promissory note for \$385.00, payable in 12 monthly installments, 11 of \$30 each, and 1 of \$55, as collateral security for the payment of said rental.

We further agree to pay you \$30 forthwith, and \$..... upon arrival of register, as partial security for the fulfillment of this agreement. At the expiration of this lease, we agree to surrender to you the said cash register in good condition, you to return to us the amount deposited with you as security as hereinbefore mentioned, provided the terms of this lease have been complied with.

\$105.00 allowed 38 1/4—459318—

100.00 paid allowed.

We are to have the option, after the expiration of this lease and after the surrender of said register, to purchase the same upon the payment to you of the amount deposited as partial security.

It is expressly understood and agreed that in default of the payment of any installment of rental, or upon the issuing of any attachment, execution, distress for rent or like process against us, or in the event of our becoming insolvent, or having a petition in bankruptcy filed by or against us, the full amount of rent for the balance of said term shall become due and payable, and you may immediately take possession of said register.

You are authorized to date above mentioned note at such time as you may elect and to insert such date either prior to or after the execution of such note.

In case of refusal on our part to receive said register, or having received it, default is made in the payments above provided, we do hereby authorize and empower any attorney of any court of record in this state, or elsewhere, to appear for and enter judgment against us and to assess damages in the case of refusal to receive said register, in an amount equal to forty per cent. of the value of said register as herein expressed, which amount is considered and agreed upon by both parties hereto as proper liquidated damages for such refusal, and in the case of default in payment of any installment of rental, in an amount equal to the whole or any part unpaid under this agreement, whether the same shall be due and payable or not; and in either instance with or without declaration, with an attorney's fee of fifteen per cent. with costs, release of errors, and with waiver of right to inquisition and appeal and of the benefit of all appraisal, stay and exemption laws of this state. All claims of representation and verbal agreement not herein embodied are

And with this eliminated, what is there on which a bailment of any kind can be predicated? It is said that at the expiration of the arrangement it is agreed that the cash register shall be surrendered in good condition, upon which the amount deposited as security for the fulfillment of the agreement is to be returned to the bankrupt, or, at his option, may be applied in the purchase of the property, the amount at which it is held being thus taken care of. But "at the expiration of this lease" is the expression in the contract, and, there being no lease, there is nothing to fulfill this condition. It is true that upon the nonpayment of the installments called for, as well as the happening of certain other adverse contingencies, there is a resulting forfeiture. But it is manifest that this is not the "expiration" which is so referred to, which contemplates the completion of the contract in due course, after full compliance with its terms, and not the abrogation of it because of a breach. And neither is it the complete payment of the installments provided for, the only other contingency by which the arrangement is to come to an end; it not being assumable that, having paid in this way, with the other credits given, the full value of the property, the bankrupt, in the same breath, was required to surrender it. There being nothing, therefore, on which the provision for a surrender can be made opera-

also waived. Should the register get out of order, from ordinary use, any time within two years from the date of shipment, you are quickly to repair same, gratis, the undersigned paying transportation charges to and from the factory or nearest agency capable of making the necessary repairs; or if repairs are desired made where the register is located, the undersigned to pay the traveling expenses of repairman from and back to your factory or nearest agency capable of making the necessary repairs. Any repairs made without your consent, or contrary to your directions or those of your representatives, will be at the expense and risk of the undersigned. Transportation charges from Dayton, Ohio, to destination, and all taxes and assessments on register, to be paid by the undersigned, he also to bear whatever cost or expense, if any, incurred in installing or setting up said register.

Accepted May 11-09 190 O. K. G. H. C.

The National Cash Register Co.

By Edw. H. Peiffer.

Harry Rinker.

Filed

May

13.

(Sign here) Harry Rinker,

By

[Indorsement on back of foregoing contract:]

Draw through M. A. Kister.

Bank of Williamsport, Pa.

Ship by Freight.

Express.

This order filled with Register No. 652966 Delivered.

Ship Exchange Register to

This order cancels order dated Sept. 23/09, for this register. Credit amt. paid to apply as part cash payment on this order.

Cash, 30.00.

Note blank dated

Date 5/3. Time Rec'd 4 p. m.

Customer Check No.

Section 4 Per J.

M. A. Kister, Williamsport, Pa., Sales Agent.

M. A. Kister,

Closing Salesman.

M. A. Kister,

Salesman Credited.

tive, it cannot be relied on to make out a bailment. The fact is that, in using the blank-form of contract employed by this company, and failing to fill out essential parts of it, a nondescript result has been produced, which it is difficult to characterize. As possibly explaining the lapses in it, it may be that the company was content to relax, in this way, the stringency of its ordinary arrangement, over one-third of the price having been paid, and to rely on the security for payment of the rest, which is otherwise provided for. But, however that may be, taking it as it reads, it is not a lease, nor any other kind of a bailment. The most that can be made out of it is that it is a sale upon condition, the property having been parted with to the bankrupt upon certain terms, upon compliance with which he was to be the owner, and it cannot, therefore, as against creditors, be reclaimed by the petitioners.

2. Upon no possible basis can the claim of Yohn Bros. be sustained to the electric or penny-in-the-slot piano. This was sold outright and beyond question in July, 1907, by the claimants to the bankrupt for \$634.50—that is to say, \$600 for the piano itself, and \$34.50 for the slot boxes—on which \$34.50 was paid August 15, 1907, and a note for \$600 given for the balance, which was renewed from time to time in decreasing amounts, until June 25, 1909, when it had been reduced to \$447.50, when, the bankrupt having got into financial difficulty, an effort was made to recall what had been done, by taking from him a so-called lease, on which \$15 was to be paid monthly. Assuming that the instrument which was so drawn up was in fact a lease, as it clearly was not, it was altogether too late to modify the existing arrangement. It may have been good as between the parties; but the bankrupt was not only seriously indebted, but was actually under levy on execution in the hands of the sheriff, and the title by which he held the property could not be juggled with in the face of this, so as to have it possibly stand as a bailment. In re Poore (D. C.) 15 Am. Bankr. R. 409, 140 Fed. 786. This is too plain for argument, and without stopping further over it, the petition must be dismissed.

3. The soda fountain is claimed by the Liquid Carbonic Company, and was delivered to the bankrupt July 1, 1908, under a writing, a copy of which appears in the margin.² Like the one in the case of the

² Sold by Town, Bloomsburg. County, Columbia. State, Penna. No. Hawkins. East Main St. Street. July 1st, 1908.

The Liquid Carbonic Co., Chicago, Ill.:—Please ship to us at the above address, on or about 190., the following Soda-Water Apparatus and other goods:

Top: Name and Length, Kentucky 12'. Finish, "B." Height, Reg. Fixtures Display Stand, none.

Remarks
Base: No., Ref., Finish, B. Length, 12'. Height, Reg. Location Port. Fountains Basing

Remarks
Dispensing Counter: No. and Name, White Italian. Finish Height, Reg. Width, Reg. Basing Front Length, 14 ft. Return Length, X. Position Right or Left, X.

Remarks: With four Onyx Pilasters with Bronze capitals & Corbels. Always accompany contract with sketch of counter and base describing return fully.

Base Slab, White Italian to fit base.

Dispensing Slabs, White Italian to fit Counter.

cash register, supra, this started out with an order with elaborate specifications, giving the type of soda fountain desired, and describing its appointments; the paper on its face at the same time stating that it is "sold by Hawkins" (an agent); the "price" being given at \$2,227.75, on which there is an allowance of \$498.50 for a secondhand apparatus, turned over by the bankrupt, making the "net price," as it is said, \$1,729.25. This the bankrupt agrees to lease from the claimants for the term of 36 months, for a total rental of \$1,729.25, its full net value, a sight draft for \$329.25 to be honored on receipt of the goods, the balance to be paid in monthly installments of \$40. At the end of the term the property is to be surrendered by the bankrupt in good con-

Draft Stands: No. and Name, 428.2 Delvan Draft Stand Voltage for Fixtures

Congress, Deep Rock, Ginger Ale, Lithia, Klissingin, Seltzer, Vichy, Waukeshia.

2 Soda Drafts. 2 Mineral Drafts.

1 Plain Water Drafts. 14 No. Syrup Pumps and Jars.

Check those wanted.	Apricot	Cherry	Dr. Pepper	Orange	Sherbet
	Blackberry	Coca Cola	Ginger	Peach	Sarsaparilla
	Banana	Coffee	Grape Kola	Pine-apple	Strawberry
	Cream	Catawba	Lemon	Plain	Vanilla
	Claret	Cream de Menthe	Nectar	Raspberry	Wild Cherry
	Chocolate	Don't Care	Maple	Root Beer.	Wintergreen

Leaders, Number and Length Connected Y Two Way-cock

Cooler Chambers: No., Type and Construction, Type "D."

Syrup Bottle }
Flavors. }

Syrup Enclosures: No., Type and Construction, Type, "D" Marble.

Workboard: Material, Facing—Describe fully. In two sections. One 3'8" G. S. Marble Faced. Special Features and Remarks. With Special Overflow & Strainer, Dipper Well, Refuse Chute.

Ice Cream Cabinets: No., Size and Construction. One 27" G. S. Marble Faced with overflow, Slide—Drawer. Remarks: One Marble I. C. Cabinet to hold 2-5 Gal. Cans. One marble I. C. Cabinets to hold 1-5 Gal. N. P. Towel Rail on Workboard. Complete outfit as shown in Pittsburg Show room.

Prices:	
Total Consideration..	\$2227.75
Less allowance for }	
2nd hand apparatus }	498.50
Net Price.....	\$1729.25

Description of Second-Hand Apparatus to be Taken in Exchange: Mfr., Liquid. Name of Apparatus, 2 Nantuckets. Variety Marble No. Syrups No. Drafts

The above second-hand apparatus is free from all liens; and we agree, at our own expense, to put the same in as good condition as possible, and pack and ship as directed by the said The Liquid Carbonic Company; this being in addition to the money payments below mentioned.

All of which we agree to lease from you for the term of Thirty-six months, for a total rental of Seventeen hundred twenty-nine $\frac{25}{100}$ Dollars (\$1,729.25), to wit: \$. on the signing hereof, and upon receipt or tender of goods, or bill of lading for the same, I will honor your sight draft, or other demand for \$329.25; and the balance of said rental I agree to pay in monthly installments, viz: \$40.00 per month, for the months of April, May, June, July, August and September. \$40.00 per month, for the months of October, November, December, January, February and March, of each year until the expiration of said term. Delivery to be made f. o. b. cars, Chicago, Ill. We also agree upon receipt or tender of goods or

Accepted
The Liquid Carbonic Company,
By C. Haumfuss, Secretary.

dition) but may be purchased by him at his option upon payment of the further sum of \$1, on receipt of which a bill of sale is to be given, until which time no title is to be taken as passing. The bankrupt further agrees not to sell the property or remove it from the place where it is set up; and in default of payment, or on a breach of any of the conditions, the whole rent is to become due, and the claimants are to have the right to enter and remove the property without the aid of legal process.

The transaction so consummated, while thinly disguised as a lease, with a definite term and a specified monthly rental, was so evidently a sale, put in this form in order to make sure of the purchase money, that it is hardly worth while to argue it. Not only is the soda fountain declared to have been "sold" by the agent named, but the price is specified, and a credit allowed by the old machine for nearly one-fourth of

bill of lading for the same, to execute and deliver promissory notes, as collateral security for said deferred payments of rental bearing interest from date at the rate of six per cent. per annum. At the expiration of the term of this lease we agree to surrender to you all the property herein described, in good condition, or, at our option, to purchase the same upon the further payment to you of one dollar; upon which payment you are to execute and deliver to us a bill of sale covering said property. No title to said property to vest in us, except as lessee thereof, until the execution of such bill of sale. We will insure said property promptly, and keep the same fully insured, at our own expense, loss, if any, payable to you, as your interest may appear; and will forward to you the policies covering same. If we delay insuring, you may at your option take out insurance, and we will at once pay the premium. We will not sell said property nor remove the same from the above address without your consent.

Should we fail to make said deposit, or to execute said notes, or default in the payment of the rent for any month when the same falls due, or sell or attempt to sell, or remove said property without your consent, or fail to comply with the above insurance provisions, then, or in either of said cases, the full amount of rent for balance of term shall forthwith become due and payable, anything in said notes to the contrary notwithstanding. Should any such default be made, you, or your agent or attorney, may without process of law, enter our premises, and take possession of and remove said property. If suit shall be brought for collection of any amount which may become due under this contract, the benefit of the exemption laws is hereby waived.

There are no conditions or agreements with your salesman, except those herein stated, and no claim will be made by us for any goods not specified herein. This order is subject to the approval of The Liquid Carbonic Company. It is understood and agreed that The Liquid Carbonic Company is not responsible for delay or prevention caused by acts of God, the public enemy, strikes or other causes beyond its control. The acceptance of the above goods, when delivered, is understood to constitute a waiver of all claims for damage, by reason of delay. It is understood that settlement will not be withheld on account of temporary delay in the shipment of articles not essential to the drawing of soda water or because of delay for any reason in the installation of said apparatus.

Draw through, and make notes payable at Farmers National Bank, of Bloomsburg, Pa. Ship by.....
(Avoid lines requiring reshipment if possible).

References: Old Customer.
Landlord's name, Wash Titman.
Address, Bloomsburg, Pa.

(Signature)

Harry Rinker.

.....
.....
(Please attach business card).

it. This credit of \$498.50, as it is to be noted, was a credit on the gross price, and not on the rental subsequently provided for, and this constituted a direct payment on account of the property, by which a definite interest was acquired, which the superadded arrangement for a lease was ineffective to qualify. The rental to be paid, also, is nothing more or less than the net price of the property, and with the credit previously given makes up the full gross value of it, for which, upon the basis of a lease, for the term named, there is no possible equivalent benefit. It is true that there is an agreement to surrender the property at the end of the term, but this is accompanied with an option, by which the bankrupt has the right to buy and apply what has been paid, which the formality of a bill of sale and the payment of a dollar, without which no title is to pass, does not detract from. This provision is a constituent part of the agreement and the ultimate aim of it; and the bankrupt being thus clothed from the outstart with the right to buy, at a specified price, on which a substantial credit is in terms given, and the payment of the balance in certain installments being in effect provided for, a sale on condition is thus made out, regardless of what it may be denominated in the writing, which as to creditors becomes a sale absolute. The case is to be classed with *Farquhar v. McAlevy*, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497, and *Kelly Road Roller Co. v. Spyker*, 215 Pa. 332, 64 Atl. 546, which sustains this view of it. See, also, *In re Tice* (D. C.) 15 Am. Bankr. Rep. 97, 139 Fed. 52, and *In re Morris* (D. C.) 19 Am. Bankr. Rep. 422, 156 Fed. 597. The petitioners, therefore, are not entitled to reclaim the property, and the petition must be dismissed, with costs.

4. In December, 1907, the bankrupt obtained from the same parties, upon a similar writing, a carbonator, for use in connection with the soda fountain which he then had, which was also "sold by Hawkins," the same agent; the "price" being \$240, and the bankrupt agreeing to lease it for 19 months for that figure, \$50 to be paid on receipt and the balance in monthly installments of \$10. This agreement is identical in terms with the one for the soda fountain, and not to be distinguished from it. According to the conclusions reached in that connection, the attempt to reclaim must be similarly disposed of.

5. The same fate also must attend the ice cream freezing apparatus, and for even stronger reasons. Except that a blank of the same form is utilized on which to put down the bargain, there is hardly the semblance of anything but a sale to be made out of the instrument as executed. As there appears, through the instrumentality of the same sales agent, in November, 1908, an order was given for certain apparatus, which is specified as follows:

1 #	813.1	I. C. Freezer.....	\$ 70.00
1 #	54	Creary I. Braker.....	54.00
12	696.9	Tube 2.75.....	33.00
12	884.9	Cans 1.60.....	19.20
			<hr/>
			\$176.20
Less 5%.....			8.81
			<hr/>
			\$167.39

This property the bankrupt agrees to lease for the term of three months for a total rental of \$167.39, the net price. And then, entirely disregarding the printed provisions of the blank, it is declared, "Terms 30, 60 & 90 days." This cannot be wrested into anything but a sale for the price and upon the terms named, for failure to pay which as so provided the claimants are not entitled to get back the property, but must look to the estate like other creditors.

The petition in each case is dismissed, at the cost of the respective petitioners.

In re MONTELLO BRICK WORKS.

(District Court, E. D. Pennsylvania. December 7, 1909.)

No. 2,922.

BANKRUPTCY (§ 318*)—FOREIGN CORPORATIONS—DOING BUSINESS IN VIOLATION OF LAW—VALIDITY OF CONTRACTS—CLAIMS.

Where duebills issued by a bankrupt corporation for money lent it by a foreign corporation were adjudged invalid in the hands of an assignee, and refused allowance against the bankrupt estate on the ground that in lending the money the foreign corporation was doing business in Pennsylvania without having registered as required by the state law, such corporation cannot prove the same indebtedness as a claim against the estate on the theory that, the duebills being void, the lender is entitled to recover on an implied contract as for money had and received; such contracts being equally within the statute.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.*]

In the matter of the Montello Brick Works, bankrupt. On certificate of referee concerning claim of United States Brick Company. Order disallowing claim affirmed.

See, also, 163 Fed. 624.

J. Howard Reber, Wellington M. Bertolet, and Duane, Morris & Heckscher, for creditors.

Harry F. Kantner, for trustee.

Isaac Hiester, for receiver United States Brick Co.

J. B. McPHERSON, District Judge. The facts out of which the present controversy arises are detailed in (D. C.) 163 Fed. 621, and in (C. C. A.) 172 Fed. 310, and need not be repeated now. It is enough to state, briefly, that these decisions rejected a claim presented by the Colonial Trust Company of Reading, the claim being founded on duebills that were given by the bankrupt to the United States Brick Company for money loaned, and were assigned by the brick company to the trust company as collateral security for certain bonds of the brick company for which the trust company was trustee under a formal deed. The brick company is a Delaware corporation and had not registered in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Pennsylvania as required by the laws of this commonwealth. Upon the facts disclosed by the testimony bearing upon the trust company's claim, it was held by the District Court that the brick company was "doing business" in Pennsylvania, and that the duebills were not legally enforceable either by the brick company or by the trust company, its assignee. This ruling was sustained by the Court of Appeals, whose decision was put distinctly upon the ground that the brick company in advancing the money and taking the securities was doing business in Pennsylvania; Judge Buffington saying on behalf of the court:

"If the Delaware company, in the advance of this money and the taking of these notes, was doing business in the state of Pennsylvania, the claim was rightly refused."

After stating and discussing the facts, the court concluded that the company was doing business within the commonwealth, giving the following reasons for this conclusion:

"It will thus appear this company was called into being to do local Pennsylvania work. It had no purpose to exercise its charter power elsewhere than in that state, and it made no effort or pretense so to do. Everything it did was a local act and in fulfillment of the local purpose for which it was created. Manifestly its sole purpose was to avoid the requirements of the Pennsylvania laws in the issue of bonds and doing the financing necessary to enable the local company to carry on the local operations. Indeed, it is clear it was a mere extra-Pennsylvania agency called into being and locally utilized by a local company for the purpose of doing local work. On the part of the Montello Brick Works, while it was a case of *fact per alium*, it was none the less a case of *fact per se*, and, viewed from the latter standpoint, it is clear that all its operations were, as they were at all times intended they should be, a doing of business in Pennsylvania. Judged from the intent of all parties concerned, and finding such intent emphasized by every proven act, we are clear the undoubted purpose of every one concerned was to have this company do business in Pennsylvania. Whatever its powers were to act elsewhere is quite apart from the present inquiry as to what it actually did in Pennsylvania. It is to be judged by the things it has done here, and not by those it has left undone elsewhere."

After the trust company's claim had been rejected by the District Court, insolvency proceedings were begun against the brick company, and a receiver was appointed on July 27, 1908; this being the date also on which the trust company's appeal from the rejection of its claim was allowed by the District Court. The receiver knew of the appeal, but made no effort to take part therein, although the argument was not had until March 23, 1909. Instead of becoming a party to that record, he waited until December 7, 1908, three days before the expiration of the year within which claims could be filed against the bankrupt estate of the Montello Brick Works, and then presented his claim as receiver, averring: That the Montello Company "was, at and before the filing of said petition (in bankruptcy), and still is, truly indebted to said (United States Brick Company) in the sum of \$266,500, with lawful interest to the day of the date hereof; that the consideration of said debt is as follows: Money loaned from time to time between March 31, 1905, and April 14, 1906, amounting as above stated to \$266,500, with lawful interest to the day of the date hereof." He also averred,

that the brick company "has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever, and that no note has been received for said debt"; but when he came to make proof of the claim (on September 17, 1909, after the decision of the Court of Appeals), it appeared that the transaction was precisely the same as had already been passed upon by the District Court, and that he had merely adopted a device to secure a second hearing in case the Court of Appeals should sustain the rejection of the claim that had been presented by the trust company. This is plainly shown by the offer of proof that was made by the receiver (Referee's Report, p. 26):

"On behalf of the claim of Robert Penington, receiver of the United States Brick Company, we offer in evidence proof of claim filed with the referee by the Colonial Trust Company upon an assignment of certain duebills executed by the Montello Brick Works and delivered to the United States Brick Company and by the United States Brick Company assigned to the Colonial Trust Company to be held under the terms of a deed of trust dated December 21, 1904, together with the original duebills described in said proof of claim and in the possession of the Colonial Trust Company and a copy of said deed of trust, and also all the proceedings relating to said proof of claim wherein said proof of claim was disallowed for the reason that the said transactions were a doing of business by the United States Brick Company, a Delaware corporation, in Pennsylvania without having complied with the act of April 22, 1874. Also proceedings in the Court of Chancery of Delaware and in the court of common pleas of Berks county whereby Robert Penington was appointed receiver of the United States Brick Company.

"We claim that, since an action does not lie upon the said duebills or upon the contract thereby evidenced or under which they were given, the present claim can be enforced to recover the moneys of the United States Brick Company had and received by the Montello Brick Works under said unenforceable contracts."

I do not think that much discussion is required to show that the claim cannot be maintained, and that the referee was right in rejecting it. As sufficiently appears, the Court of Appeals held the duebills to be unenforceable, because the brick company had been unlawfully doing business in Pennsylvania, and because the duebills had been given in the course of such business. The giving of the duebills was in itself a matter of no importance. They were mere pieces of paper, and if they had evidenced no other transaction than their own execution they would have been worthless against the creditors of the Montello Company. But (until the Pennsylvania statutes were invoked) they were not worthless. They represented loans of money, and it was this passing of actual cash that gave them value. Essentially therefore the trust company's claim was made upon these loans, of which the duebills were merely the evidences; and, when the duebills were declared invalid for the reasons already referred to, it was not the pieces of paper that were thus stigmatized, but it was the loans that lay behind them. Indeed, the duebills themselves contained no express promise to repay the loans. They simply declare that:

"There is due and payable to the United States Brick Company \$—, for moneys advanced to this company by said United States Brick Company, with interest from this date."

In strictness therefore the claim of the trust company rested, not upon the express promise, but upon the implied promise, of the Montello Company, growing out of the fact that the brick company had advanced the money in question. As the claim of the receiver rests also upon the same implied promise, and upon nothing else, the question has been adjudicated, and the judgment binds the receiver as well as the brick company, because the brick company was in privity with the trust company, and the receiver has no higher right than his insolvent.

A few words more may perhaps be permitted in reference to the case of Delaware Construction Co. v. Pass. Ry. Co., 204 Pa. 22, 53 Atl. 533, cited by the Court of Appeals in support of its ruling. That decision is authority for the proposition that, since the brick company was doing business in Pennsylvania without having complied with the statutes relating to registration, no right of action would arise in its favor out of a loan of money made in the course of such business, whether the promise of repayment was express or implied. In the Delaware company's case it appeared that a foreign corporation came into Pennsylvania and did business here without registration, employing capital and laborers in building a railway—that being a business for which the company was chartered—and the court held that it could not recover from the railway company for labor and materials furnished during the progress of the work. The construction company had filed a creditor's bill to compel payment of its claim from the property of the railway company, and also from the uncollected subscriptions to its capital stock; and, although the bill did not aver an express contract (as appears from the opinion of Judge Scott in the court below) it did disclose, as a basis for the action, an implied contract to pay for the work and the materials furnished. But recovery even upon the implied contract was forbidden; the Supreme Court saying:

"The effect given by our decisions to the act of April 22, 1874 (P. L. 108) is to prohibit a recovery by a foreign corporation on a contract made in violation of the provisions of the statute. * * * This act has been liberally construed, and isolated transactions between a foreign corporation and citizens of this state have been held not to come within its prohibition, and only such corporations as have entered this state by their agents and prosecuted their ordinary business here have been considered as 'doing business' in violation of the act. * * * This subject, as well as that of the liability of the plaintiff to recover in a proceeding that discloses as its only basis the forbidden contract, * * * have been fully and ably discussed by the learned judge, and nothing can profitably be added to what is so well said in the opinion filed. * * * The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of those with whom it does business or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made can give it a right of action. Any other construction of the act would violate its plain words and wholly defeat its object by affording protection to the corporation and denying it to the public."

Other reasons why the present claim cannot be successfully maintained are presented in the briefs of opposing counsel, but I do not

think they need be referred to. In my opinion the receiver's position should not be upheld. To allow it to succeed would result in nullifying the Pennsylvania statute. If the receiver's contention should prevail, a foreign corporation need pay no attention to the state law, for a promise to pay can always be implied from the doing of work or the advancing of money, and the corporation will be wholly indifferent whether it recovers on such a promise or on a contract that may happen to be express. The chief reliance of the receiver seems to be upon a metaphysical subtlety—that "where a contract is void, money paid under it may be recovered as money had and received, for the title does not pass." It is no doubt true that this refinement has sometimes been usefully employed to prevent an unconscionable result, but it has no place in such a situation as is now presented, where the public policy of a sovereign state has been violated—deliberately violated, as the Court of Appeals has declared—and the offender is seeking to escape the just consequences of his act. If the attempt under consideration should succeed, the statutes of Pennsylvania commanding the registration of foreign corporations will be a subject for derision, rather than for wholesome respect.

The referee's rejection of the claim is affirmed.

BESWICK v. DORRIS et al.

(Circuit Court, N. D. California. December 2, 1909.)

No. 14,687.

1. PLEADING (§ 8*)—CONCLUSIONS—FRAUD.

A creditor's bill to set aside a conveyance of real estate by the debtor as fraudulent must set out facts tending to establish the alleged fraud, and not merely charge it as a legal conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 28½; Dec. Dig. § 8;* Fraudulent Conveyances, Cent. Dig. § 773.]

2. FRAUDULENT CONVEYANCES (§ 249*)—RIGHT TO RELIEF—LACHES.

A creditor's bill to set aside a conveyance made by the judgment debtors nearly eight years before it was filed, which shows that complainant's debt was then due, that judgment was not obtained thereon until nearly five years afterward, and the present suit instituted just within the three years allowed thereafter by the state statute of limitations, is subject to demurrer, on the ground of laches, unless it alleges facts in excuse of the delay.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 735-737; Dec. Dig. § 249.*]

3. FRAUDULENT CONVEYANCES (§ 241*)—ACTIONS—CONDITIONS PRECEDENT—LEVY OF EXECUTION.

Under the rule that a creditor's suit cannot be maintained by a judgment creditor to subject real estate of the debtor held by a third person on a secret trust for him until an unsuccessful attempt has been made to reach the property by an execution, and Code Civ. Proc. Cal. § 688, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

makes such property subject to levy, without which no lien attaches to it, the creditor must make such levy before he can maintain his suit in equity.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 720; Dec. Dig. § 241.*]

4. EXECUTORS AND ADMINISTRATORS (§ 431*)—ACTIONS—CONDITIONS PRECEDENT—EXHAUSTION OF LEGAL REMEDY.

Under Code Civ. Proc. Cal. §§ 1589, 1590, providing that where the estate of a decedent is insufficient to pay his debts, and he has in his lifetime conveyed real estate in fraud of his creditors, his executor or administrator shall by order of the court, made on application of the creditor and the giving of security for costs, if required, commence and prosecute any proper action to recover such property, a creditor is required to make such application to the court before he is entitled to himself bring suit to recover the property.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1664; Dec. Dig. § 431.*]

5. FRAUDULENT CONVEYANCES (§ 255*)—ACTIONS—PARTIES—DEFENDANTS.

To a creditor's suit to set aside a conveyance as fraudulent, alleged to have been made by the judgment debtors through a third party as a mere agent or conduit, such judgment debtors are necessary parties.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 748; Dec. Dig. § 255.*]

In Equity. Suit by Richard Beswick against W. J. Dorris and P. S. Dorris. On demurrer to amended bill. Demurrer sustained.

Bourdette & Bacon, Chas. W. Slack, and R. S. Taylor, for complainant.

Dinkelspiel & Schlesinger, James R. Tapscott, and Bert Schlesinger, for defendants.

VAN FLEET, District Judge. The amended bill in this case is defective in certain respects which require that the demurrer thereto be sustained, and its defects may be briefly pointed out.

1. In the first place, the bill is wanting in substantive facts to warrant the interference of a court of equity. It seeks to have set aside a conveyance to the defendants of certain real estate upon the ground that it was made in fraud of the rights of complainant as a creditor of the defendants' grantors. The transaction counted upon is, in substance, as alleged, that Presley A. Dorris and Carlos J. Dorris, the uncles of the defendants, being then indebted to complainant in a large sum evidenced by their promissory note, in June, 1900, entered into an arrangement with one Jerome Churchill, to whom they were likewise indebted, whereby they conveyed to Churchill in a settlement then had with him the property in suit, with other real estate, of which they were the owners, and as a result of which settlement it was agreed that the first-mentioned property should belong to and be the property of Churchill's grantors freed of all claim by Churchill, but with the understanding that instead of said property being reconveyed to them it should be conveyed by Churchill to their nephews, the defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is alleged:

"That thereupon, and in pursuance of the said agreement, the said Jerome Churchill, on the 29th day of June, A. D. 1900, did convey to the defendants herein the real property hereinafter particularly described, and the defendants ever since have been and now are in possession thereof; that no consideration for the said conveyance passed from the defendants or either of them to the said Jerome Churchill."

And it is alleged: That the said agreement with Churchill, and the conveyances and each of them, made in pursuance thereof, were made and entered into by the parties thereto, and each of them, with the willful purpose and intent to hinder and delay the collection of the sum due complainant on the promissory note mentioned, and to defraud him of all the said sum; that the property so conveyed was and is of the value of \$50,000; and that there is no other property owned or possessed by either the estate of Presley A. Dorris (since deceased), or the said Carlos J. Dorris, out of which complainant's judgment, based upon said note, can be satisfied.

These facts constitute the gravamen of complainant's cause of action, and it is at once apparent that they do not afford a sufficient predicate of fraud as against either the defendants or their grantors.

It is true that it is averred that the transaction was had to hinder and delay the complainant in the collection of his note and to defraud him of his debt; but, standing alone, this averment is no more than the conclusion or characterization of the pleader. It must be supported by tangible facts tending to show fraud, and those facts must be fully stated. No such facts are stated. It is alleged that no consideration passed from the defendants to Churchill; but this is obviously immaterial. Under the averments of the bill Churchill had no interest in the transaction as between his grantors and the defendants. The equitable title to the property was in his grantors for whom he held the bald legal title. He was therefore a mere intermediary without interest—a naked trustee to convey that legal title. He had nothing for which the defendants were called upon to pay him a consideration. It might be material that a consideration should have passed from the defendants to their uncles, the original grantors; but as to that the bill is silent, and, in the absence of the fact being negatived, it will be presumed that a full and adequate consideration was paid by defendants to the latter. It is not alleged other than by inference that the defendants had any knowledge of or participation in the original agreement or arrangement between Churchill and his grantors whereby the legal title was passed to the former, or that they had any knowledge of the rights of complainant; and mere implications do not subserve the office of direct averment. Nor is it in any manner alleged that at the time of the transaction with Churchill and the conveyance by the latter his grantors did not have property other than that conveyed amply sufficient to meet the demand of complainant. The only allegation in that regard is that they had not at the time complainant obtained his judgment, and have not now, any other property out of which complainant's judgment can be sat-

ified. For all that appears therefore, except for the general averment of a fraudulent purpose, the transaction may have been an entirely innocent one and had in the most perfect good faith.

In this respect therefore the bill is wholly insufficient.

2. The bill is also obnoxious to the objection of laches. The alleged fraudulent conveyance was made on June 29, 1900, and, as no concealment is alleged or want of knowledge on the part of complainant, he knew of the fact on that date. It is true that complainant was not in a position to attack the transfer until he had established his demand at law by reducing it to judgment; but his note was at that time long past due, and he did not commence his action thereon until February 28, 1901, and his judgment was not obtained until March 23, 1905. No sufficient facts are alleged to show diligence on the part of complainant in prosecuting his claim to judgment. It is alleged that pending the action one of the defendants, Presley A. Dorris, died, and the necessary steps had to be taken to continue the action against his estate; but this occurred in 1902, and nothing further is alleged to account for the long lapse intervening those steps and bringing the action to a conclusion.

In *Donaldson v. Jacobitz*, 67 Kan. 244, 72 Pac. 846, an action of very similar purpose and character, it is said:

"With regard to the second point raised by plaintiff in error, that the statute of limitations did not begin to run until the claim was placed in judgment, it is sufficient to say that, while the present action could not have been begun until a judgment had been obtained (*Taylor v. Lander*, 61 Kan. 588, 60 Pac. 320), the case falls within the rule that one cannot indefinitely postpone the running of the statute of limitations by delay in taking some preliminary action incumbent upon him. *Bank v. King*, 60 Kan. 733, 57 Pac. 952, and cases cited; *Mickel v. Walraven*, 92 Iowa, 423, 60 N. W. 633; *Stubblefield v. Gadd*, 112 Iowa, 681, 84 N. W. 917. As soon as Jacobitz had notice of the fraud (which in legal effect was when the deed was filed for record), or, at all events, as soon thereafter as the then existing note matured, he could have paid the debt and begun action against Donaldson for repayment. Probably the statute would have been suspended between the beginning of the action and the rendition of judgment, provided the action had been diligently prosecuted; but a failure to begin such proceeding for more than two years resulted in a complete bar against the action to set aside the deed."

Moreover, while complainant obtained judgment on his note in March, 1905, the present action was not commenced until February 29, 1908. While this was barely within the period of the statute of the state within which complainant could legally maintain the action, it does not obviate the present objection. It is not sufficient that complainant show merely that he is within his strict legal rights. The very purpose of coming into a court of equity is that those rights are not adequate for his relief. Where it is disclosed that any considerable delay intervened between the ripening of his demand and its assertion, he must allege facts that reasonably account for such delay upon grounds other than that of neglect or acquiescence. The rule applicable to such cases is aptly stated in *Kleinclaus v. Dutard*, 147 Cal. 245, 249, 250, 81 Pac. 516, where it is said:

"Following the maxim that equity aids the vigilant, and not those who slumber on their rights, it has been universally declared that only conscience, good

faith, and reasonable diligence can call a court of equity into activity, and that, entirely independent of any statutory period of limitations, stale demands will not be aided where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof. Where such is the condition, the demand is, in a court of equity, barred by laches. As has often been said, there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine. * * * It therefore devolves on one seeking the aid of a court of equity, in a case of this character, where the complaint shows great lapse of time without the assertion of any claim, and long-continued acquiescence in acts hostile to the claim, to allege in his complaint the circumstances showing good faith and reasonable diligence on his part. The complaint will be construed most strongly against the pleader, and, if circumstances that might excuse the delay are not alleged, it will be presumed that they do not exist. See: *Bell v. Hudson*, 73 Cal. 289, 14 Pac. 791, 2 Am. St. Rep. 791; *Badger v. Badger*, 2 Wall. 87, 95, 17 L. Ed. 836."

While that was a case of an express trust, the principles announced are quite as pertinent here.

3. In this connection I think the bill also fails to show that the complainant has exhausted his remedy at law for the realization of his demand. It is alleged that in July, 1907, a writ of execution was issued on complainant's judgment directed to the marshal of the district, and that on August 9, 1907, "it was duly returned wholly unsatisfied." It is not alleged that the writ was levied on the property involved or any interest therein, and the presumption therefore is that it was not. The equitable title to this property was at that time, and still is, if the theory of the bill be correct, in Presley A. Dorris, or his estate, and Carlos J. Dorris presumptively, nothing appearing to the contrary, in equal undivided interests; the defendants merely holding the legal title thereto in trust for their benefit or that of their creditors. This being so, the interest of Carlos J. Dorris was subject to levy under the statute of this state, which renders all real property of the judgment debtor, or any interest therein, subject to execution (Code Civ. Proc. Cal. § 688); and until such levy the property is not affected by the execution, and no lien attaches.

In *Jones v. Green et al.*, 1 Wall. 330, 17 L. Ed. 553, it is held that a bill in equity will not lie on behalf of judgment creditors to subject real property of their debtor, held by a third party upon a secret trust for him, to the satisfaction of their judgment until a fruitless attempt has been made for its collection by execution at law, and it is said:

"A court of equity exercises its jurisdiction in favor of a judgment creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it. * * * In the second case the equitable relief sought rests upon the fact that the execution has issued and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation. It is to remove the obstruction, and thus enable the creditor to obtain a full price for the property, that the suit is brought."

The averments of the bill do not show a compliance with this requirement.

As to the interest of Presley A. Dorris, or his estate, the complainant's rights were different. That defendant having died pending action on the note, the judgment was made to run against his estate, to be paid "in the due course of administration." As to this interest therefore the complainant could not have execution. The property being in the custody of the probate court, it was not subject to levy or forced sale. Code Civ. Proc. Cal. § 1504. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. But complainant was afforded a remedy at law to reach this interest, and the bill fails to disclose that he has exhausted that remedy. Section 1589, Code Civ. Proc. Cal., so far as pertinent here, provides as follows:

"Where there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, * * * the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed."

Section 1590 of the same Code provides that the executor or administrator is only bound to bring such action on application of a creditor, "who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court, or a judge thereof, shall direct."

Reading these two sections in conjunction, it will be seen that the application to have such an action brought by the representative of the estate must be made to the court, and an order procured directing the suit to be brought; and this is the interpretation which has been put upon those provisions. *Mesmer v. Jenkins*, 61 Cal. 151; *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303. Complainant did not pursue this course. He alleges that:

"Prior to the commencement of this action, your orator demanded of the said Roland D. Dorris, administrator aforesaid of the estate of Presley A. Dorris, deceased, that he commence and prosecute to final judgment a proper action for the recovery of the real property herein mentioned as having been conveyed to the said Jerome Churchill, for the benefit of the creditors of the estate of the said Presley A. Dorris, deceased, and at the time of the said demand offered to pay all of the costs and expenses of the said suit"; but that the administrator "neglected and refused, and still neglects and refuses, to commence or prosecute such an action."

This was not the equivalent of the course required by the statute. Complainant should have made his application to the court, and upon proper representation the administrator could have been required to bring the action. The allegation shows no more than a mere personal demand upon the administrator, and does not disclose that the matter was ever brought to the attention of the court.

Whether the remedy thus afforded by the statute is exclusive of the right of the creditor to sue in any event is left in some doubt by the decisions of the Supreme Court of the state. *Hills v. Sherwood*, 48 Cal. 386; *Ohm v. Superior Court*, 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245; *Mesmer v. Jenkins* and *Emmons v. Barton*, supra. And see: *Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 857, 37 Am. St.

Rep. 50; Freeman on Executions, § 394. But, however this may be, I think that where, as here, the creditor confessedly brings the action in behalf of all the creditors of the estate to cover the property into the hands of the administrator and be disposed of in the regular course of administration, the court having the estate in its keeping should be given the opportunity to say whether the action shall be brought by the representative of that estate before the creditor is at liberty to pursue an alternative remedy.

4. I think, moreover, that, in the circumstances shadowed forth in this bill, if it is to be maintained, not only Carlos J. Dorris, the surviving grantor, but the representative of the estate of Presley A. Dorris, the deceased grantor, are necessary parties defendant. They were the real grantors of defendants, Churchill being a mere instrument, and they have a right to be heard.

For the reasons suggested, the demurrer must be sustained, and it is so ordered.

UNITED STATES v. McLEOD et al. (two cases).

SAME v. CARSON et al.

(Circuit Court, D. Oregon. November 28, 1909.)

Nos. 2,773-2,775.

PUBLIC LANDS (§ 120*)—SUIT BY UNITED STATES FOR CANCELLATION OF PATENTS—PATENTS TO FICTITIOUS GRANTEES.

Patents to lands issued by the Land Department to fictitious grantees on forged and fraudulent homestead applications and proofs convey no title, and the United States is entitled to their cancellation, even as against a purchaser in good faith, for value, and without notice, who acquired apparent title through forged conveyances.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

In Equity. Suits by the United States against G. B. McLeod and James E. Warwick, against G. B. McLeod and William H. Watkins, and against Samuel L. Carson and G. B. McLeod. The cases were consolidated for trial. Decree for complainant in each case.

John McCourt, Dist. Atty., for the United States.

C. W. & G. C. Fulton, for defendant McLeod.

BEAN, District Judge. These are three suits to cancel patents of the United States for lands in Lane county, Or., dated in 1901, and purporting to have been issued to persons by the names of James E. Warwick, William H. Watkins, and Samuel L. Carson, upon proof of settlement and cultivation under the homestead law. They present substantially the same facts and were tried together.

It is clearly shown by the testimony that there were no such persons

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as Warwick, Watkins, or Carson, and that there was no settlement, residence, or cultivation by any person on any of the land described in the patents referred to. The homestead papers upon which the patents were issued were all fraudulently prepared by Miss Marie L. Ware, United States commissioner, at the request, and by the suggestion, and with the assistance of S. A. D. Puter, Horace G. McKinley, and others. The method of procedure was as follows: The names Warwick and Watkins were signed to applications, affidavits, and final proof papers in blank by Puter, and the name Carson signed to like papers by Laurence Hickey, Puter's brother-in-law. The homestead applications, affidavits of claimants, and other necessary papers were thereafter filled out by Miss Ware, and, after attaching her jurat thereto, she forwarded the same, together with notices of intention to make final proof before her, giving the names of fictitious witnesses, to the United States land office at Roseburg, accompanied by the necessary fees, which were furnished by Puter and his associates. The papers being regular and fair upon their face, the land office thereupon directed that notice of intention to make final proof be given, as required by law, and at the time specified therein the final proof papers were filled out by Miss Ware and the other parties in the names of the fictitious applicants and witnesses, and, after being certified to by her, were forwarded to the land office, and in due time patents issued thereon in the names of the fictitious applicants.

At the time the fraudulent homestead papers were signed, the names of Warwick and Watkins were signed by Puter to deeds in blank, and the name of Carson signed to a similar instrument by Hickey. After the final certificates had been issued, these deeds were filled out with a description of the property, and the name of Emma L. Watson inserted as grantee. The deeds all purported to have been executed before Puter as a notary public. The property was subsequently conveyed by Mrs. Watson to Woodford, who in turn conveyed it to the defendant McLeod, who, it is admitted by the government, was a purchaser in good faith, for value, and without notice of the fraud.

The only question for decision is whether, under the facts stated, the title to the land ever passed from the government. If it did, the defendant should prevail, under the decision in *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182. But, if the title did not pass, the plaintiff is entitled to a decree, within the rule laid down in *Moffat v. United States*, 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623.

I am unable to distinguish this case upon its facts from the *Moffat Case*. In this and in the *Moffat Case* the homestead papers upon which the patent issued were wholly fraudulent. No real persons actually appeared before the United States commissioner as settlers or witnesses, either under their true or assumed names. The applicants and witnesses were pure myths, and the fictitious names were adopted by Miss Ware, Puter, McKinley, and their associates to accomplish their fraudulent purpose. The patents issued in the names of such fictitious persons were, as stated by Mr. Justice Field in the *Moffat Case*, "no

more than a declaration that the government thereby conveys the property to no one," and no title could be secured under a conveyance in the name of such grantees.

The contention that Puter and Hickey were the real homestead applicants, under the assumed names of Warwick, Watkins, and Carson, finds no substantial support in the testimony. Neither of these parties ever attempted or assumed to make application for the land as settlers thereon. They were simply engaged in the scheme of manufacturing false and spurious homestead papers and proofs, using the names Warwick, Watkins, and Carson as a convenient method of accomplishing their unlawful purpose, but with no intention themselves of assuming the attitude of applicants under the homestead laws.

A decree will therefore be entered in favor of the plaintiff.

UNITED STATES v. McCLURE et al.

(Circuit Court, D. Oregon. November 28, 1909.)

PUBLIC LANDS (§ 49*)—SUIT BY UNITED STATES TO CANCEL PATENT—JURISDICTION.

The tender to the Land Department by the holder of the record title to land within a forest reservation of a quitclaim deed to such land, to be exchanged for outside land under Act June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541), does not vest title thereto in the United States until the deed is accepted and the exchange approved, nor does such tender deprive a court of jurisdiction of a suit by the United States to cancel the patent to such land for fraud; the Land Department having no power to determine such question.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 49.*]

Jurisdiction of federal courts in suits under public land laws, see note to *Bailey v. Mosher*, 11 C. C. A. 314.]

In Equity. Suit by the United States against Helen A. McClure, Charles W. McClure, John J. Rupp, trustee under the will of Williams C. McClure, deceased, Jethro G. Mitchell, Leory Brooks, Robert B. Montague, and Horace G. McKinley. Decree for complainant.

John McCourt, U. S. Dist. Atty.
Platt & Platt, for defendants.

BEAN, District Judge. This is a suit to set aside a patent to land in the Cascade Forest Reservation, on the ground that it was issued to a fictitious person upon false and fraudulent homestead papers, prepared in the office of the county clerk of Linn county, by Robert Montague, deputy clerk, and Horace G. McKinley. The bill alleges that, after the issuance of the patent, Montague made or caused to be made a deed in the name of the fictitious patentee to one Otterson, who was also a fictitious person, and afterwards executed a pretended deed in the name of Otterson, purporting to convey the land to one Garland; that Garland subsequently made a deed of relinquishment to the government, and caused the same to be recorded, and, based thereon, ap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plied to select, in lieu of the land described in the patent, other vacant public lands in Polk county, but that the deed has not been accepted or the lieu selection approved by the Land Department; that thereafter the defendants became the owners by proper mesne conveyances of Garland's interest in the selected lands and the lands offered in exchange therefor.

The bill states facts which, if true, entitle the complainant to the relief sought (*Moffat v. U. S.*, 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623, and *United States v. McLeod*, 174 Fed. 508, just decided), unless Garland's deed of relinquishment precludes the government from maintaining this suit. It is claimed that when Garland made and recorded his deed, and tendered it to the Land Department in exchange for other lands, the title vested in the government, and that the validity of such title and the right to make a lieu selection is to be determined by the Land Department, and not by the courts. I do not so understand the effect of the transaction, or the jurisdiction of the Land Department. It is provided by Act June 4, 1897, c. 2, § 1, 30 Stat. 36 (*U. S. Comp. St.* 1901, p. 1541):

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent."

No method of procedure for effecting the exchange is provided by law. The general administration of the forestry reservation acts, however, and the adjudication of the various questions arising therein, are vested in the Land Department. It has the power and authority to adopt, and has adopted, rules and regulations governing the procedure in relinquishing lands within a reservation, and the selection of other lands in lieu thereof, of which the courts will take judicial knowledge. *Cosmos v. Gray Eagle*, 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064.

By the rules and regulations as so formulated, one desiring to relinquish lands and select other lands in lieu thereof, where final certificate or patent has issued, is required to make a quitclaim deed to the United States for the land offered in exchange, have it recorded in the proper county, and file the same, accompanied by an abstract of title, duly authenticated, showing a chain of title from the government back to the United States, to the property offered, in the local land office, and at the same time designate the particular tract which he desires in lieu of that relinquished. 30 Land Dec. Dep. Int. p. 180, rule 16; *William S. Tevis*, 29 Land Dec. Dep. Int. p. 575.

But the title does not pass to the land offered in exchange until the deed is accepted. The mere execution and recording of a deed and the tender thereof vests no title in the government. Until the deed and title are examined and approved, it is a mere assertion by the applicant of his title and right to make the selection. *Cosmos v. Gray Eagle*, supra; *C. W. Clarke*, 32 Land Dec. Dep. Int. 233; *W. E. Moses Land Scrip & Realty Co.*, 34 Land Dec. Dep. Int. 460. But the equitable,

if not the legal, title remains in him. The deed and tender thereof amounts to nothing more than an offer by the owner to exchange one tract of land for another, and the title does not pass to either party until the exchange is effected. Until the deed is accepted, the owner of the land offered in exchange retains title thereto, either legal or equitable, and the Land Department has no authority to determine the validity of the title offered, if it is defective, or there is some adverse claim thereto. *H. H. Goetjen*, 32 Land Dec. Dep. Int. 209. All it can do in such a case is to refuse to accept the deed and make the exchange. Its jurisdiction over the matter, so far as the title is concerned, ends when it ascertains that there is a defect or irregularity therein. Its duty is to then reject the deed, leaving the controverted question of title to be determined in some appropriate proceeding in a tribunal having jurisdiction thereof. This rule is not affected, or the jurisdiction of the Land Department extended, by the fact that the alleged defect in the title is connected with the issuance of the original patent by the government. The Land Department has no authority to revoke or cancel a patent. After a patent for public lands is once issued and delivered to and accepted by the grantee, all control of the executive departments over the title ceases. The patent can be set aside or vacated only in a bill in chancery brought by the United States in some court having jurisdiction. *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848.

I conclude, therefore, that the Garland deed of relinquishment did not vest the title in the government, or confer upon the Land Department authority to determine the question whether the patent for such land was procured by fraud, and the demurrer should be overruled.

VIRGINIA PASSENGER & POWER CO. et al. v. LANE BROS. CO.

(Circuit Court of Appeals, Fourth Circuit. December 15, 1909.)

No. 910.

1. STREET RAILROADS (§ 54*)—MORTGAGES—IMPROVEMENT EXPENSES—PRIORITY OF LIEN.

A street railroad mortgagee, in accepting his security, impliedly agreed that the current debts of the mortgagor incurred in the ordinary course of business should be paid from the current receipts before the mortgagee had any claim on the income, and that the income out of which the mortgagee was entitled to be paid was the net income after deducting from the gross earnings for necessary operating and managing expenses, proper equipment, and useful improvements.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 133; Dec. Dig. § 54.*]

2. STREET RAILROADS (§ 54*)—MORTGAGES—IMPROVEMENTS.

An electric railway and light company contracted with claimant for the improvement of a water power to be used instead of steam at one of its plants, where the equipment was old, unreliable, and liable to break down. The contract provided for monthly payments in "current funds," and prior to the corporation's insolvency payments had been made from the general income and charged to "construction work." Receivers having been appointed for the corporation, they were ordered to continue the work on their representation that a failure of the steam plant would stop all the street cars on certain of the lines and throw one of the towns in darkness, and that a completion of the water power would amount to a considerable annual saving in operating expenses. When the receiver was appointed, the current income was more than sufficient to pay current expenses and the monthly payments under the contract, and the receivers paid the claimant for the work done after their appointment. *Held*, that the work was not new construction, but a permanent improvement, and hence the contractors were entitled to payment of the indebtedness incurred and unpaid prior to the appointment of receivers as a preferred claim as against mortgagees.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 133; Dec. Dig. § 54.*]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

Suit by the Equitable Trust Company of New York, as trustee, and another, against the Virginia Passenger & Power Company, for the foreclosure of certain mortgages issued to the trustees, in which Lane Bros. Company intervened for the allowance of a balance due on an improvement contract as a preferred claim. From a judgment allowing the claim of preference, the power company and the trustees appeal. Affirmed.

Eppa Hunton, Jr. (Munford, Hunton, Williams & Anderson, on the brief), for appellants.

David H. Leake and Thomas S. Martin (D. H. & Walter Leake, on the brief), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. In the case above stated, which was for the foreclosure of certain mortgages to the trustees therein named, Lane Bros. Company filed its intervening petition, alleging that it entered into a contract with the Virginia Passenger & Power Company August 15, 1903, to widen and deepen the Appomattox Canal on the Southern bank and near to the Appomattox river, in Dinwiddie county, Va., by excavating and removing earth and rock and performing the work incident thereto. This work was undertaken in order to produce power by water instead of by steam at the Petersburg plant, which was at that time a very old one, equipped with old machinery, the reliable life of which was passed. The intervening petition and the cause generally was referred to the Honorable A. L. Holladay, special master, who took the testimony, heard arguments, and filed an elaborate report. It appears that after the contract of August 15, 1903, was made, Lane Bros. Company proceeded diligently with the work, until stopped by the appointment of the receivers July 16, 1904. The work was to be done under the direction and supervision of the engineer of the power company, who was to make monthly approximate estimates of all work done and materials furnished under the contract, and monthly payments by the terms of the contract were to be made in "current funds." The funds received from the current earnings of the Virginia Passenger & Power Company, and funds derived from other sources, were all put together, and payments to Lane Bros. Company and other operating expenses generally were paid out of that fund; the work being charged on the books of the company as "construction work." The claim under consideration was for the month immediately preceding the appointment of the receivers. On July 23, 1904, the receivers filed their petition, earnestly recommending that they be authorized to enter into a contract with Lane Bros. Company for the continuance and completion of this work, with letters from the general manager and chief engineer of the Virginia Passenger & Power Company, setting forth in detail the reasons why the work should be completed, stating, among other things:

That "the Petersburg Steam Plant is a very old one, equipped for the most part with old machinery, that has passed its period of reliable life, that it was liable to be shut down at any moment, from causes beyond the control of those operating the plant, or that could be remedied by ordinary, or even extraordinary, repairs, and that the shutting down or serious disablement of this plant would stop all the cars in Petersburg, throw the town into darkness, and prevent the operation of the Richmond & Petersburg Line, and that there would be a considerable saving in the annual operating expenses after its completion."

And the court thereupon entered an order authorizing the contract for the completion of this work, recognizing that it was "to the best interest of the property that a contract should be immediately entered into." The character of this work is set forth in the report of the special master, an uncommonly able and careful lawyer, as follows:

"That the work of widening and deepening the upper Appomattox Canal was essentially necessary to enable the Virginia Passenger & Power Company to operate its railway lines as a continuing business; that the latter company would have failed in its duty (a) to the public, (b) its mortgagees, and (c) its stockholders, if it had neglected to make the improvements contemplated in

its contract of August 15, 1903, with Lane Bros. Company; that said indebtedness of the Virginia Passenger & Power Company to Lane Bros. Company constituted a part of the necessary current operating expenses of the Virginia Passenger & Power Company as a transportation company which should have been paid out of its current receipts; that Lane Bros. Company are entitled to an equitable lien upon the income and revenue of the Virginia Passenger & Power Company, superior to all mortgages, to the full extent of their said claim; that said income and revenue subsequent to July 16, 1904, when a receiver was appointed, have been more than sufficient to pay all current operating expenses and said indebtedness."

The special master further reported that Lane Bros. Company was entitled to a mechanic's lien under the statutes of the state of Virginia. The court, upon hearing the exceptions to the report, held that the petitioners are entitled to an equitable lien to the amount of their debt, payable out of the income derived from the operation of the property over and above current expenses, and superior to all mortgage indebtedness existing against the same; the income and revenue from the operation of the property since the appointment of the receivers being largely more than sufficient to pay the expenses incident thereto. Having reached this conclusion, it did not consider it necessary to pass upon the validity of the mechanic's lien reported in favor of the petitioners. In its opinion the court says:

"The actual service performed by the petitioners in digging the canal, as well as the supplies charged for in connection therewith, for which the claim is made, was something necessary in furtherance of the more effective and economical operation of the existing plant owned and operated by the defendants as a public service corporation, and a useful improvement thereof. No new or independent electric light or power plant was established or railway constructed, but the defendant in its business of the operation of its lines of street railway, and in furnishing light and power to the city of Petersburg and the surrounding country, found it could do the work more effectively and economically by enlarging, improving, and increasing its plant, and, having concluded so to do, the petitioners were employed and engaged on the work at the time of the appointment of the receivers herein, and they now ask payment for labor and materials furnished within 30 days of the receivership. The court's receivers, when appointed, employed the petitioners to complete the work then unfinished, paying them for what was done for the receivers, and subsequently, after further work in the same, proceeded to use the canal and the same has since that time and is now being so used, operated, and conducted by the receivers of the court in this cause in furnishing light and power necessary in the conduct of its business."

A decree for \$18,747.59, with interest thereon from July 16, 1904, was thereupon entered, payable out of the income and revenue arising from the operation of the Virginia Passenger & Power Company since the appointment of the receivers, and the same was declared to be an equitable lien superior to all mortgage indebtedness; this being the amount due for work done and materials supplied during the month immediately anterior to the appointment of the receivers. The total amount payable under the contract with Lane Bros. Company on account of this work was something over \$200,000. The mortgage indebtedness consisted of two mortgages, one for \$15,000,000, and one for \$1,000,000.

The question made by this appeal is whether indebtedness incurred in the circumstances stated falls within the exceptional class in which

preferential payments may be allowed, for it is the exception, and not the rule, that priority of liens secured by mortgage can be displaced. The courts have laid down no inflexible rule that governs in all cases, but, beginning with *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, the Supreme Court has in numerous cases stated the governing principle. Many of these cases are reviewed in *Southern Railway v. Carnegie Steel Company*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, and *Gregg v. Met. Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, is one of the last that has been brought to our attention. The principle seems to be this: That every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income; that the income out of which he is entitled to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. In a certain limited class of cases such preferential payments have been allowed out of the corpus, but these cases need not be considered, as here the income from current receipts is more than ample for the payment of this claim. One of the foundations of the principle is that the public interest requires that a railroad must be kept a "going concern." It does not depend, therefore, upon the diversion, or even upon the existence of income. No definite period of time within which such preferential claims may accrue has been fixed; but, recognizing that there must be some limitation, a period of six months before the appointment of the receivers has been generally accepted as reasonable. This differentiates this case from that considered by the court in *Lackawanna Co. v. Farmers' Loan Co.*, 176 U. S. 298, 20 Sup. Ct. 363, 40 L. Ed. 475, delivered at the same term at which the *Carnegie Case* was decided, upon which case the appellants lay much stress. In the *Lackawanna Case* there was an unusually large purchase of rails, which had been delivered long before the railroad company had made any default in the payment of interest, about 16 months before the company's property was put into the hands of a receiver, and about five and a half years before the appointment of the receiver in that cause. Then, as says the court:

"There is the circumstance that the *Lackawanna Company*, during the negotiations resulting in the execution of renewal notes, under the second contract for rails, demanded and received collateral security to a large amount from the railroad company; the circumstance tending to show that it did not regard itself as entitled to an equitable claim upon the net earnings in preference to mortgage creditors, but relied upon the general credit of the railroad company."

The contract with the *Lane Bros. Company* was that the monthly installments were to be paid in "current funds," and payments were actually made as a part of the operating expenses, out of a fund derived in part from current earnings, and in part from other sources. As a matter of bookkeeping, payments made on this account were charged to construction account, and appellants contend that work for new construction does not fall within the principle above stated, that preferential payments are allowed on account of operating expenses,

citing *Hale v. Frost*, 99 U. S. 389, 25 L. Ed. 419. That case was decided at the same term with *Fosdick v. Schall*; the Chief Justice, who delivered the opinion in the leading case, announcing in a short opinion that it is governed by *Fosdick v. Schall*. *Hale & Co.* had two accounts, one for supplies for the machinery department, and one for material for construction purposes. As to the first, preferential payment was allowed; as to the second, the court says:

"There is nothing in the case to show any special equities in their favor in respect to that part of their account which is for material for construction purposes."

The precise nature of this account is not stated in the report of the case. It may have been proper for the company, as a matter of book-keeping, to charge this improvement to construction account, but it is plain that the indebtedness incurred was for the permanent improvement of the mortgaged property. It was not a new construction in the sense that the building of a new railroad, or the building of a new plant, would be, but was, as said by the judge below, "something necessary in furtherance of the more effective and economical operation of the existing plant." The precise nature, character, and object of the work appears from the report of the receivers, and the testimony of the general manager. The receivers recommended its completion as "absolutely essential." The general manager reported that:

"The steam plant at Petersburg was liable to be shut down at any moment from causes beyond the control of those operating the plant, or that could be remedied by ordinary or even extraordinary repairs, and that the shutting down or serious disablement of that plant would stop all the cars in Petersburg, throw the town in darkness, and prevent the operation of the Richmond & Petersburg Line."

That the receivers and the general manager of the company considered that the completion of the work upon the canal was absolutely essential to keeping the company a "going concern" is evidenced by their acts, and that the court which had the responsibility of protecting the property and its bondholders was impressed by its necessity is shown by its orders, among the first entered after the appointment of the receivers. If that be so, how can it be justly claimed that the work done by the petitioners during the month immediately preceding the appointment of the receivers was not of equal necessity? No question was made as to the propriety and legality of the orders of the court made after the appointment of the receivers, directing the continuance of this work, and providing for payment for the same out of the current earnings, and for the issue of receivers' certificates, and it appears from the testimony that Mr. Gould, who was the chief owner and controlled the bonds and stock of the Virginia Passenger & Power Company, assented to the same and became the purchaser of the receivers' certificates issued therefor.

The Supreme Court, in affirming the judgment of this court in the *Carnegie Case*, *supra*, allowing a preferential lien for rails purchased shortly before the receivership, referring to the circumstance that the court, after the appointment of the receivers, directed the purchase of additional rails, uses this language:

"It is apparent that the purchase of new steel rails while the railroads were in possession of receivers were made in the ordinary course of business, and were properly chargeable upon and payable out of current receipts in preference to the claims of mortgage creditors. In every substantial sense the expenses thus incurred were operating expenses. They were incurred in the interest of mortgage creditors. * * * Why should a different rule be applied to the contracts made with the Carnegie Company shortly before the appointment of receivers in the Clyde suit; the original contract being for only 2,500 tons and the last for only 1,656 tons? Is it to be said that the contract for 2,000 tons of steel rails and the contract for 2,500 tons made by the receivers in the foreclosure suit created debts of a preferential character, while contracts made by the railroad company of exactly the same kind shortly before the appointment of receivers for 2,500 and 1,656 tons of steel rails could not under any circumstances become a preferential debt chargeable upon the current receipts? * * * It is evident that the Carnegie rails purchased shortly before the receivers in the Clyde suit were appointed—the rails here in question—were obtained for the same reason that induced the subsequent purchases by the receivers. No one will say that the use of these rails did not add directly to the value of these securities of mortgage creditors. Within the reason of the rule adverted to, the debts contracted with the Carnegie Company were as much current debts in the ordinary course of the business of the railroad company as were the debts contracted by the receivers under the order of the court when they purchased new rails to put the road in a safe condition. * * * Is it to be said that such expenses incurred by the receivers were preferential debts, but that debts incurred by the railroad company shortly prior to the receivership for rails needed to keep its road in a safe condition for use are not of that class?"

The testimony shows that the payments made to Lane Bros. Company up to the time of the appointment of the receivers were made as ordinary operating expenses, and there are no circumstances tending to show that the intervening petitioners relied upon the general credit of the Virginia Passenger & Power Company, or took any other security, or had any other expectation than that they were to be paid out of the current receipts.

The judgment of the court below is affirmed.

VAN IDERSTINE v. NATIONAL DISCOUNT CO.

(Circuit Court of Appeals, Second Circuit. December 7, 1909.)

No. 79.

1. APPEAL AND ERROR (§ 1000*)—REVIEW—GENERAL VERDICT—EQUITABLE ACTIONS.

While federal District Courts may obtain general verdicts in equity causes from jurors for their guidance, such verdicts, without special findings of fact, are of little assistance to the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3925-3927; Dec. Dig. § 1000.*]

2. APPEAL AND ERROR (§ 990*)—EQUITY CAUSES—REVIEW OF EVIDENCE.

On appeal from a decree in equity, the appellate court must weigh the evidence and determine whether, on such evidence, the decree is right.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3898; Dec. Dig. § 990.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 180*)—FRAUDULENT CONVEYANCE—ELEMENTS.

In order that a conveyance by a bankrupt shall be fraudulent within Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), providing that all conveyances made by the bankrupt within four months prior to the filing of the petition with intent to hinder, delay, or defraud his creditors, or any of them, shall be void except as to purchasers in good faith and for a fair consideration, the bankrupt must have an intent to hinder, delay, and defraud creditors, and there must have been a want of good faith on the part of the transferee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 252; Dec. Dig. § 180.*]

4. BANKRUPTCY (§ 180*)—FRAUDULENT CONVEYANCES—TRANSFER OF ACCOUNTS.

Where a bankrupt, with knowledge of insolvency, assigned certain accounts to secure advances from defendant, and at once used the money so obtained to pay favored creditors, the transaction, while constituting a preference, contained no element indicating an intent to defraud except inferentially by the making of a preferential payment, and was therefore not a fraudulent transfer prohibited by Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 252; Dec. Dig. § 180.*]

5. BANKRUPTCY (§§ 159, 175*)—TRANSFERS—PREFERENTIAL AND FRAUDULENT TRANSFERS DISTINGUISHED.

A "preference" and a "fraudulent transfer" of a bankrupt's assets, within the bankrupt act, are not the same. In a preferential transfer, the fraud is technical, and consisting in the infraction of the rule of equal distribution among all creditors, which it is the policy of the court to enforce when all cannot be fully paid; while in a "fraudulent transfer" the fraud is actual, in that the bankrupt has secured an advantage for himself out of what, in law, should belong to his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 247; Dec. Dig. §§ 159, 175.*]

6. BANKRUPTCY (§ 182*)—FRAUDULENT CONVEYANCES—NOTICE TO GRANTEE.

Where a bankrupt, while insolvent, transferred certain merchandise accounts to defendant in order to raise money to pay favored creditors, the fact that the bankrupt desired to obtain advancements on his accounts, and that in order to do so he acceded to onerous and oppressive terms exacted by the lender, did not show that the lender had knowledge of the bankrupt's insolvency and that the transfer was a fraud on the bankrupt's creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 255; Dec. Dig. § 182.*]

Appeal from the District Court of the United States for the Southern District of New York.

Action by Robert Van Iderstine, as trustee in bankruptcy of the firm of A. Fellerman & Son, against the National Discount Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with instructions.

Prior to August, 1905, the bankrupts, Fellerman & Son, were engaged in business as clothing manufacturers in New York City.

The defendant was a Maine corporation doing business in New York and engaged chiefly in advancing money to merchants upon their outstanding customers' accounts.

On August 15, 1909, the elder Fellerman applied to the defendant for advancements upon his firm's accounts, and a written agreement was entered in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to wherein the defendant, as "banker," agreed to advance to Fellerman & Son, as "customer," 75 per cent. of the face value of such accounts as might be transferred to and accepted by it. The "customer" agreed to pay the "banker" 5 per cent. commission upon the gross amount of the accounts pledged, to reimburse it for such outlays as exchange and postage, and to pay 6 per cent. interest upon advances. The contract also contained other stipulations which are not of especial importance in the present case.

At the time of the execution of the contract, the defendant advanced to Fellerman \$3,000 in cash upon accounts amounting to \$5,232.39, and on August 18th made a further advancement upon accounts amounting to \$2,495.60. Of the latter advancement Fellerman actually received \$1,006.33; the amount of the commissions upon the accounts being treated as a part of this advancement.

Before making the advances the defendant looked up the financial standing of Fellerman & Son in the mercantile agency reports and found them rated as being worth from \$50,000 to \$75,000, with fair or good credit. With reference to that time, however, the reports were wholly inaccurate; Fellerman & Son being hopelessly insolvent.

Fellerman knew that his firm was insolvent at the time he pledged the accounts to the defendant. He used most of the money which he received in paying certain creditors whom he desired to prefer.

On August 19, 1905, a petition in involuntary bankruptcy was filed against Fellerman & Son, and they were subsequently declared bankrupts. After the bankruptcy proceedings, the defendant through an attorney collected upon the pledged accounts an amount in excess of the advancements upon them, and subsequently accounted to the trustee for the balance collected after deducting a small sum for interest and a large sum for attorney's fees.

The complainant, as trustee in bankruptcy of Fellerman & Son, brought a suit in equity in the District Court against the defendant to set aside as fraudulent the aforesaid transfers of accounts and to obtain an accounting. The District Court submitted the question of liability to a jury, which found that the complainant was entitled to recover \$4,767.76; that being the amount with interest which it was claimed that the defendant had actually received. The District Court adopted the finding of the jury as its own and entered a decree for the amount stated, from which decree the defendant has appealed.

Gainsburg & Solomon (William J. Wallace, of counsel), for appellant.

James, Schell & Elkus (Abram I. Elkus, Carlisle J. Gleason, and Robert P. Levis, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). Although this was a suit in equity, it was tried in the District Court substantially in the manner of a common-law action. The issues were submitted to a jury, which brought in a general verdict. No particular questions were submitted and no special findings made. The court accepted and adopted the verdict and entered a decree thereon.

We do not question the right of the District Court to obtain from jurors for its guidance general verdicts in equity causes. But we must point out that such verdicts are of little assistance to this court in ascertaining the facts in the case upon appeal. Without any special findings we cannot tell, except by inference, what facts were or were not found. We must examine and weigh all the evidence in the record and determine whether, upon such evidence, the decree was right.

To sustain the decree we must be satisfied that the transfers of accounts from Fellerman to the defendant constituted fraudulent con-

veyances within the meaning of the bankruptcy act. Section 67e provides that:

"All conveyances, transfers, assignments or incumbrances of his property, or any part there made * * * a person adjudged a bankrupt * * * within four months prior to filing the petition with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them shall be null and void as against the creditors of such debtor except as to purchasers in good faith and for a present fair consideration." Act July 1, 1898, c. 541, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

These elements then must necessarily appear in this case if the pledges of the accounts are to be held fraudulent:

(1) An intent upon the part of Fellerman & Son to hinder, delay, or defraud their creditors.

(2) Want of good faith upon the part of the defendant.

Now, while it is clear that Fellerman in pledging the accounts acted in view of insolvency, the evidence is not at all satisfactory that he intended to defraud his creditors, as distinguished from obtaining the means for preferring particular creditors. It seems quite clear that the first money obtained from the defendant was used to pay a note at the bank. It also seems that most, if not all, the other money was used to pay favored creditors.

So far as Fellerman was concerned, the payments made with the money obtained from the defendant were undoubtedly preferences. The money might have been recovered if the creditors had had reasonable cause to believe that preferences were intended. But there is no evidence that the payments were fraudulent. There is a marked distinction between a "preferential payment" and a "fraudulent conveyance." Every preferential payment must to some extent hinder and delay creditors, but it is not necessarily a fraudulent conveyance. As said by the Supreme Court of the United States, in the recent case of *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772:

"A consideration of the provisions of the bankruptcy law as to preferences and conveyances shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect prescribed in section 60, enabling one creditor to obtain a greater portion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view to obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference. In construing the bankruptcy act this distinction must be kept constantly in mind. As was said in *Githens v. Shiffler* [D. C.] 112 Fed. 505: 'An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one.' In *Re Maher*, 144 Fed. 503-509, it was well said by the District Court of Massachusetts: 'In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors, which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual, the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him.'"

A preferential payment may be constructively fraudulent, but it is not in and of itself a fraudulent conveyance. It can only become the latter in the unusual case where actual fraud in addition to the pref-

erences is established. Thus a secret trust in favor of a person making such payments might turn a mere preference into a fraudulent conveyance. But there is no proof in this case of any intent to hinder or defraud creditors more than the preferential payments in themselves would have hindered them. The language of Judge Sanborn in *Sargent v. Blake*, 160 Fed. 57, 61, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, is especially in point:

"The only way in which Maxwell could have made this payment in bad faith would have been to have made it in whole or in part in secret trust for himself, or with the actual intent to hinder or defraud the creditors of the company more than the mere payment of the debt * * * must necessarily have delayed or prevented their collection of their claims, and there was no evidence of any such trust or intent."

See, also, *Coder v. Arts*, supra.

If then there was no actual fraud upon the part of Fellerman in using the money obtained from the defendant in making preferential payments, it necessarily follows that there was no actual fraud in pledging the accounts to the defendant to obtain the money for such use. If a preference itself is not fraudulent as to creditors, there can be no fraudulent intent in obtaining the money to make a preference.

The decision in *Ex parte Stubbins*, L. R. 17, Ch. Div. 58, 68, with respect to the English bankruptcy act is applicable:

"But it is pressed upon us * * * that the transfer of goods to a purchaser for value with the view of using the purchase money for a voluntary preference, the purchaser knowing this intention, was a fraudulent conveying away or transfer within the meaning of the sixth section of the act. It appears to me that that view cannot be sustained. In truth a mere voluntary transfer impeachable only on the ground that it is a preference to a particular creditor has never been held to be, in itself, a fraud or an act of bankruptcy. It may be impeached on the ground that it is voluntary, but it is impossible, as it appears to me, to hold that a mere voluntary transfer is of itself an act of fraud, and if this is not fraudulent within any principle of law it would be equally impossible to say that a sale becomes fraudulent because there is an intention in the mind of the vendor to use the purchase money for the purpose of making a voluntary preference, and the purchaser knows that that is the motive of the sale and the intention of the vendor with reference to the proceeds of the sale."

Assuming, however, that a fraudulent intent on Fellerman's part appears, the other element of the complainant's case is lacking. There is no tangible evidence to negative good faith on the part of the defendant. The complainant alleged, but failed to establish, that the defendant had full knowledge of Fellerman's fraudulent intention "and was not a purchaser in good faith of said accounts, nor did it pay a present fair consideration, but took said transfers with the intention to aid the consummation of said fraudulent scheme."

On the contrary, the defendant in making the loans did pay a present fair consideration, and there is no affirmative evidence that it took the transfers of accounts with the purpose of assisting Fellerman in an attempt to defraud his creditors. Substantially the only direct evidence showing any want of good faith upon the part of the defendant is the testimony that Levison suggested that Fellerman use the equity in the accounts to buy stock in the defendant corporation which could readily be turned over to members of his family. But the testimony

concerning this statement is not wholly satisfactory. Moreover, if Levison made it as Fellerman testifies, it must have been made, according to the same testimony, in ignorance of the condition of Fellerman's affairs. Fellerman, when called by the complainant, testified that he did not disclose his financial situation to the defendant.

Practically all the complainant can urge is that the defendant was put upon inquiry by these circumstances:

(1) That Fellerman desired to obtain advancements upon his accounts.

(2) That, in order to obtain them, he acceded to onerous and oppressive terms.

We cannot say, however, that a desire to borrow money upon accounts is indicative of an intent to defraud creditors. From the defendant's point of view at that time it would seem that Fellerman's desire to secure advancements was quite as consistent with an intention to pay creditors, or, at least, to pay favored creditors, as it was to defraud creditors. And the fact that Fellerman was ready to agree to harsh and oppressive terms to obtain the money indicates Fellerman's need, but hardly his fraudulent intent.

If, in view of the allegations of the complaint, the burden were upon the complainant to establish his allegation that the defendant was not a purchaser in good faith, we think that he wholly failed to do so. And even if the burden were upon the defendant to show its good faith, we are of the opinion that it sustained the burden.

The defendant undoubtedly took advantage of Fellerman's apparent necessities. But there was nothing in these necessities necessarily indicative of an intention to defraud—certainly nothing showing an intent to make a "fraudulent conveyance" as distinguished from a "preference."

The decision of the District Court is reversed, with costs, and the cause remanded, with instructions to dismiss the bill, with costs.

IN RE SOUTHERN TEXTILE CO.

(Circuit Court of Appeals, Second Circuit. December 7, 1909.)

No. 57.

BANKRUPTCY (§ 184*)—CHattel MORTGAGES (§ 5*)—LIENS—REGISTRATION.

Revisal N. C. 1905, § 982, declares that no trust or mortgage of personal property shall be valid as against creditors, or purchasers for value from the mortgagor, but from date of registration; and section 983 declares that all conditional sales shall be registered and shall have the same effect as chattel mortgages. The bankrupt, having several textile mills, in order to provide working capital agreed that claimants, who were factors, should advance on its goods, in process of manufacture, in transit, in the hands of finishers, and in the possession of customers until paid for, and that the goods should be subject to advances to be made generally by claimants against all merchandise in and produced at enumerated mills. *Held* in effect a chattel mortgage, and not an equitable lien, and that its character was not changed as to goods in process of manufacture because claimants in fact advanced more than the 80 per

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cent. of the value as agreed; and hence such contract, not being recorded as required, was not a valid lien against the creditors of the bankrupt, as provided by Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. § 184; * Chattel Mortgages, Cent. Dig. § 4; Dec. Dig. § 5.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of the Southern Textile Company, bankrupt. From an order disallowing the claim of Peter H. Corr and T. Ashby Blythe for a preference against or lien on certain personal property belonging to the bankrupt, they appeal. Affirmed.

George Gordon Battle and J. De F. Junkin, for appellants.

Shepard, Smith & Harkness (Wm. Mason Smith, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The Southern Textile Company was a New Jersey corporation which owned a number of mills, including one at Burlington, N. C., called the "Windsor Mill." It was put into involuntary bankruptcy in the Southern district of New York in the summer of 1904. In some way not explained the trustee came into possession of this Windsor Mill. There was found therein manufactured goods and goods in process. The manufactured goods were largely in cases, marked with the initials "B. & C." and with the names of various consumers. These consumers had been induced to purchase by a commission company controlled by appellants Blythe and Corr. The initials referred to them. A small quantity of the manufactured goods was not boxed, but was in piles on the floor of the mill, marked with tags "B. & C." The manufactured goods represented about 95 per cent. of the value of all the personal property on the premises. By agreement of all parties the trustee sold the property, and the claim now is to the fund resulting from such sale.

The facts upon which claimants rely are as follows: The Southern Textile Company, not having the means necessary to carry on the business, made an agreement with Blythe & Corr, who were engaged in selling the products of the mill, for advances. This agreement, dated October 29, 1903, recites that the company is without working capital sufficient to provide it with necessary raw material, and pay wages and other expenses incident to preparing the products of its mills for market, and is desirous of obtaining the same; that it has applied to Blythe & Corr as factors to advance moneys to it upon its goods in process, manufactured, in transit, in the hands of the finishers, and in the possession of its customers until paid for, subject to such advances, the same to be made to company by Blythe & Corr generally against all merchandise in and produced by the mills of the company at the Windsor Mills, Burlington, N. C., and at enumerated mills in three other states. The agreement on the part of Blythe & Corr is "as factors to make advances to the party of the first part

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against its goods and merchandise generally in its said mills in process and manufactured or at its finishers, as required by the company from time to time, to an amount not exceeding 80 per cent. of the market value of the said goods and merchandise at the time of such advances." In consideration therefor the company agreed that "all of the goods in and from its various mills in process, manufactured, in the finishers, in transit, or delivered to purchasers, until actually paid for by the purchaser thereof, shall be subject to a factor's lien in favor of the parties of the second part to the extent of all advances due them from time to time made as aforesaid; that when such goods are shipped from its mills, either to a finisher or to a purchaser, the same shall be shipped in the names of the parties of the second part, and all other proceedings be taken to preserve the lien of the party of the second part thereon as factors as are customary and usual." This agreement was carried out by both parties for some months after its date. Claimants advanced a large amount of money, which was used by the company to purchase raw material and pay wages of employes. The goods thus manufactured were sold to customers whom Blythe & Corr procured, and until bankruptcy the proceeds collected therefor were paid to Blythe & Corr.

The bankruptcy act provides:

"Sec. 67a. Liens. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate. * * * (d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." Act July 1, 1898, c. 541, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

This agreement of October 29, 1903, was never recorded, and the question presented here is whether, by reason of such want of record, the advances made under it would not have been valid liens as against the claims of the creditors of the bankrupt. Claimants concede that, if the instrument were a deed of trust or chattel mortgage, recording would be essential. The property upon which it is sought to impose a lien was located in North Carolina, and the statutes of that state provide (Revisal 1905, §§ 982, 983):

"982. No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth, or in case of personal estate where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor shall reside out of the state, then in the county where the said personal estate, or some part of the same, is situated, or in case of choses in action, where the donee, bargainee or mortgagee resides.

"983. Conditional sales of personal property. All conditional sales of personal property in which the title is retained by the bargainor, shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in case the purchaser shall reside out of the state, then in the county where the said personal estate or some part thereof is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides."

The claimants contend that the agreement is neither a deed of trust nor a chattel mortgage, but simply written evidence of an agreement between them and the company giving them an "equitable lien" upon the goods produced from their advances until the same were repaid. And they refer to the authorities which hold that, where the agreement is of such a character that the law does not require it to be recorded, want of record does not make it invalid under the bankrupt act. *Good-nough M. & S. Co. v. Galloway* (D. C.) 156 Fed. 504. In order to determine whether it is of such character, reference should be had to the law of North Carolina. If such a contract would there be held a chattel mortgage, to be recorded as such, it is not material that in other states it would not be so considered. The authority cited on respondent's brief seems determinative of this question. *Brown v. Dail*, 117 N. C. 41, 23 S. E. 45. In that case Heath and others entered into contract with Brown which, after setting forth that the former, who were engaged in the business of cutting and sawing timber, had not the means necessary to carry on the business and had applied to Brown for financial aid, and that he had agreed to make the advances if he should be fully secured, provided as follows:

"It is agreed by all the parties to this agreement that all the logs cut, all the lumber sawed, and every product of this business shall stand as security for all and any advancements made under this agreement; and when the lumber is sawed any sums received for the sale of the same at the mill shall be paid over to the party of the first part, and any shipment made of said lumber the bill of lading shall be made out in W. E. Brown's name and the proceeds of the same shall come first to him. That from the moneys received by W. E. Brown from the sale of lumber shall be applied to the payment of any and all indebtedness to him due and owing by the parties of the second part * * * for advancements made under this contract and agreement, and the balance, if any, shall be paid over to the said parties of the second part * * * as interest may appear."

Of this contract the court said:

"We think the agreement must be construed according to the manifest intent of the parties as a chattel mortgage. No particular form is essential, and the instrument has all the constituents necessary to create a chattel mortgage. The intention of the parties that the property to be thereafter acquired should be held in trust for the benefit of the plaintiff, and that the proceeds of the sale of it should be paid over to him, is plainly expressed, and the instrument must therefore be construed as a chattel mortgage, subject to lien laws and other statutes subject (sic) to such contracts."

We are unable to differentiate the contract in this case at bar from the one thus construed in *Brown v. Dail*, and must hold it to be a chattel mortgage, which under the statutes of North Carolina would be valid against creditors only if it were recorded. Such a result is wholesome. The fewer secret trusts or liens there are the better. It may fairly be presumed that, if they had been notified by the record of this document that the bankrupt had practically transferred everything to Blythe & Corr, the present creditors of the Textile Company would not have extended credit to it.

It is contended that these goods, in process or manufactured, were really the property of Blythe & Corr. The contract certainly does not so provide, and the circumstance that subsequent to January 1, 1904,

they advanced more than 80 per cent. does not operate to change it. The bankrupt bought the goods and held title to them until sale, reserving merely a lien thereon to Blythe & Corr for their advances.

The order appealed from is affirmed.

O'NEIL v. WOLCOTT MINING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1909.)

No. 3,057.

1. CORPORATIONS (§ 130*)—TRANSFER OF STOCK—JUSTIFICATION OF REFUSAL—ADVERSE CLAIM OR PROTEST INSUFFICIENT—FACTS ESTABLISHING REASONABLE DOUBT OF RIGHT ESSENTIAL.

The existence of facts known to the corporation, which at least raise a reasonable doubt of the right of a demandant who presents a clear prima facie case for a transfer, are requisite to justify a refusal of his request by the corporation.

An adverse claim or a protest is insufficient unless supported by facts which show some reasonable probability that it is well founded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 488, 489; Dec. Dig. § 130.*]

2. CORPORATIONS (§ 130*)—DUTY TO TRANSFER IMPOSED ON CORPORATION BY REQUEST OF VENDOR AND PURCHASER BEFORE CONTRACT OF SALE IS COMPLETE.

The request of a purchaser and an intermediate owner, parties to a contract of sale, accompanied with the certificate properly assigned by the stockholder of record, as effectually imposes the duty upon the corporation to transfer the stock where the transfer is a condition of the performance of the contract of sale as a request by the transferee after the sale is completed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 488, 489; Dec. Dig. § 130.*]

3. CORPORATIONS (§ 141*)—ESTOPPEL—UNREGISTERED ASSIGNMENTS OF STOCK ESTOP ASSIGNORS ALTHOUGH STATUTES REQUIRE TRANSFERS ON CORPORATION BOOKS.

Notwithstanding provisions in statutes, charters, or by-laws to the effect that transfers of stock shall be void unless made on the books of corporations, stockholders are estopped by their delivery of certificates of their stock indorsed with blank assignments and powers of attorney from claiming any title to or interest in their stock as against bona fide purchasers thereof from those to whom such stockholders have delivered such certificates.

Section 508, Mills' Ann. St. Rev. Supp. Colo., is subject to this rule.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 477; Dec. Dig. § 141.*]

4. CORPORATIONS (§ 130*)—DUTY TO TRANSFER STOCK—FACTS—CONCLUSION.

A certificate of stock in a corporation was issued to W. in 1890. He indorsed upon it a blank assignment and delivered it to D., who in 1905 contracted to sell it to C. for \$2,000. D. delivered the certificate to C., who paid \$2,000 to F., the mutual agent, therefor, and D. and C. agreed that F. should cause the stock to be transferred by the corporation to C., and upon receipt of the return certificate should deliver it to her and pay the \$2,000 to D. F. forwarded the original certificate properly indorsed for transfer to C. to the corporation and requested that the transfer be made; but the corporation refused to make it because all dividends on the stock prior to the contract of sale had been paid to W., in whose

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

name it stood upon the books of the corporation, and because in 1890 or 1891 W. had stated to the corporation that he had lost some of his stock and had instructed it not to transfer any stock in his name without his knowledge and approval.

Held, the purchaser C. presented to the corporation a clear right to a transfer of the stock, and the payment of the dividends to W. and his ancient claim and protest constituted no justification for a refusal by the corporation to make the transfer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 488, 489; Dec. Dig. § 130.*]

5. APPEAL AND ERROR (§ 747*)—CROSS-ERRORS NOT ASSIGNABLE—DEFENDANTS CANNOT ASSAIL DISMISSAL FOR DEFECT OF PARTIES.

An appellee or a defendant in error who takes no appeal or writ of error himself cannot, by assigning cross-errors, or by brief or argument, confer jurisdiction upon a federal appellate court to consider, review, or decide rulings against him in the court below. Cross-errors are not assignable in the national courts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3054; Dec. Dig. § 747.*]

6. JUDGMENT (§ 251*)—GENERAL DECREE OF DISMISSAL NOT SUSTAINABLE BY MATTER IN ABATEMENT.

A general decree that the bill be dismissed, which does not clearly show that it rests upon some matter in abatement which prevents it from barring future actions upon the same cause, cannot be sustained by the sufficiency of the proof of the matter in abatement, where there are pleas in bar, because the legal effect of the decree is to sustain the latter and to work a complete estoppel of subsequent suits upon the same cause.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

7. EQUITY (§ 94*)—ABSENCE OF "INDISPENSABLE PARTIES" ONLY FATAL TO THE JURISDICTION OF FEDERAL COURTS.

It is the absence of indispensable parties only that is fatal to the jurisdiction of the federal courts.

An "indispensable party" is one who has such an interest in the subject-matter of the controversy that a final decree between the parties before the court cannot be made without injuriously affecting his interest or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

W. and D. were not such parties in this case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 252; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 4, p. 3559.]

8. COURTS (§ 312*)—FEDERAL COURTS—COLLUSION TO INVOKE JURISDICTION—FICTITIOUS TRANSFERS, NOT THE MOTIVE OR PURPOSE TO INVOKE JURISDICTION BY REAL TRANSFERS, OBNOXIOUS TO THE ACT OF 1875.

The fact that the purpose to bring a cause of action within the jurisdiction of a federal court is the motive which induces a gift or a sale, and a conveyance of a cause of action, or of the property out of which the cause of action arises, does not deprive the assignee of his right to invoke the jurisdiction of that court to determine the cause, provided the transfer was real and absolute.

It is sham or fictitious transfers which colorably place titles and rights in assignees to enable the latter to maintain suits in the federal courts for the benefit of the assignors that are obnoxious to Act March 3, 1875, c. 137, 18 Stat. 470, 472 (U. S. Comp. St. 1901, pp. 508, 511), and not the motive or purpose of real transfers.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 865; Dec. Dig. § 312.*]

(Syllabus by the Court.)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the District of Colorado.

Bill by H. M. O'Neil against the Wolcott Mining Company and others. Decree for defendants, and complainant appeals. Reversed and remanded.

The complaint in this case is that at the final hearing the court dismissed the bill of the appellant, which was exhibited to obtain a transfer to the complainant upon the books of the Wolcott Mining Company of 3,000 shares of its capital stock. The mining company was organized about 1890, and it had a capital stock of 100,000 shares of a par value of \$1 per share. It issued a certificate for 3,000 of these shares to A. Wolcott. He indorsed upon this certificate a blank assignment and power of attorney to transfer the stock and delivered it to S. Delamater. The business of the corporation was conducted and its corporate books were kept in the state of Colorado, while Wolcott was of Indiana and Delamater of Illinois. On the 9th day of September, 1905, at Denver, Delamater exhibited to John K. Carleton, the agent for his wife, L. B. Carleton, and to W. F. Ford, a broker, and the agent of both Delamater and Mrs. Carleton in this transaction, this certificate of stock bearing the written assignment and power of attorney of A. Wolcott. Delamater represented to them that he was the owner of the stock, that the assignment and power of attorney were valid, and that the stock would be transferred upon the books of the corporation upon request; and in reliance upon this representation Mrs. Carleton, through J. K. Carleton, her agent, and Delamater, agreed that Mrs. Carleton would buy the stock of Delamater, that it should be assigned and transferred to her on the books of the company, that she would pay him \$2,000 therefor, that the certificate should be immediately assigned to L. B. Carleton, that the certificate so assigned and the \$2,000 should be deposited with Ford, the broker, who should send the certificate to the office of the company and have the stock transferred to Mrs. Carleton, that on the receipt of the certificates issued to her he should deliver them to Carleton and pay the \$2,000 to Delamater, and that if the stock should not be transferred the original certificate should be returned to Delamater. This agreement was performed by all the parties to it. Delamater delivered the certificate of stock to Carleton, who deposited it with Ford, and Carleton paid the \$2,000 for it to Ford for his wife, and Ford still holds the money for Delamater. At the request of Delamater and Carleton, the name of Mrs. Carleton was written into the blank assignment, and Ford then sent the certificate to the company and requested on behalf of both Delamater and Mrs. Carleton that the stock be transferred to her. The company refused to transfer it because 13 years before the date of the demand A. Wolcott had notified the corporation that he had lost some of his stock and had instructed it not to transfer any that stood in his name without consulting him and securing his approval. On September 14, 1905, after the company had declined temporarily to transfer the stock, Delamater notified Ford not to pay the \$2,000 back to Mrs. Carleton, but to hold it for him, and that he should hold Ford responsible for it. But on September 27, 1905, he notified Ford that he withdrew all offers to have the stock transferred and on the same day he wrote to the secretary of the company that, as the stock was claimed by A. Wolcott and he had arranged with Wolcott that the latter might keep the stock, he authorized the secretary to deliver it to him, or to John A. Ewing, his attorney. Thereupon the secretary, without any notice to Ford or Mrs. Carleton, delivered the certificate and the assignment which he had received from Ford to W. W. Charles, the agent of A. Wolcott, who sent it to the latter in Indiana. When the secretary received the certificate on September 11, 1905, he wrote Ford that he would be obliged to refer it to E. H. Wolcott, who was the son of A. Wolcott, and the president of the company before the transfer was made, that aside from this A. Wolcott claimed that he had lost some stock and he desired to communicate with him before the transfer. But he never did communicate with A. Wolcott because the latter was incapacitated to transact business by his age, and, although he notified his son E. H. Wolcott, there is no evidence in the record that the latter made any claim to the stock on

behalf of his father or otherwise. The defendant did not call as witnesses E. H. Wolcott, or Delamater, or Charles, and it did not present any competent evidence that either A. Wolcott, or E. H. Wolcott, had any prior right to the 3,000 shares of stock here in issue at the time Mrs. Carleton demanded the transfer of the stock to herself, and the corporation refused to transfer it and delivered the certificate to Charles.

Harvey Riddell, for appellant.

John A. Ewing and Charles Cavender, for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). The salient feature of this case is that the corporation which received from the mutual agent of the vendor and purchaser the certificate of the stock here in question properly indorsed for transfer and a regular request from the registered stockholder, Wolcott, and from the intermediate vendor, Delamater, and the purchaser, Mrs. Carleton, to transfer it to her, refused to make the transfer and delivered the certificate and the assignment to the agent of A. Wolcott without the knowledge or consent of Mrs. Carleton, the purchaser, who had paid \$2,000 for it, or of the mutual agent of the vendor and purchaser from whom the corporation received it.

Why was it not the duty of the company to transfer the stock to Mrs. Carleton upon the joint request of the original stockholder, the vendor, and the purchaser, and upon the presentation of the certificate properly indorsed for transfer? Counsel answer because the sale was not complete, but was conditional on the transfer of the stock, and because the records of the corporation disclose the facts that the stock had been issued to A. Wolcott about 1890, that the dividends had been paid to him, and that, 13 years before, he had notified it that he had lost some of his stock and had requested that none of the stock standing in his name should be transferred without consulting him and obtaining his approval. But a completed sale was not indispensable to Mrs. Carleton's right to a transfer of the stock. There was a valid contract of sale between her and Delamater and a legal request for the transfer by the original stockholder and by both the vendor and the purchaser, and such a request as effectually imposes the duty upon the corporation to make the transfer as a request from the purchaser after a perfected sale. A request by the vendor and purchaser of stock for its transfer upon the books of the corporation as effectually imposes the duty upon the corporation to transfer it when it is made in performance of a contract of sale whose completion is conditioned by the transfer as when it is the result of a completed sale. *State ex rel. Townsend v. McIver*, 2 S. C. 25, 45, 46; *Cook on Corporations*, §§ 384, 386; *Webster v. Upton*, 91 U. S. 65, 71, 23 L. Ed. 384; *Johnston v. Laffin*, 103 U. S. 800, 804, 26 L. Ed. 532; *Paine v. Hutchinson*, 3 L. R. Ch. App. 388.

Again, the stock was actually sold to Carleton for his wife, and she actually paid the purchase price to Ford for Delamater. It is true that the vendor and purchaser agreed that their agent, Ford, should procure its transfer upon the books of the corporation, and that he should hold the purchase money until the stock was transferred and

the certificates were returned, should then deliver the latter to Mrs. Carleton and pay the money to Delamater, and that "in case stock is not transferred the above contract is canceled and stock to be returned to Mr. Delamater." But the true meaning of the clause in quotations was not that the agreement should be annulled if the transfer was prevented by the illegal acts or omissions of Delamater, or of the corporation, but that it should be canceled only in case the vendor and the purchaser were not legally entitled to the transfer of the stock upon the presentation to the corporation of their joint request together with the certificate and the assignment and power of attorney of the original stockholder, A. Wolcott, indorsed thereon. As this right to the transfer existed, and as the purchaser has never surrendered it, the contingency on which the contract of sale might have become void has never arisen, and the agreement and the sale remained in force.

Did the facts that 13 years before the demand of the transfer was made A. Wolcott had given notice that he had lost some of his stock and had requested the corporation not to transfer any that stood in his name without notice to him and his approval relieve the corporation of its duty to make this transfer? A blank assignment and power of attorney to transfer stock indorsed upon the certificate thereof estop the transferor from claiming any further title to or interest in the stock as against subsequent bona fide transferees thereof, although the transfer is not recorded in the books of the corporation. Cook, in his work on Corporations, says that there is no case which denies this principle of law. 2 Cook on Corporations, § 378; Masury v. Arkansas National Bank, 35 C. C. A. 476, 478, 93 Fed. 603, 605; Moore v. Metropolitan Bank, 55 N. Y. 46, 47, 14 Am. Rep. 173; McNeil v. Tenth National Bank, 46 N. Y. 329, 7 Am. Rep. 341; Zulick v. Markham, 6 Daly (N. Y.) 129, 133; Supply Ditch Company v. Elliott, 10 Colo. 327, 333, 15 Pac. 691, 3 Am. St. Rep. 586. The reason for this rule is that it would be contrary to justice and good conscience to permit the original owner to assert title against an innocent purchaser from one clothed by the original owner with all the indicia of ownership and power of disposition.

There is a section of the statutes of Colorado which relates to the records that corporations of that state are required to keep of their capital stock and of its transfer which contains this clause:

"And no transfer of stock shall be valid for any purpose whatever except to render the person to whom it shall be transferred liable for the debts of the company according to the provisions of this act, unless it shall have been entered therein, as required by this section, within sixty days from the date of such transfer." Mills' Ann. St. Rev. Supp. § 508.

But the effect of this provision and the intent of the Legislature in enacting it were not to prescribe an exclusive method whereby a stockholder might divest himself of his title, or might assign it to a third party, but to provide a means of transfer and a record thereof which should be effectual and controlling between the corporation and its stockholders in matters relating to the internal management of the corporation and which would protect transferees against creditors of transferors and other third parties claiming title. The rule is too

firmly established and is supported by too great a weight of authority to be avoided by anything less than an express legislative repeal that notwithstanding provisions of this nature in general statutes, in charters, and in by-laws of corporations, stockholders may estop themselves conclusively from claiming any interest in or lien upon their stock as against subsequent bona fide purchasers and may divest themselves of all title to it by unregistered assignments thereof. *Masury v. Arkansas National Bank*, 35 C. C. A. 476, 478, 93 Fed. 603, 605; *Johnston v. Laflin*, 103 U. S. 800, 804, 26 L. Ed. 532; *Cook on Corporations*, § 378, and cases there cited; *Bank of Commerce v. Bank of Newport*, 63 Fed. 898, 900, 11 C. C. A. 484, 486; *Horton v. Mercer*, 71 Fed. 153, 155, 18 C. C. A. 18; 1 *Morawetz on Private Corporations*, § 197. Moreover, this rule of law is not only reasonable but almost necessary to the facile transaction of commercial business in this country. While certificates of stock are not negotiable in the strict sense of the law merchant, they are negotiable in fact. Thousands of them are bought and sold throughout the entire nation daily upon blank assignments and powers of attorney without registration of the transfers in reliance upon the rule of law which has been stated. An avoidance of all such assignments not evidenced by the books of the corporation within 60 days after their dates would greatly impede traffic in stocks and would seriously decrease their value. The statutes of the nation and of the other states of the Union do not strike down the rule of law and of commerce which has been stated, and it cannot be that the Legislature of Colorado either intended to, or did by this statute, single out the stocks of the corporations of its own state and subject them to so serious a disadvantage in the markets of the world. This conclusion has not been reached without a careful reading of the decision of the Supreme Court of Colorado in *Central Savings Bank v. Smith*, 43 Colo. 90, 95 Pac. 307, 308; but that decision is not controlling in this case: First, because it was not rendered until after the transaction here in question was had. *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; *Speer v. Board of Com'rs*, 32 C. C. A. 101, 113, 88 Fed. 749, 760; *Clapp v. Otoe County*, 45 C. C. A. 579, 582, 104 Fed. 473, 476; *Westinghouse Air Brake Co. v. Kansas City So. Ry. Co.*, 71 C. C. A. 1, 10, 137 Fed. 26, 35; *Harrison v. Remington Paper Co.*, 72 C. C. A. 405, 408, 140 Fed. 385, 388, 3 L. R. A. (N. S.) 954; *City of Mankato v. Barber Asphalt Pav. Co.*, 72 C. C. A. 439, 447, 142 Fed. 329, 337. And, second, because the transfer in that case was held void against a creditor, and the statute may have that effect without avoiding assignments from stockholders to third persons as against subsequent innocent purchasers.

A. Wolcott therefore, by his assignment of the certificate in blank and his execution of the blank power of attorney thereon and by the delivery of the certificate thus indorsed to Delamater, was estopped from claiming any interest in or title to the stock here in issue against Mrs. Carleton, who was induced by that assignment and delivery to make the contract to purchase the stock and was persuaded to pay the \$2,000 for it. The certificate, the assignment, and the request for the transfer in regular form were presented to the defendant. On their

face they entitle Mrs. Carleton to a transfer of the stock. The legal presumption was that they had been lawfully and honestly made and acquired. The corporation refused to make the transfer, and it thereby took upon itself the burden of proving a justification of its refusal. It proved that dividends on this stock had been paid to Wolcott prior to the contract of sale to Mrs. Carleton. But that fact constituted no defense to the legal demand of Wolcott, Delamater, and Mrs. Carleton that the stock should be transferred to her after the contract. It proved that 13 years before the demand was made upon it Wolcott had told the company that he had lost some of his stock and had instructed it not to transfer any that stood in his name without his approval. But his written assignment of this stock and his written power of attorney and request to transfer it to Mrs. Carleton evidenced the fact that he had not lost this stock, and that he had knowingly assigned it and authorized the transfer of it.

Concede, however, that his ancient request justified the corporation in delaying the transfer of it until it could communicate with him or with his representative and could give him an opportunity to show to the corporation that he had a prior claim to the stock that might prove superior to that of Mrs. Carleton. The burden was then upon his son and representative, E. H. Wolcott, to present such a claim, and the duty was upon the defendant to transfer the stock if no such claim was established. Where the rights of a claimant are reasonably clear, and the corporation suspends action and gives to another an opportunity to establish his opposing claim, and he neither does so before the corporation nor commences any action to prevent the transfer within a reasonable time, it is the duty of the corporation to record the transfer demanded by the first claimant. *State ex rel. Townsend v. McIver*, 2 S. C. 25, 44. The secretary of the corporation gave notice of the demand for the transfer to E. H. Wolcott, the son and the representative of A. Wolcott, who was incapacitated by age; but neither of them disclosed any probable right or interest in this stock, neither of them proved or even claimed that A. Wolcott had ever lost the stock here in controversy, and the defendant has produced no evidence whatever in this case of any such loss. The result was that there was no proof of any justification or excuse for the defendant's refusal to transfer the stock except A. Wolcott's request 13 years before the demand that none of the stock in his name should be transferred without notice to and approval by him, and this request constituted no justification. Evidence of some adverse title, interest, or lien, that at least raises a substantial doubt of the right of a demandant to a transfer of stock, is indispensable to sustain a refusal to make it. The corporation when it refuses, and upon the trial of the issue the court, must be able to see from the facts established that there is some question to be tried. A mere claim of the stock is not sufficient. *State Insurance Co. v. Gennett*, 2 Tenn. Ch. R. 82, 84; *State ex rel. Townsend v. McIver*, 2 S. C. 25, 44. The question was well put by Sir G. Jessel, Master of the Rolls, in *Ex parte Sargent*, 17 Law Reports Equity Cases, 1873-4, 273, 282, in these words:

"Is it sufficient cause that somebody whose name is on the register gives notice to the company that the transfer is not valid, the transfer being valid

in form? I cannot hold that to be sufficient cause, because it would come to this, that anybody giving notice would stop a transfer. Then is it sufficient cause if the person who gives the notice turns out to be wrong? The company took no step to ascertain who was in the right, but simply refused to register, and stood on that refusal; in fact, it sided with Mr. Fry, its chairman. Can I say that a company which chooses to refuse a transfer because the chairman says it is wrong, when it is right, is not to bear the costs resulting from that refusal, although it chose to act without getting an indemnity for those costs over and against Mr. Fry? I do not think so."

Any other rule would enable any person to deprive the owner of his stock temporarily by simply giving notice to the corporation that he claimed it and protested against its transfer.

The finding that there was no proof of any excuse for the corporation's refusal except Wolcott's ancient notice has not been made without a consideration of Delamater's letter to the corporation dated September 27, 1905, wherein he declared that Carleton had not paid anything on account of the stock, and wrote:

"And as the said stock is claimed by A. Wolcott, and as I have arranged with the said Wolcott for him to keep the said stock, I hereby authorize you to deliver the same to the said A. Wolcott, or to his attorney, J. A. Ewing, as I have no further claim thereto."

But Delamater did not testify that these declarations were true, and, while his admissions against his interest and against the interest of the corporation which attempts to justify under them constitute admissible evidence in favor of the complainant, his statements favorable to himself and the defendant were incompetent evidence against her because they were hearsay and were self-serving statements. Delamater had no power to authorize the delivery of the stock to Wolcott. He was bound by his contract with Mrs. Carleton to cause that stock to be transferred to her, and the corporation was bound by the fact that it had received it from Ford with the request that it be transferred to Mrs. Carleton, to either transfer, it or to return it to Ford or to deliver it pursuant to his order.

Nor has the letter of Stickley, the secretary of the company, to Ford on October 7, 1905, been overlooked, in which he wrote that A. Wolcott claimed that he had placed the stock with Delamater "with the distinct understanding when he (Delamater) wanted to dispose of it, that he (Wolcott) was to have the first option at the price which he was willing to sell it for; and the said A. Wolcott stated that he had been ready at all times to give him the money for the stock, but Delamater had never signified his willingness to accept any amount." No one testifies that this was the claim of Wolcott. Even if it were, it would have given him no title to or interest in the stock against Mrs. Carleton and no right to prevent its transfer to her. This claim would have been an acknowledgment that Wolcott delivered the stock and his blank assignment of it to Delamater knowing that Delamater owned the stock and that he had the right to sell it. The "distinct understanding" mentioned did not constitute an agreement for a legal consideration and was void, and, if it had risen to the dignity of a contract, it would have created no title to or lien upon the stock. It would have related to personal property, and its specific performance

could not have been enforced, and Wolcott's only remedy under it after Delamater's contract of sale to Mrs. Carleton would have been an action for damages against him for its breach. And, finally, as this and every other claim of Wolcott was unknown to Mrs. Carleton when she paid the \$2,000 for the stock, he was estopped by his assignment of the stock and delivery of the certificate from making this or any other claim to the stock as against her.

Our conclusion is that Mrs. Carleton's right to a transfer of the stock was clearly proved to the corporation and to the court, that no facts were presented to either that could have raised any reasonable doubt or question of that right, and that the action of the corporation in refusing to make the transfer and in delivering the certificate to Charles without the order of Ford, from whom it received it, was of a partisan character and violative of its legal duty. *Hinckley v. Pfister*, 83 Wis. 64, 85, 53 N. W. 21.

The defendants alleged in their answer, and this averment was denied by the replication, that A. Wolcott, S. Delamater, W. W. Charles, and E. A. Frazier were proper and necessary parties to this suit, and counsel argue that the decree should be affirmed because they were not made parties. The position is untenable. In the first place, if these persons were indispensable parties, that fact would not sustain, but would reverse, the decree below, and, as the defendants have taken no appeal, they cannot be heard in this court to urge errors which would set aside the result in their favor. They can present contentions that will support the decree and those only. An appellee or a defendant in error who takes no appeal or writ of error himself cannot, by assigning cross-errors, or by brief or argument, confer jurisdiction upon a federal appellate court to consider, review, or decide rulings against him in the court below. Much less can he be heard to challenge rulings that were too favorable to him. Cross-errors are not assignable in the national courts. *Bolles v. Outing Co.*, 175 U. S. 262, 268, 20 Sup. Ct. 94, 44 L. Ed. 156; *Cleary v. Ellis Foundry Co.*, 132 U. S. 612, 614, 10 Sup. Ct. 223, 33 L. Ed. 473; *Canter v. American, etc., Ins. Co.*, 3 Pet. 307, 318, 7 L. Ed. 688; *Chittenden v. Brewster*, 2 Wall. 191, 196, 17 L. Ed. 839; *Loudon v. Taxing District*, 104 U. S. 771, 774, 26 L. Ed. 923; *The Maria Martin*, 12 Wall. 31, 40, 20 L. Ed. 251; *Clark v. Killian*, 103 U. S. 766, 769, 26 L. Ed. 607; *United States v. Blackfeather*, 155 U. S. 180, 186, 15 Sup. Ct. 64, 39 L. Ed. 114; *The Stephen Morgan*, 94 U. S. 599, 24 L. Ed. 266; *Building & Loan Ass'n v. Logan*, 14 C. C. A. 133, 134, 66 Fed. 827, 828; *Guarantee Co. v. Phenix Ins. Co.*, 124 Fed. 170, 171, 172, 173, 59 C. C. A. 376, 377, 378, 379; *Pauly, etc., Mfg. Co. v. Hemphill Co.*, 10 C. C. A. 595, 600, 62 Fed. 698, 703; *Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co.*, 154 Fed. 545, 567, 83 C. C. A. 431, 453.

The only decree which the absence of indispensable parties to a suit will sustain is one which dismisses the bill upon that ground without prejudice to another suit against the same defendants and all other indispensable parties upon the same cause of action, while the decree in this case was upon the merits. It rendered the issues *res adjudicata* and constituted a complete bar to all future suits for a transfer of

the stock. A general decree that the bill be dismissed, which does not clearly show that it rests upon some matter in abatement which prevents it from barring future actions upon the same cause, cannot be sustained by the sufficiency of the proof of the matter in abatement, where there are pleas in bar, because the legal effect of the decree is to sustain the latter and to work a complete estoppel of subsequent suits upon the same cause. *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 49 C. C. A. 229, 233, 111 Fed. 81, 85; *Speer v. Board of County Commissioners*, 88 Fed. 749, 752, 32 C. C. A. 101, 105; *Indian Land & Trust Co. v. Shoenfelt*, 135 Fed. 484, 487, 68 C. C. A. 196, 199; *House v. Mullen*, 22 Wall. 42, 46, 22 L. Ed. 838; *Four Hundred and Twenty Mining Co. v. Bullion Mining Co.*, 9 Fed. Cas. 592, 599 (No. 4,989), 3 Sawy. 634; *Sheldon v. Edwards*, 35 N. Y. 279, 287, 288; *United States v. Pine River Logging & Imp. Co.*, 78 Fed. 319, 325, 24 C. C. A. 101, 107.

In the second place, it is the absence of indispensable parties only that necessarily compels the abatement of a suit in the national courts. The court below necessarily found, when it entered its general decree of dismissal, that the persons named in the answer were not such parties, and the evidence is insufficient to warrant the reversal of that finding. An "indispensable party" is one who has such an interest in the subject-matter of a controversy that a final decree between the parties before the court cannot be made without injuriously affecting his interest or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree between them, is a proper party. *Rev. St. §§ 737, 738* (U. S. Comp. St. 1901, p. 587); *Equity Rule, 47*; *Sioux City Terminal R. & W. Co. v. Trust Co. of N. A.*, 82 Fed. 124, 27 C. C. A. 73, 75; *Chadbourn v. Coe*, 2 C. C. A. 327, 328, 329, 51 Fed. 479, 480, 481; *Rogers v. Penobscot Mining Co.*, 154 Fed. 606, 616, 83 C. C. A. 380, 390, and cases there cited; *Lawrence v. Southern Pacific Co.* (C. C.) 165 Fed. 241, 243.

This was not a suit to enforce specific performance of an agreement of sale, or to quiet title, or to determine conflicting claims to the title or the possession of the stock. It was a suit to compel the corporation to discharge its duty to transfer the stock to Mrs. Carleton, and it was nothing more. The corporation was the only indispensable defendant because a decree between the complainant and the corporation cannot injuriously affect the interests of any of the persons named in the answer and it cannot leave the controversy in such a situation that its final determination may be inconsistent with equity and good conscience, because those persons are not parties to, and they will not be bound by, that decree. They will be as free after, as before, the decree, to enforce any rights they may have to the stock or to a record of it in their names, both against the complainant and against the corporation.

There is another reason why those persons were not indispensable parties, and that is because the complainant denied, and the proof failed

to show, that they were such parties. The burden was upon the defendants to make such proof, and in this court, after the adverse finding of the chancellor upon this issue, the burden is upon them to present proof of sufficient cogency to overcome the legal presumption that that finding was right. The proof is that A. Wolcott had estopped himself as against the complainant from claiming any interest in this stock or in its transfer and had died before the answer was interposed, that S. Delamater had estopped himself from claiming any interest in the stock or in the transfer against the complainant by his contract of sale, by his delivery of the stock to Mrs. Carleton for her \$2,000, and by his subsequent written disclaimer, that Charles was the agent of Wolcott, and hence without interest in the controversy or the property, and there was no evidence whatever about Frazier. The result is that the decree of dismissal cannot be sustained, nor can a decree for the complainant be avoided on the ground that there was a defect of parties to this suit.

Finally, the defendants insist that the bill was properly dismissed because, as they claim, Mrs. Carleton, a resident and citizen of the same state as the defendants, is the real party in interest in the suit, the complainant paid no consideration for the assignment to her, and it was made for the sole purpose of creating a cause cognizable by the national courts. But the record fails to sustain these claims. It contains convincing evidence that Mrs. Carleton made and delivered to the complainant a written assignment of all her right, title, and interest in the 3,000 shares of stock in November, 1905, and that therefor the complainant gave to her assignor her promissory note payable on demand upon condition that Mrs. Carleton should not discount the note, and that if the stock should not be transferred to the complainant Mrs. Carleton should return the note. There is nothing in this sale substantially different in legal effect from a sale of stock for cash with an express or implied warranty of title. In the latter case, if the title fails, and the purchaser cannot secure a transfer of the stock upon the books of the corporation, the seller must return the consideration with interest, and in the case at bar the same result will follow from the same cause. But in each case the title to the stock and the right to the transfer vest absolutely in the vendee at the time of the sale. If the title proves valid, and the transfer is enforceable, the consideration remains the property of the vendor. If the property sold was, at the time of the sale, or thereafter becomes, worth more or less than the purchase price, the gain or the loss is the vendee's. The evidence in the record established a valid sale and assignment to the complainant of the stock and of the right to its transfer for a valuable and lawful consideration.

The fifth section of the act of March 3, 1875 (18 Stat. 470, 472, c. 137 [U. S. Comp. St. 1901, pp. 508, 511]), which has never been superseded (*Lake County Commissioners v. Dudley*, 173 U. S. 243, 251, 19 Sup. Ct. 398, 401, 43 L. Ed. 684), provided:

"That if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially

involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a cause cognizable or removable under this act, the said Circuit Court shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just."

The counsel for the defendants contend that the complainant was improperly and collusively made a party to this suit for the purpose of bringing the cause of action it presents within the jurisdiction of the court below. But the transfer of the stock and of the cause of action to the complainant was real and absolute, and, even if one of the motives which induced Mrs. Carleton to sell and the complainant to buy had been to enable the purchaser to invoke the jurisdiction of the federal courts, that fact alone would not have defeated the purchaser's suit. Mrs. Carleton had the right to make a gift or a sale of her stock and of her cause of action to the complainant from that very motive, and if the gift or sale was genuine, and the title and the beneficial ownership vested absolutely in the assignee, as they did, the latter could lawfully maintain her suit and enforce her rights.

The fact that the purpose to bring a cause of action within the jurisdiction of a federal court is the motive which induces a gift or a sale, and a conveyance of a cause of action or of the property out of which the cause of action arises, does not deprive the assignee of his right to invoke the jurisdiction of that court to determine the cause, provided the transfer was real and absolute. *McDonald v. Smalley*, 1 Pet. 620, 623, 7 L. Ed. 287; *Smith v. Kernochen*, 7 How. 198, 215, 12 L. Ed. 666; *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 327, 336, 16 Sup. Ct. 307, 40 L. Ed. 444; *Dickerman v. Northern Trust Company*, 176 U. S. 181, 191, 20 Sup. Ct. 311, 44 L. Ed. 423; *South Dakota v. North Carolina*, 192 U. S. 286, 310, 311, 24 Sup. Ct. 269, 48 L. Ed. 448.

It is sham or fictitious transfers which colorably place titles and rights in assignees to enable them to maintain suits in the federal courts for the benefit of the assignors that are obnoxious to the act of March 3, 1875, and not the purpose or motive of real transfers. The record fails to establish that the assignment to the complainant was either sham, fictitious, or colorable, and the objection to it must be overruled.

The decree below must be reversed, and the case must be remanded to the Circuit Court, with directions to enter a decree in favor of the complainant for the relief prayed in the bill, including a recovery from the defendant corporation, but not from the other defendants, of the dividends which have been declared upon the 3,000 shares of stock in controversy since September 27, 1905, and interest thereon from the times when they were respectively payable; and it is so ordered.

MORSE v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. October 11, 1909. On Motion to Amend Mandate, November 23, 1909.)

No. 292.

1. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—CRIMINAL PROSECUTION OF OFFICER FOR MISAPPLICATION OF FUNDS—INSTRUCTIONS.

In a prosecution of an officer of a national bank under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), for misapplication of funds with intent to injure and defraud the association, general language used in the charge in explaining the section, stating that a misapplication of funds, in order to constitute an offense, must have been with intent to injure or defraud the bank "or to deceive any officer of the bank or any agent appointed pursuant to law to examine the affairs of the bank," was not misleading, where the jury were subsequently charged specifically on the precise issue presented by the indictment and that an intent to defraud the bank must be shown.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

2. CRIMINAL LAW (§ 1172*)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

An error in an instruction applying to certain counts only of the indictment does not warrant a reversal, where there was a verdict of guilty also on other counts not affected by such instruction, which is sufficient to support the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3161; Dec. Dig. § 1172.*]

3. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—CRIMINAL RESPONSIBILITY OF OFFICERS—MAKING FALSE ENTRIES.

Upon a charge against an officer of a national bank of making false entries in the books of the bank, it is immaterial whether defendant made the entries in person or caused them to be made by a clerk or book-keeper.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 960-962; Dec. Dig. § 256.*]

4. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—CRIMINAL RESPONSIBILITY OF OFFICERS—FALSE ENTRIES.

Entries in the books of a national bank showing loans to persons named on the security of stocks deposited as collateral, when in fact the transactions were purchases of the stock by the bank, the supposed borrowers being merely dummies wholly irresponsible for the amount of the notes which they gave without any intention of paying the same or any knowledge of the actual transactions, were false entries, and, when made by the direction of an officer of the bank who conducted the transactions, a jury was justified in finding that they were fraudulent and made with intent to deceive the bank examiner and his agents in violation of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497).

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 960; Dec. Dig. § 256.*]

5. CRIMINAL LAW (§ 1159*)—APPEAL AND ERROR—REVIEW—CONCLUSIVENESS OF VERDICT.

Where the evidence was conflicting on an issue of fact in a criminal case, the finding of the jury thereon is conclusive on an appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—OFFENSES BY OFFICERS—FALSE REPORTS.

The fact that a national bank is prohibited by Rev. St. § 5201 (U. S. Comp. St. 1901, p. 3494), from purchasing its own stock, does not make such a purchase a nullity, nor does the purchase extinguish the stock, and, where a bank bought and held shares of its own stock, an entry in a report to the Comptroller of the bonds, securities, etc., held by the bank from which such stock was omitted, constituted a false entry.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 960, 961; Dec. Dig. § 256.*]

7. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—OFFENSES BY OFFICERS—FALSE REPORTS.

The fact that entries in a report made by a national bank to the Comptroller accurately state the facts as shown by the books does not prevent them from being false, where the books themselves do not correctly show the actual transactions or condition of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 961; Dec. Dig. § 256.*]

8. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—CRIMINAL RESPONSIBILITY OF OFFICERS—FALSE REPORTS.

Defendant, who was vice president of a national bank, caused stock of the bank to be purchased through brokers. The shares as bought were delivered to the bank and paid for by a cashier's check. On the same date defendant would cause his stenographer to give her unsecured note to the bank for a like amount. No loan was in fact made to her, but the stock was bought by the bank and retained by it, although the transactions did not so appear on the books, and when reports were made to the Comptroller the stock was not shown therein. *Held*, that although the reports were made by employés from the books, and the false entries in respect to the bank's securities therein were not expressly directed by defendant, he was chargeable therewith criminally under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497).

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 962; Dec. Dig. § 256.*]

9. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—CRIMINAL PROSECUTION OF OFFICERS—INSTRUCTIONS.

In the prosecution of defendants, under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), charged as officers with having made false entries in the books of a national bank and in reports to the Comptroller with intent to injure and defraud the bank and deceive its officers and the examiner, it was not error to charge the jury that, if they found that such false entries were made, they were authorized to presume therefrom, in the absence of any explanation, that defendants knew them to be false, and that, if the natural and probable consequence of such entries was to defraud or deceive, they might presume, in the absence of explanation, that such was defendant's intention.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 974; Dec. Dig. § 257.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Charles W. Morse was convicted of offenses against the national banking law, and brings error. Affirmed.

See, also, 169 Fed. 1021, 94 C. C. A. 667.

On writ of error to review a judgment, entered upon the verdict of a jury, convicting the defendants Morse and Alfred H. Curtis, as vice president and president, respectively, of the National Bank of North America, of making false entries in the books and reports of the bank and of misapplication of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its funds. Three indictments were filed against the defendants containing 84 counts. These indictments were consolidated by order of the court. Twenty-one counts were withdrawn by the district attorney or were dismissed by the court, leaving 63 counts to be considered by the jury. The consolidated indictment as printed in the record covers 231 pages. The jury convicted the defendants upon 53 counts, charging misapplication of the funds of the bank and the making of false entries in its books and reports to the Comptroller. Upon all of the conspiracy counts the defendants were acquitted.

Sentence was suspended as to the defendant Curtis. The defendant Morse was sentenced to imprisonment in the federal prison at Atlanta, Ga., for 15 years.

Martin W. Littleton and Owen N. Brown, for plaintiff in error.

Henry A. Wise, U. S. Atty. (Henry L. Stinson and Felix Frankfurter, of counsel).

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. It is urged that grave injustice was done the defendant Morse in requiring him to answer an indictment charging him with having committed 84 separate and distinct offenses.

The trial occupied 3 weeks, the court sitting from 10 o'clock until 5 each day, Saturdays included; so that, if the ordinary court hours had been observed the trial would have occupied 4½ weeks.

The questions considered required the examination of a large number of complicated banking and commercial transactions, necessitating the study of a vast array of figures and the understanding of the book-keeping and procedure incident to the business of national banks.

It is argued that a jury, with nothing but the memory of its members upon which to depend, cannot keep such a tremendous record of complicated facts in mind, and that its conclusion must inevitably be based upon vague general impression and conjecture. These considerations would be persuasive were they germane to the issue now before us. They should, however, be addressed to the legislative and not to the judicial branch of the government.

The statutes of the United States permit a multiplicity of counts, and the consolidation of indictments relating to the same general subject is within the discretion of the trial court.

It is asserted that it is for the interest of the accused that this should be done, that there is less hardship to him in meeting the charges at one trial than at a series of trials extending, perhaps, over a term of years.

It is possible that if the attention of the lawmakers were called to this subject they might, at least, limit the number of charges which an accused person is required to meet under section 5209, Rev. St. (U. S. Comp. St. 1901, p. 3497), as they have done under other sections of the Revised Statutes. If the jury experienced the same difficulty as this court in adapting the voluminous proof to the various charges, they must have found the task a most arduous and perplexing one. The fact that counsel have deemed it necessary to submit briefs aggregating 576 printed pages is a forcible reminder of the difficulties which must have beset the jury in its endeavor to comprehend such an array of complicated accusations.

That a jury is not a proper tribunal to pass intelligently upon such issues is recognized in civil causes.

To meet a multiplicity of charges depending upon technical knowledge requires the employment of experts and the outlay of large sums of money which, in the case of a poor man, might almost amount to a denial of justice. These considerations, if presented to Congress, may induce some action along the lines suggested; but as the law now stands there seems to be no limit to the number of counts which a person accused of violating the national bank act may be required to meet.

It is also asserted that the sentence of the defendant Morse to 15 years' imprisonment was excessive and unusual.

In view of the fact that sentence was suspended in the case of the defendant Curtis, who was president of the bank, there is much that may be said in support of this contention. These considerations, however, should be addressed to the President upon application for executive clemency. This court is not permitted to consider them.

The defendant insists that the trial court committed a fundamental error in submitting to the jury on the misapplication counts the intent to deceive which was not alleged in the indictment. Count 30 of the indictment—and all the misapplication counts are alike in this respect—alleges that the defendants "unlawfully, knowingly, and fraudulently, and with intent to injure and defraud the said National Banking Association, did willfully misapply certain of the moneys, funds, and credits of the said National Banking Association then and there being to the amount and value of \$102,920." The allegation is plainly one charging the defendants with misapplication with intent to injure and defraud the bank, and the proof tended to establish the truth of the allegation, and not an intent "to deceive any officer of the association, or any agent appointed to examine the affairs of any such association."

After quoting and carefully explaining to the jury the applicable portions of section 5209 of the Revised Statutes, the court said:

"It is further necessary, to complete the crime of willful misapplication, not only that there should have been a conversion of money, funds, or credits to the use of some one other than the bank, but that such conversion should have been made with the intent on the part of the defendants to injure or defraud the bank or any other person, or to deceive any officer of the bank, or any agent appointed pursuant to law to examine the affairs of the bank."

Although this is a correct exposition of the law, it is urged by the defendant's counsel that in its application to the case in hand it was incorrect and misleading and may have induced the jury to believe that they were justified in convicting the defendant of misapplication of the funds of the bank if they found that his intent was to deceive an official of the bank or a bank examiner, even though they found him guiltless of the intent to defraud the bank as alleged in the indictment.

The answer is:

First, The language criticised occurred in that part of the charge where the court was explaining the law generally to the jury, and any possible misapprehension on their part must have been removed by the clear and compendious explanation subsequently given by the court of the precise issue presented to them on the misapplication counts.

Second. Assuming error, it only affected the misapplication counts and will not warrant a reversal if the defendant was properly convicted on the counts charging false entries. Indeed, if the conviction can be upheld upon two of these counts, it is sufficient to sustain the judgment.

Third. No exception was taken to the charge in this regard, and no error is assigned predicated on this portion of the charge.

If we were satisfied that any substantial injustice had been done the defendant, if, for instance, we were convinced that he has been convicted of an offense not charged in the indictment, we would not hesitate to ignore the failure to note an exception. In criminal causes the court should be zealous to protect the rights of the defendant and should never permit a conviction to stand where there is a material variance between the allegation and the proof. It is most unlikely, however, that the jury were misled by the paragraph of the charge quoted above. As already pointed out, the court was explaining, generally, the meaning of the statute, and the language quoted was an absolutely correct statement of its provisions. Later, when dealing with the specific charges of misapplication, the court charged that the intent must be to injure or defraud the bank. For instance, in describing the crime of misapplication by means of an overdraft, he said:

"If the money was taken and permitted to be taken without authority or in excess of the authority lodged in Curtis and Morse, if it was taken with the prescribed intent to defraud or injure, then it was unlawfully taken."

There are other portions of the charge which tend strongly to support the contention that the jury could not have entertained the idea that intent to deceive an officer of the bank or an examiner was an ingredient of the offense of willful misapplication as charged in the indictment.

Pursuant to requests by the defendant's counsel, the court charged the specific proposition as to the nine counts numbered from 21 to 29, both inclusive:

"That the jury must acquit unless satisfied beyond a reasonable doubt that the acts of the defendant were done with intent to injure or defraud the said association for his own use, benefit, and advantage, or for the use, benefit, and advantage of some person or company other than the said bank."

These counts charged the misapplication of the funds of the bank by means of an overdraft. As to these counts, therefore, it would seem most unlikely that the jury could have been misled.

Per contra, we cannot wholly divest ourselves of the apprehension that the jury may have obtained a mistaken notion of the essentials of the offense and may possibly have convicted the defendant upon the theory that the funds of the bank were misapplied with intent to deceive an officer of the bank or an agent of the government, and not with intent to injure and defraud as alleged in the indictment.

In a civil cause a theory resting upon a foundation so insubstantial could not be maintained; but, where the liberty of a citizen is at stake, the court should be clearly convinced that he has not been convicted under a mistaken interpretation of the law. If the language above quoted were the only portion of the charge upon which the defendant's

argument is based, it would not be difficult to disregard it; but later on, when the court was explaining the misapplication counts relating to the Ice transactions, he charged, after stating that, if the jury believed that the Ice stock was purchased at grossly excessive prices, they might find that the amount paid in excess of the real values of said stock was a willful misapplication thereof, providing they also found "that such misapplication was with the intent denounced by the statute."

It would have been more accurate had he said, "with the intent charged in the indictment."

The intent denounced in the statute, as previously explained by the court, was (1) either to injure or defraud the bank, or (2) to deceive any officer of the bank or any agent appointed to examine its affairs.

Is it not possible that the jury may have convicted the defendant, upon the counts in question, of an intent not charged against him in the indictment?

The fact that no exception was reserved to this portion of the charge would, in a civil cause, ordinarily be a sufficient answer to the contention here asserted; but our rules permit us to consider "a plain error though not assigned," and in a criminal case such an error should not be ignored. *Wiborg v. U. S.*, 163 U. S. 632, 659, 16 Sup. Ct. 1127, 41 L. Ed. 289; *Crawford v. U. S.*, 212 U. S. 183, 194, 29 Sup. Ct. 260, 53 L. Ed. 465.

In view of this possible misunderstanding on the part of the jury, we pass to the consideration of what are known as the "False Entry, Ice Stock Counts." These are 3A, 4B, 7A, 8A, 9A, 3B, 4C, 6A, 9B, and 10A, all charging false entries in the books of the bank. Defendant was convicted on all these counts.

We see no escape from the proposition that, if the defendant were properly convicted upon two of these counts, the judgment must be sustained. Count 3B, for instance, charges:

That on December 8, 1905, the defendant, being vice president of the National Bank of North America, unlawfully, knowingly, and fraudulently did willfully make in a book of the bank known as "Call Loans," on page headed "No. 5188 Davison Brown," a certain entry, as follows:

"114712.83 6 Dec. 8, 1905, 4000 Am. Ice Secy. Com."

That this entry purported to show, and did in substance indicate and declare, that a loan in the amount of \$114,712.83 had then and there been made by the bank to Davison Brown with 4,000 shares of the American Ice Company as security.

That said entry was false (1) because no loan in that amount or any amount had been made to Davison Brown by the bank, and (2) that the 4,000 shares of Ice stock had not been placed as security for such loan but were in fact the property of the bank.

That the false entry was made by the defendant with intent to injure and defraud the bank and its shareholders and creditors and to deceive the other officers of the bank and any agent appointed by the Comptroller of the Currency to examine the affairs of said bank.

This count will serve as an illustration of these charges of false entries. So far as they are concerned, the gist of the accusation against

the defendant is that, having obtained control of the bank, he entered upon a career of reckless and forbidden speculation, purchasing with the money of the bank securities of a fluctuating and doubtful value and concealing the transactions by entries in books and reports. It is contended that these entries indicated that the money so misapplied was loaned to third parties with the said securities as collateral; whereas, the alleged borrowers were, in truth, mere creatures of the defendant wholly under his influence and control and of no financial responsibility, their names being used merely as a cloak to cover the improper use of the bank's funds.

These charges are strenuously denied by the defendant. The issue thus raised is one of fact to be determined by the jury, and their verdict, unless clearly against the weight of evidence, cannot be disturbed by this court.

The broad fundamental questions underlying several of these counts were:

First. Who owned the Ice stock, the bank or Morse?

Second. If the bank owned it, was this fact concealed by false entries in the books and reports made by the direction or procurement of the defendant?

These propositions were clearly and fairly stated by the court, and the jury were repeatedly informed that the crucial question for them to determine was who owned the stock, and they were told again and again that, if they found that Morse was the real owner, he must be acquitted.

For instance, the court said:

"If you find that these shares of the American Ice Securities Company were not the property of the bank and were not owned by the bank, there is an end of the * * * false entry charges resting thereon."

The finding of the jury that the bank owned the stock carried with it, almost as matter of course, the other ingredients of the crime. It cannot be maintained that the entries were consistent with such ownership, and the jury were justified in finding not only that they were false, but were made with intent to conceal the true situation. So that the only question is whether there was any evidence to submit to the jury, for if there were it would have been error to have granted the motion for a direction of a verdict for the defendant.

A single example will serve to illustrate this branch of the controversy, as all the counts charging false entries of Ice stock relate to substantially similar transactions.

In December, 1905, one John F. Carroll purchased, through the defendant, 4,000 shares of the stock of the American Ice Company with money advanced by the Bank of North America at 28%. Four days afterwards (December 8th) the bank purchased this stock from Carroll at 33%, paid Carroll \$20,707 as his profits, and canceled the loan. The bank then owned 4,000 shares of Ice, or, at least, the jury were justified in so finding.

Davidson Brown was a clerk in the office of Primrose & Braun, note brokers, at a salary of \$25 per week. Braun was the defendant's private secretary. Brown could not have paid a note to exceed \$5,000

at the time in question. At the request of some one at the bank, Brown signed a promissory note for \$135,420. He had no interest in the transaction, knew nothing about it, and did not expect to pay the note or any part thereof.

On December 8, 1905, the 4,000 shares of Ice appear on the books of the bank as collateral to a call loan made to Davison Brown on his note. On January 9, 1906, the same 4,000 shares were sold to Katherine T. Gelshennen at 40; \$25,000 being paid by her to the defendant and by him to the bank. The profit of this sale was passed to the credit of the bank, the December loan to Davison Brown was canceled, and a new one entered. On the 15th of January Mrs. Gelshennen sold the stock at a profit of \$13,855; 2,000 shares remaining with the bank. The stock was sold for 43½, \$87,000 being the price paid for 2,000 shares, and the transaction appeared on the books as a loan to one Leslie E. Whiting with the shares as security. Whiting was also a clerk of Primrose & Braun, receiving a salary of \$12 a week and was but 19 years of age. He knew nothing about the transactions in which he was asked to sign notes at the bank and concededly, upon his own testimony, was acting as a dummy with no knowledge of or interest in the loans made in his name.

From January 11, 1906, to April 18, 1907, the books show seven similar transactions in which loans appear as made to Whiting on his notes with Ice and Copper stock as collateral. In form these transactions were undoubtedly entered as loans; but the jury may fairly have found that in substance and in fact the bank was the actual purchaser of the stock, and that the entry in the names of the irresponsible clerks who knew nothing of the merits of the transactions, was merely a subterfuge to prevent the Comptroller and his agents from learning that the bank was engaged in speculating in fluctuating stock.

If loans, why was no interest charged the borrower? Upon what theory was the lender entitled to dividends earned by the collaterals? Why should profits made on sales of the collaterals be given to the bank? Upon the hypothesis of ownership the bank was entitled to the dividends and profits of sales which it received, but upon the theory of a loan the bank was only entitled to a return of the principal with interest. Crediting the bank with profits when the stock rose in value, and charging it with the loss when it declined, is surely inconsistent with the theory that the stock was deposited with the bank solely to secure a loan. In passing upon this question, it was proper for the jury to consider the relations of the makers of the notes to the defendant, their financial irresponsibility, the understanding between the defendant and Curtis as to the character of the transactions, and all the surrounding facts and circumstances. That the defendant and Curtis were aware of the details of each and all of these transactions is amply established by the proof. Indeed, their contention is that the loans were in fact made to the defendant with the intention on his part to give the bank the benefit of any profits growing out of the transactions. We do not understand, however, that it is pretended that there was ever any guaranty of the loans enforceable against the defendant.

The natural result of representing these transactions as loans on Ice stock collateral instead of purchases by the bank of such stock was

that the reports to the Comptroller—themselves the subject of another series of counts—contained similar misrepresentations. The motive is obvious. If the Comptroller or his examiners had been advised that the bank was speculating in stocks of problematic and fluctuating value, the bank would have been called sharply to account. As late as January 24, 1907, the Comptroller believed that the transactions in question were loans. He says:

“Attention is also called to the fact that a very large proportion of the loans are collateralized by stocks of speculative enterprises. In times less favorable than the present there would be grave danger of large losses on these loans. Of the \$5,697,000 in loans to directors their corporations and other dealers of the bank, a large amount is secured by stock of the Ice Securities Company, the Clyde, Mallory, and Eastern Steamship Companies and other corporations in which Vice President Morse is interested.”

The object of the law requiring periodical reports—not less than five annually—is to put the Comptroller in possession of the actual condition of the bank. This information he expects to receive, and this information the officers of the bank are expected to furnish honestly and truly.

Upon the assumption of the bank's ownership of the stock, as found by the jury, the acts of the president and vice president were not only *ultra vires*, but they were of a character so reckless that, if persisted in, they were certain to bring disaster to the bank's stockholders and creditors.

It is true that the defendant did not make any of the entries in the books or reports with his own pen. All of them were made by the employés of the bank as part of their routine work.

If it were necessary to prove against a director that he actually made the entry charged to be false, conviction under the statute would be impossible, as these entries are invariably made by subordinates in the executive department. Congress was not seeking to punish the ignorant bookkeeper who copies items into the books as part of his daily task, but the officers who conceived and carried out the fraudulent scheme which the false entry was designed to conceal. It is wholly immaterial whether such officer acts through a pen or a clerk controlled by him.

The argument of the defendant as to false entries and the responsibility for making them will be further discussed below in connection with the next series of counts.

The testimony supporting the counts alleging false entries as to Ice stock is of the same general nature and need not be considered in detail. Assuming that the facts warranted the jury in finding that the transactions represented by the Brown and Whiting notes were purchases of stock by the bank and were not loans with these stocks as security, the finding that the entries were false follows almost as a matter of course. The entries on the books and reports show that these transactions were loans, concededly they were not loans to Brown and Whiting, and there was testimony sufficient to support the finding that they were actual purchases. No examination of the books and reports would have led to a discovery of the truth, and the jury may

well have found that the entries were false and made with the intent denounced by the statute.

The entries in question were false because they stated the existence of transactions which the jury found never took place. They were not entries of improvident or fraudulent loans, but entries as loans of transactions that should have been entered as sales to the bank of speculative stocks. There is a distinction between a real, although fraudulent, note, and a fictitious or sham note which represents no real transaction. The jury were warranted in finding that these were merely sham notes, that the makers gave them with no intention of assuming responsibility, and that the bank accepted them with the same understanding.

The entries in question found their way to the books and reports because the defendant set the machinery in motion which required the entries to be made. He knew every detail of the various transactions. They were all devised, accepted, or engineered by him, and the jury were justified in finding that the entries were false, that the defendant knew them to be false, and that they were made with intent to deceive.

Certain transactions concerned with stock of the Bank of North America may next be considered. They are covered by counts 17, 18, 19A, and 20A, all false entry counts.

Count 17 charges: That Morse (director and vice president) and Curtis (director and president) did on April 11, 1906, unlawfully and knowingly make a certain false entry in a report, which it was the duty of the bank to make to the Comptroller of the Currency, and which it did make, showing the condition of the bank at the close of business on April 6, 1906, attested by the signatures of three directors, including defendants. That the false entry was to the effect that, at the close of business on the last-mentioned day, the amount of "bonds, securities, etc., including premiums on same" (see schedule) was \$564,330; whereas, as defendants at the time well knew, the bank was then the owner of 331 shares of its own capital stock (value \$96,783.25), but said sum was not included in the entry nor were the said shares of stock set forth in the schedule. Intent is charged to injure and defraud the bank and its stockholders and to deceive the other officers of the bank and any agent who might thereafter be appointed by the Comptroller to examine the affairs of said bank.

Counts 18, 19A, and 20A contain similar charges as to reports to the Comptroller of the condition of the bank on June 18, 1906, September 4, 1906, and November 12, 1906, respectively.

These four counts are very clearly expressed, and it is not understood that any question is raised as to their sufficiency in form. The facts of which they are predicated are as follows: The defendant Morse, between December, 1905, and July, 1906, ordered Primrose & Braun, stock brokers, whenever they learned of any odd lots of the stock of the Bank of North America for sale that they could buy reasonably, to pick it up. This would tend to keep the price of the stock steady and be for the interest of the stockholders, including defendant, who was the owner of upwards of one-third of the shares of its stock and had loans outstanding on which some of this stock was pledged

as collateral. What happened was this: Each lot of stock was delivered to Primrose & Braun by the seller and put in their name with transfer executed in blank. It was sent by messenger, who presented himself at the bank, received a cashier's check, for the price, and delivered the certificate. In accordance with instructions received from Curtis, the loan clerk thereupon made out a demand loan note for the amount, bearing 6 per cent. interest, took it to Miss K. A. Wilson, and had her sign it. He then placed it with others in an envelope marked in her name. She was Morse's private secretary, with no resources other than her salary. The notes she signed were personal without collateral. The following excerpt from the brief of defendant thus summarizes the transaction:

"The bank books showed, under date of each of these loans, that Primrose & Braun received cashier's checks for sums corresponding with the amounts of said loans, in payment for varying quantities of shares of the capital stock of the National Bank of North America; the amount of check also including broker's commissions. The price of the stock varied from 270 to 300 per share. On the date of each one of these payments to Primrose & Braun the bank books showed that a loan was entered in the name of K. A. Wilson for the amount of the payment to Primrose & Braun. It seems that Curtis would notify either Primrose or Rado that a certain number of shares of the bank's stock would be delivered by Primrose & Braun on that day, for which they should pay at a certain rate and make a demand loan in the name of K. A. Wilson. Pringle & Rado, when the stock came in, would make a note for the amount paid Primrose & Braun and have Miss Wilson sign. No collateral was held against these loans between January and July, 1906. The stock would then be turned over to the transfer clerk and retained in the possession of the bank. The number of shares acquired in this way amounted on April 6, 1906, to 331 shares; on June 18, 1906, to 428 shares; and on July 2, 1906, to 430 shares. This stock was carried on the register of the bank between January, 1906, up to and subsequent to January, 1907, in the name of Arthur Braun, or Primrose & Braun. No interest was collected from K. A. Wilson on these loans; and from time to time dividends were paid to Primrose & Braun, and Primrose & Braun would thereupon give the Bank of North America a check for the amount of said dividends, which was credited on the books of the bank as 'Interest Received.'

"On July 2, 1906, the total of this series of Wilson loans amounted, without interest, to \$125,376.75. On that date the National Bank of North America received a cashier's check of the Bank of New Amsterdam, drawn to the order of the Bank of North America, for \$125,376.75, which was credited on said K. A. Wilson loans and they were marked paid. On the same day it appeared from the books of the Bank of New Amsterdam that a loan had been made to K. A. Wilson on her note secured by 430 shares of the stock of the National Bank of North America, for the sum of \$125,376.75. Statements of the amount of interest due on this loan would be sent to Miss Wilson by the Bank of New Amsterdam, and the Bank of North America would issue and deliver a cashier's check, signed by Curtis as president, to the Bank of New Amsterdam therefor. While his loan was in the Bank of New Amsterdam a dividend check for dividends on said stock was received by Primrose & Braun, who deposited said check in their own bank and in turn sent their check to the National Bank of North America for the amount of said dividend."

The defendant Morse was a director of the Bank of New Amsterdam.

While the stock was in the possession of the Bank of North America, it was not kept in the customary tray in which collateral for loans was kept in the loan department, nor entered in the special deposit book in which securities carried by customers were often entered; it was kept

by Rado, assistant cashier, in a clip or file in his possession. No interest was ever collected or asked for from Miss Wilson. While the stock was in the possession of the Bank of New Amsterdam, the Bank of North America received a check from the New York Construction Company, one of its customers, for \$7,125 paid as commission on loan. This sum it paid over to the Bank of New Amsterdam to be credited on the principal of the loan by the latter bank, of \$125,376.75 to Miss Wilson.

Section 5201, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3494), provides that:

"No association shall make any loan or discount on the security of the shares of its own capital stock, nor be a purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and the stock so purchased or acquired shall within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four."

Upon these facts the fundamental question was: Who bought the stock of the Bank of North America?—a question which was submitted to the jury on conflicting evidence. Morse testified that he bought it for the object named—to keep the price of the stock steady—that these purchases from time to time were paid for by loans to him in Miss Wilson's name for whatever amount was needed. Curtis testified that the Wilson notes were used for the purchases of bank stock, that at the commencement he heard Morse tell her to make these notes. The government relied on the circumstances that the purchase price was paid directly in the form of cashier's checks to the brokers; that the bank received all dividends on the stock; that it paid all interest necessary to carry the same and stood the loss caused by the failure of the dividends to equal the interest; that no claim was made on Miss Wilson for the same; that funds belonging to the bank were applied in reduction of the loan after it was transferred to the Bank of New Amsterdam; that so long as the stock remained in the Bank of North America it was treated in respect to its custody as belonging to the bank and not to customers; that while there Curtis was heard to say to Morse that the Wilson loan should not be in the bank; that while the loan to Miss Wilson was outstanding in the Bank of New Amsterdam it was criticised by the Comptroller of the Currency on the ground that the examiner was of the opinion that Morse was in some way interested in it; that he and two of his co-directors in that bank replied that Morse was not directly interested in this loan and that the maker was absolutely good, and the note would be paid if there were no security for it.

The evidence fully warranted the submission to the jury as a question of fact: "Who owned this stock, the bank or Morse? Who owned it in fact?" The court thus phrased it, no exception was reserved to the charge on these counts, and there was no request to charge with regard to them specifically. The finding of the jury on the proofs is conclusive upon the appellate court. *Crompton v. U. S.*, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 958; *Burton v. U. S.*, 202 U. S. 344,

26 Sup. Ct. 688, 50 L. Ed. 1057. Indeed, if sitting as triers of the facts, we would be inclined to reach the same conclusion upon this record.

Error is assigned to the refusal to direct a verdict for defendant on these four counts on the ground that because of the prohibition of section 5201, above quoted, any attempted purchase by the bank of its own stock would be wholly void ab initio, an absolute nullity, citing *Transportation Company v. Pullman Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, and *Burrows v. Niblach*, 84 Fed. 111, 28 C. C. A. 130. We cannot assent to the proposition that the unlawful acquisition of shares of its own stock is a nullity absolving the bank from reporting the fact to the Comptroller. The views expressed in *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443, *Fortier v. New Orleans Bank*, 112 U. S. 439, 5 Sup. Ct. 234, 28 L. Ed. 764, and *Walden v. Nat. Bank*, 130 N. Y. 221, 29 N. E. 127, 14 L. R. A. 211, require a different conclusion.

It is further contended that a verdict should have been directed for defendant on the ground that a purchase by the bank of shares of its own stock would extinguish the stock thus purchased until it might be reissued, so that there would really be no item of property to include in a report. In view of the provisions of the national bank law (section 5143, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3463]), prescribing the formalities upon which alone the capital stock of a bank can be reduced, this contention is unsound.

It having been established by the verdict that these shares of stock of the Bank of North America were in fact bought and owned by the bank, was there any false entry in regard to them? Concededly they appear nowhere in the reports referred to. These reports are made according to a form prepared by the Comptroller. That form contains a heading entitled, "Resources," under which is a subheading entitled: "8. Bonds, Securities, etc., including premium on same (see schedule)." On the succeeding page appears the schedule entitled, "Bonds, Securities, etc. (Bonds, Claims, Judgments and similar items should be included under this head)."

The defendant contends that, by reason of the language last quoted, it is to be inferred that the schedule covers only claims growing out of expressed promises to pay money, and does not include certificates of stock. Ordinarily the words, "Bonds, Securities, etc.," would include shares of stock, and it is apparent that the draughtsman of the form did not use the word "Securities" with any special restricted meaning, because twice on the same page, in the schedule of "loans and discounts," the phrase is used: "Secured by stocks, bonds and other personal securities." There is no other heading in the entire report under which shares of stocks owned by the bank could possibly be classified. It must be assumed that they were to appear somewhere, and the several reports which were put in evidence show that the persons who filled them out had no difficulty in understanding the heading "Bonds, Securities, etc.," because various items of the stock of different corporations are listed therein.

The main contention on this branch of the case is that the alleged

false entries are not false, but faithfully describe actual occurrences. The reports to the Comptroller which form the gravamen of these counts are, of course, taken from the books of the bank and do accurately and faithfully state what the books themselves disclose. But the real test of their truth or falsity is whether or not they faithfully represent the original transaction—that they were repeated automatically through a long series of books and documents is immaterial. We have the facts established by the verdict that the bank bought and owned this stock. At the time of the purchase, a paper in the form of a promissory note was before the bank employé whose duty it was to record what had taken place. That paper falsely represented the transaction; the bank had not loaned Miss Wilson the money on her personal obligation to repay it, but had paid the money out to certain brokers as the consideration for shares of stock, which it had purchased. The recording employé, relying on the paper, made an entry which presumably he had no reason to suppose was untrue, which described the transaction as he supposed, and had good reason to suppose, it to be, but the entry, being contrary to the actual fact was none the less a false one, although the employé who innocently made it could not himself have been convicted of a violation of section 5209. Every entry therefore in the books and documents, which asserted that on the day named Miss Wilson borrowed the sum named from the bank, and every entry which undertook to enumerate the property belonging to the bank, and omitted the shares of this stock bought on that day, is a false entry, because it “represented as an actual occurrence one which did not exist,” or was “false in a material part.” *Coffin v. U. S.*, 162 U. S. 664, 679, 16 Sup. Ct. 943, 949, 40 L. Ed. 1109.

The entries therefore in the four reports to the Comptroller which purported to set forth the “Bonds, Securities, etc.,” and omitted all mention of any of this stock, were false. Who was responsible for their appearance in those reports? It is not disputed that it is no longer the law that only the person who actually writes the entry can be convicted under section 5209, but it is contended that there is no evidence whatever in the record that the defendant gave any direction to any of the clerks or employés of the bank in regard to the making of entries in reports to the Comptroller. The contention is thus stated in the brief:

“The rules and regulations of the bank intervened between the act of the defendant Morse and the making of such false entries. In order that one may be guilty of the offense denounced by the statute, he must direct the doing of the prohibited act, that is, the making of the false entry itself; and before the defendant can be found guilty it must appear from the testimony that he directed the very act which the statute prohibits and not the doing of some other act which, by reason of the intervention of some other force or duty acting upon a third person, results in the making of a false entry.”

The argument submitted in support of this proposition is long and elaborate, but too refined for practical application. Manifestly, whoever caused the original false entries to be made in the books would be responsible for the repetition of such entries automatically in reports drawn up from the books. If on the day the bank bought some

of these shares Miss Wilson had not appeared or signed anything, but defendant had orally instructed a recording clerk to enter a demand loan of hers for the amount, he would have been responsible for such entry and equally responsible if he had given similar instructions in writing. Is the situation in any way different because similar instructions are given indirectly? Miss Wilson had no personal concern in these transactions; she was Morse's employé, carrying out his instructions; this is not disputed. He sends her to the bank to sign and leave with it a paper which represents that on the day named she had borrowed a sum of money, which, in fact, she had not borrowed, well knowing that the result of leaving such paper there will be the recording of such a loan in the books and the omission from the books of any entry to show that the bank had actually bought shares of its own stock on that day. It seems to us that defendant is as fully responsible for any false entries which necessarily result from the presentation of these pieces of paper which he caused to be prepared as he would if he had given oral instructions in reference to them or had written them himself.

This conclusion does not seem to run counter to any of the authorities cited by defendant's counsel. In *U. S. v. Booker* (D. C.) 98 Fed. 291, defendant appeared, not at the beginning, but at the end, of the recording action. He merely signed and verified reports prepared by others which was held not to be the equivalent of making the false entry which they contained. In *Twining v. U. S.*, 141 Fed. 41, 72 C. C. A. 529, there was no evidence (the "witness was not at all sure") that Exhibit No. 7, which came into Davis' possession with an additional sheet containing memoranda in Twining's handwriting, was handed to him by Twining. There is no doubt here that defendant himself caused Miss Wilson to sign and leave the several notes with the bank. In *U. S. v. Harper* (C. C.) 33 Fed. 471, *Agnew v. U. S.*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624, and *U. S. v. Youtsey* (C. C.) 91 Fed. 864, there was evidence of express directions to make the particular entries. As we have previously seen when considering the Ice stock transactions, the motive for thus covering up the purchase so that the reports to the Comptroller would not disclose it is manifest. Had that officer been advised of the real transaction, he would at once have ordered the stock to be sold, and the scheme for keeping the price steady by purchases with the bank's own money of its own shares would have been abruptly terminated.

Error is assigned upon exception duly reserved to the charge as to inferring intent from the transactions themselves. The passages criticised are these:

"If, however, you should find that they made or caused to be made a false entry in a book of the bank, or a report to the Comptroller of the Currency. 'You are authorized to presume from that false entry itself, in the absence of any explanation or of any other testimony, that they knew such entry to be false.' * * *

"Any one of these intentions is sufficient under the act, and, as has been pointed out, this intent may be inferred from the false entry itself in the absence of explanation. The law presumes that a man intends the legitimate consequences of his acts, and if the natural and probable consequence of a false entry in a book or a report of the bank is to deceive the Examiner, or to

injure or defraud the bank, or deceive any of its officers, you are authorized to presume from the entry itself that it was made with that intent. It is no defense to a wrongful act, knowingly and intentionally committed, that it was done with an innocent intent."

These propositions are supported by a long line of authorities. *U. S. v. Allis* (C. C.) 73 Fed. 170; *Id.*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; *U. S. v. Peters* (C. C.) 87 Fed. 984; *Id.*, 94 Fed. 127, 36 C. C. A. 105; *Id.*, 176 U. S. 684, 20 Sup. Ct. 1026, 44 L. Ed. 638; *U. S. v. Harper* (C. C.) 33 Fed. 471; *U. S. v. Lee* (C. C.) 12 Fed. 819; *McKnight v. U. S.*, 115 Fed. 972, 54 C. C. A. 358; *Agnew v. U. S.*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; *U. S. v. Youtsey* (C. C.) 91 Fed. 875; *Coffin v. U. S.*, 162 U. S. 683, 16 Sup. Ct. 943, 40 L. Ed. 1109.

The motives which actuate men can be ascertained only by a scrutiny of their acts. One who passes a counterfeit coin, knowing it to be counterfeit, and receives value in return, is not permitted to say that he did the act with innocent intent, and the same rule applies to the crimes we are now considering. A bank officer who willfully misapplies the funds of the bank, or who makes or causes to be made a false entry in its books, knowing it to be false, cannot be heard to say that he did the act innocently. The misapplication of its funds necessarily tends to injure or defraud the bank, and he who commits the act cannot escape the natural inference which flows therefrom. So, too, as to a false entry, such an entry is calculated to deceive, and he who made it, or caused it to be made knowingly, cannot avoid the inevitable presumption.

Moreover, in immediate connection with the passages above quoted and complained of, the court charged:

"In this case you have the evidence of the defendants as to the acts, and you have their explanations. If you find that they made personally or by direction any of the false entries charged knowingly, you must determine with what intent they did it from their acts; from the natural and legitimate consequences of such act, from the explanations given, and from all the evidence before you."

In view of the conclusions we have reached as to the conviction under the 14 counts already discussed, it seems unnecessary to review the remaining counts, referred to on the argument as "Mercantile Bank false entry counts," "New Amsterdam Bank false entry counts," "Knickerbocker Trust Company false entry counts," and "overdraft misapplication counts."

It may be proper, in this connection, to state that a majority of the court is of the opinion that the evidence relating to the "overdraft counts," numbered 21 to 29 inclusive, was insufficient to warrant conviction.

There were numerous objections to the admission or rejection of evidence, many of which have been presented in the briefs and at the argument.

In an unusually protracted trial, depending upon a wilderness of figures, and during which a vast number of complicated transactions were investigated, it is not unnatural that mistakes should have been made. Neither is it surprising that judges removed from the excite-

ment of the forum, who have time to examine the events of the trial as they appear when portrayed in cold type, should have discovered some rulings which may be open to criticism. But we are convinced that no prejudicial error was committed.

Most of the exceptions to evidence bear upon counts other than those charging false entries as to Ice stock and as to the bank's own stock. They need not be discussed, since our affirmance is based on those 14 counts only. Error is assigned to the admission of certain correspondence of the Comptroller of the Currency with the bank. In admitting it the court stated that the letters were not evidence of the facts stated; they were material as showing the attitude of the Comptroller towards this bank and were illuminative as to motive, showing the importance of concealing from that officer any extension of loans to Morse, or which he guaranteed, or which were based upon enterprises in which he was interested. Error is also assigned to permitting the witness Rado, the assistant cashier, to testify to conversations with Curtis as to the Ice stock, and to the admission of a letter from Curtis to Morse referring to "our Ice holdings." But when the evidence was admitted the counts charging Morse and Curtis with conspiracy as to these transactions were in the case—the jury acquitted as to those counts—and under well-known principles it was properly admitted.

We fully realize the consequences to the defendant which must follow an affirmance of this judgment, and yet we cannot doubt that he was given a fair trial, and that the verdict on these 14 counts was amply sustained by the proof. No unprejudiced person can read the record without being convinced that by the defendant's procurement the bank bought its own stock and the stock of the Ice Securities Company, and that by his procurement the entries in the bank books and in the reports to the Comptroller as to these transactions were so arranged as to conceal the truth, and to record transactions which in reality never took place.

The judgment is affirmed.

On Motion to Amend Mandate.

The application made by plaintiff in error to amend the mandate of this court affirming the judgment of conviction is granted to extent of adding thereto the following:

"Without prejudice to the right of plaintiff in error to move in the Circuit Court for a new trial or for any other or further relief."

Such amendment, however, is not to be taken as indicating any expression of opinion by this court on the question whether or not the Circuit Court has jurisdiction to entertain such motion, and without expressing any opinion as to whether such amendment is necessary to enable plaintiff in error to make such motion in that court.

In re DAVIS.

Appeal of WINTER.

(Circuit Court of Appeals, Third Circuit. November 11, 1909.)

No. 24.

BANKRUPTCY (§ 340*)—PROVABLE CLAIMS—SECURED DEBTS—PURCHASE OF MORTGAGED PROPERTY BY CREDITOR.

A bankrupt had given two mortgages on the same property in Pennsylvania, the second of which was held by a bank. Claimant, who was president of the bank, shortly after the bankruptcy bought the first mortgage, which was due, foreclosed it, and bought in the property at the sale for the costs, there being no competing bid at the sale because the two mortgages, both in effect held by the same interest, exceeded the value of the property. Claimant then filed the bond secured by the mortgage as a claim against the estate. He admitted as a witness that the property was worth more than the amount of the mortgage and costs. *Held* that, in the absence of any legal rule in the state making the sum bid at the sale conclusive as to the value of the property, such evidence should be considered, and the claim was properly disallowed as having been paid by the foreclosure.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

In the matter of Harry Davis, bankrupt. Emil Winter appeals from an order disallowing his claim against the estate. Affirmed.

Willis F. McCook, for appellant.

Maurice L. Avner, for appellee.

Before GRAY and LANNING, Circuit Judges, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge. This is an appeal from an order disallowing a claim, and brings up all the evidence for examination. We find the facts to be as follows:

In June, 1903, Davis executed a purchase-money mortgage for \$50,000 to secure the payment in June, 1908, of a bond in like amount. The mortgage provided that the debt should become payable at an earlier date if Davis should make default in paying the interest, insurance, taxes, or other municipal charges. On April 2, 1908, he was adjudged a bankrupt, and not long afterwards a trustee was duly elected. On April 16, 1908, Emil Winter bought the bond and mortgage, paying to the holder the full amount of principal and interest. At this time Davis was in default in the payment of certain taxes and water rents, and the principal sum secured by the bond and mortgage was due and collectible. A savings bank of which Winter was the president owned a second mortgage of \$50,000 on the same premises. It was Winter's intention to acquire the property, and he pursued the method of buying the bond and mortgage, because the mortgage contained a clause giving 5 per cent. attorney's fees in case of foreclosure, and he desired to save that sum (or at least a part of it) by suing out the mortgage

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

himself, and thereby controlling the allowance for fees. On April 20, 1908, Winter petitioned the referee for leave to issue a scire facias in accordance with the Pennsylvania practice and foreclose the mortgage in the usual manner before any of the common pleas courts of Allegheny county. The referee made the order. Winter proceeded to judgment and execution, and the property was offered at sheriff's sale. What the value of the property was we are not accurately advised. The only evidence on the subject is (to use Winter's language) that it was "worth what I paid for it, and more," meaning the amount he paid for the mortgage; but, as no other person competed for the property, and Winter bid it in for the sheriff's costs, it is a fair inference that there was margin enough above his mortgage to admit of a satisfactory payment upon the mortgage held by his bank. The testimony on this point is not very definite, but it sufficiently appears, we think, that the bank was protected by Winter to some extent, and received enough money to quiet its claims. At all events, it is clear that the reason why no other bids were offered was because the two mortgages, amounting to \$100,000 and controlled substantially by the same interest, were notice to intending purchasers that bidders would have to encounter these two debts, and could not expect to buy the property unless it should be worth a bid of more than that amount. The fact that no one entered the competition is convincing evidence that the property was not worth more than \$100,000, and Winter's testimony is equally convincing that it was worth more than \$50,000. There was no fraud in the sale, but the foregoing facts show plainly that the bidding was merely formal, and afforded no test of real value.

Winter, having become the purchaser, took title by sheriff's deed, and is now the absolute record owner. On November 6, 1908, not long after the sale, he presented to the referee a proof of claim upon the bond that accompanied the mortgage, declaring:

"That no part of said debt has been paid; that there are no offsets or counterclaims to same; that no note has been taken or received for said indebtedness except as herein stated; that no judgment has been rendered for said indebtedness or any part thereof, except as herein stated; and that to this defendant's knowledge or belief he has not had or received satisfaction or security, except as hereinafter stated, for said debt in any manner whatsoever. Claimant held a mortgage as collateral security for said bond, recorded," etc., "which was reduced to cash according to the terms thereof at No.," etc., "but nothing was realized therefrom; claimant buying said premises for costs."

The claim was objected to by the trustee and was afterwards rejected by the referee, whose action was approved by the District Court. From the court's decree, the present appeal is taken.

We are of opinion that the referee and the District Court were right in rejecting the claim. It is no doubt true that in Pennsylvania the bond is the principal debt, for which the mortgage is merely collateral security. There are numerous decisions that regard the mortgage for some purposes as an independent contract, but (speaking generally) the bond is the primary obligation. In *Commonwealth v. Wilson*, 34 Pa., the court says on page 67:

"In Pennsylvania a mortgage is considered merely as a security for the debt and confers upon the mortgagee nothing more than a lien upon the land."

And, in *Eagle Beneficial Society's Appeal*, 75 Pa. 226, it is said that:

"The bond is the principal debt in law and must govern the rights of the parties between themselves."

But, although this is true, it is equally true that the bond does not secure one debt while the mortgage secures another, and certain important consequences flow from the fact that the debt is the same in both instances. For example—and it is a striking illustration of the substantial identity of the two securities—it was held in *Hodgdon v. Naglee*, 5 Watts & S. (Pa.) 217, that:

"Payment by the obligor to the obligee of a bond accompanying a mortgage extinguishes the mortgage, even in the hands of an assignee of the mortgage for a valuable consideration, who neglects to give notice to the obligor of the assignment before payment of the bond."

See, also, *Tubbs' Appeal*, 161 Pa. 254, 28 Atl. 1109. This identity may be further illustrated by considering the situation that is sometimes presented when a judgment is obtained by suit upon the bond or by confession under a warrant of attorney. In such a case, when the judgment on the bond is entered, there are two distinct incumbrances on the debtor's land, one created by the recording of the mortgage, and the second created by the entry of judgment on the bond; but they have uniformly been treated by the Pennsylvania courts as the same lien. The Supreme Court declared, in *Commonwealth v. Wilson*, supra, that:

"If a sale is made on a judgment for the whole or a part of a debt, or even for the interest of part of a debt secured by a mortgage, it has the same effect as if the sale had been directly made under proceedings upon the mortgage security itself, and both before and since the act of 1830 it discharges the lien of a first mortgage."

The Act of 1830, thus referred to, is as follows:

"The entering of any judgment for the same debt secured by any mortgage shall not cause a sheriff's sale of the mortgaged premises to discharge or in any way affect the lien of such mortgage, nor shall the plaintiff in such judgment be entitled to any part of the proceeds of such sale, provided always, that such sale has not been made under or by virtue of such judgment." 1 *Purdon's Dig.* (10th Ed.) p. 479, par. 109.

And in *Bury v. Sieber*, 5 Pa. 431, it was said in reference to the two securities (in that case one of the liens was created by a deed instead of by a mortgage):

"We see no substantial difference between this case and *McCall v. Lenox*, 9 Serg. & R. [Pa.] 310; for the lien created by the deed, and the judgment on the bond on which suit is brought, arise out of the same transaction. They are in contemplation of law one instrument, form one security, and consequently the lien of the judgment, as is there decided, must relate to the date of the lien in the deed."

Still further, in dealing with another situation, which resembles more nearly the state of facts that is now before us, namely, where a mortgagee buys at sheriff's sale the property that is bound by his mortgage, but buys subject to his own incumbrance, the court has ruled in several cases that:

"If the purchaser is the mortgagee, his mortgage is in equity satisfied; his claim is paid in the purchase of the property sold subject to it." *Greensburg Fuel Co. v. Natural Gas Co.*, 162 Pa. 85, 29 Atl. 275, and cases there cited.

Another recent case upon this subject is *Cock v. Bailey*, 146 Pa. 329, 23 Atl. 370, where the holders of bonds that were secured by a mortgage upon the property of a limited partnership bought the property subject to the lien of the mortgage, and had it conveyed to a trustee for their own benefit. The court held that the bonds became a part of the purchase money, and the liability of the mortgagor to pay them was extinguished; Chief Justice Paxson, who delivered the opinion, saying on page 339 of 146 Pa., page 371 of 23 Atl.:

"It would then appear that the bondholders have purchased, through a trustee designated by them, the mortgaged premises, subject to the lien of the mortgage. Having thus obtained the property, can they now proceed upon the bond and collect the amount thereof from the company or from the defendants as individuals? If so, they will be twice paid. That is to say, they will have both the money and the land. That this cannot be done is plain both upon reason and authority. Having purchased the property subject to the lien, the bonds became a part of the purchase money withheld at the time of the sale; in other words, they were a part of the bid."

This being the law of Pennsylvania, when a mortgagee buys property subject to his own incumbrance, it must certainly be the law also when he buys the property at a sale made by proceeding upon that very lien. And there is no doubt that the rule is as thus indicated: The lien of his mortgage is extinguished by the sale, and this is the result whether he pays little or much for the property. It is elementary that the incumbrance is merged in the title, and that the lien disappears.

But the appellant contends that although the lien is gone the debt may remain, either in whole or in part, and it is upon this theory that he offered to prove his claim upon the bond, insisting that while he was bound to credit upon the bond whatever he realized at the sale upon the mortgage he was bound to do no more, and therefore, since he had realized nothing, no credit should be given. This, in our opinion, is not a sound position, under all the circumstances of the present case. It fails to take into account that, while he obtained no money from the sale, he did obtain money's worth and now owns in fee the mortgaged premises, which he admits to be worth more than the full amount of his mortgage. The fact that he realized no cash from the sale does not seem to be material. He has property which concededly can be turned into cash and will then produce more than enough to pay the principal and interest of his mortgage. If he can prove his claim on the bond against the bankrupt estate, it must be for the reason that (if bankruptcy had not intervened) he could have sued Davis on the bond and recovered judgment against him for the full \$50,000, and that this judgment might have been collected out of other property of which Davis was the owner. Thus the appellant would have received satisfaction twice over for the same debt, and it is clear enough, without further elaboration, that something wrong may be suspected about the reasoning that would lead to such a conclusion.

But in truth there is no reasoning that even seems to lead to this

conclusion; it is the authority of decided cases that is invoked to support it; and we have therefore been at some pains to show what the state court has held upon several important and relevant questions growing out of the coexistence of these two securities. They all throw light, we think, upon the precise question that is presented by this appeal, namely: Where a mortgagee buys the mortgaged property in good faith at a sale upon his own security, paying a merely nominal sum therefor, and it appears affirmatively that the property is worth more than the mortgage, is the debt satisfied in full by the purchase, or is it only satisfied pro tanto? Certainly, the Pennsylvania cases to which we have already referred show plainly what answer should be given to this question, if the inquiry is still open. The creditor is not to be paid twice, unless some rigid requirement of the law compels a court to reach that result; and (under the facts stated) the only rule that is urged upon us is said to be a rule that the price bid for the property is conclusive evidence of its value. If such a rule exists in Pennsylvania, it must be susceptible of easy proof. Only two cases, however, are cited to support the position, and neither is sufficient.

It should first be noted that in this state there is no such thing as a deficiency judgment, and therefore we need not consider decisions elsewhere upon the effect of such a proceeding—a deficiency judgment rendered in New York was involved in *Cudaback v. Hay* (C. C.) 134 Fed. 120, and *Hay v. Cudaback*, 139 Fed. 369, 71 C. C. A. 465—but it is undoubtedly true in Pennsylvania, as a general proposition, that after a mortgagee has exhausted his mortgage and has failed to realize the full amount of his debt he may proceed upon his bond to recover the balance. The dictum in *Bradley v. Chester Valley R. R. Co.*, 36 Pa. 150 (one of the cases cited by the appellant), is sound enough, although Justice Woodward was speaking generally of “the remedies of a mortgagee against his mortgagor as existing at common law and as modified in equity,” and did not have special reference to the Pennsylvania practice by *scire facias*. The following is the sentence upon which the appellant’s counsel lays particular stress (page 150):

“After final decree of foreclosure, the mortgagee might sell the estate, and, according to some authorities, if he did this fairly, and it produced less than the mortgage debt, he might still have remedy against the mortgagor’s other estate for the balance of the debt.”

But the question now under consideration was not there involved, even remotely, and nothing whatever is said about it. The other case (*Wolfe’s Appeal*, 110 Pa. 126, 20 Atl. 410) is more nearly in point. There Wolfe sold a leasehold to Wright and took a mortgage as security for part of the purchase money. After default by Wright, the mortgage was sued out and the property sold by the sheriff to Wolfe for \$1,024.87. This sum was credited upon his claim, and he was then allowed to prove the balance against the estate of Wright; the Supreme Court saying (page 130 of 110 Pa., page 410 of 20 Atl.):

“The mortgage he took was his only security. Having exhausted that without realizing the full amount of his claim, he has a right of recourse against the estate of his debtor for the residue.”

But an examination of the facts will disclose that Wolfe's Appeal differs from the present case in a material point. The figures show plainly that the sale was competitive, and so far as appears the property was sold for its full value. This is assumed by the court, and there is no trace of controversy upon the subject; whereas, it appears here by affirmative proof—the testimony of the appellant himself—that, while he bid a merely nominal sum, he acquired property that was worth more than his debt. So far as we are advised, therefore, the Supreme Court of Pennsylvania has not laid down the rule that the price paid for property sold under a mortgage is under all circumstances to be regarded as conclusive evidence of value, and (assuming that we should be bound by such a rule) we are free to decide the question that is now before us according to our best judgment.

There is nothing in *Hiscock v. Varick Bank*, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, that lays down the rule contended for by the appellant. In that case insurance policies were pledged as collateral security under an agreement which authorized the pledgee to sell without notice and to buy at his own sale; the pledgor expressly agreeing to "remain liable for any deficiency arising upon such sale." The securities were, accordingly, bid in by the pledgee at a bona fide sale, credit was given for the price, such price being found by the Supreme Court to be adequate, and proof of the balance of the debt was allowed against the bankrupt estate. There is no suggestion in the case that any such question as is now presented was raised at any stage of the proceedings, or was considered by the Supreme Court, and, in view of the pledgor's express agreement to be liable for any deficiency arising upon the sale, it is difficult to see how the question could possibly have been involved.

The present appeal does not require us to construe section 57, subsections "e" and "b," of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]). The value of the appellant's security, namely, of the land that was mortgaged to secure the debt, was no doubt "determined" by the proceeding upon the scire facias; but the point that is before us is a question of fact rather than a question of law, namely: How much was that value? If there was a legal rule in Pennsylvania that made the sum bid at a sheriff's sale conclusive evidence of value in all cases, a question of law would be presented, for (if the rule bound us) we should not go behind the bid; but, as we are not advised of any such rule, we feel at liberty to inquire into the question of fact for ourselves. Upon the evidence, as we have already said, there seems to be no difficulty in finding that the value exceeded the debt due to the appellant, and that he has therefore received full value for his bond and mortgage.

It may be as well to add that the District Court did not collaterally attack the proceedings in the court of common pleas, or seek to modify their effect in any particular. The court of common pleas simply confirmed the sale and directed a sheriff's deed to be made to the appellant, but it did not attempt to decide how much credit the appellant was bound to give upon his bond. That question was not necessarily involved in the decree confirming the sale, but was raised for the first

time before the referee. In our opinion, it was properly decided by him and by the District Court.

The decree is affirmed, at the costs of the appellant.

MARINETTE SAWMILL CO. v. SCOFIELD.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909. Petition for Rehearing Overruled November 20, 1909.)

No. 1,591.

1. APPEAL AND ERROR (§ 544*)—REVIEW—ACTION TRIED TO COURT.

On writ of error to review a judgment of a Circuit Court in an action tried by stipulation to the court without a jury, as provided by Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), where there was a general finding, in the absence of a bill of exceptions, the record presents only the question whether the pleadings support the finding and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2426; Dec. Dig. § 544.*]

2. COURTS (§ 356*)—FEDERAL COURTS—DECISIONS REVIEWABLE—RULING ON PLEA IN ABATEMENT.

An answer in an action on a judgment in a federal court, setting up a parol agreement between the parties that in consideration of defendant's consent to the taking of the judgment, plaintiff should take no steps for its enforcement until the termination of another suit which is still pending, is in effect a plea in abatement under the Wisconsin practice, and under Rev. St. § 1011 (U. S. Comp. St. 1901, p. 715), providing that there shall be no reversal for error in ruling any plea in abatement, a judgment sustaining such defense and dismissing the action is not reviewable by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

Orders, decrees and judgments reviewable in Circuit Court of Appeals, see notes to *Salmon v. Mills*, 13 C. C. A. 374; *Taylor v. Breese*, 90 C. C. A. 566.]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Action by the Marinette Sawmill Company against Edward Scofield. Judgment for defendant, and plaintiff brings error. Writ of error dismissed.

Plaintiff in error, which was plaintiff below, a corporation and citizen of the state of Illinois, seeks a reversal of a judgment of the Circuit Court adjudging that plaintiff's suit be abated as having been prematurely brought, and awarding execution for costs to defendant, a citizen of Wisconsin, and an inhabitant of the Eastern district of Wisconsin. The cause is before the court upon the pleadings, a general finding, and the judgment; there being no bill of exceptions.

It is alleged in the complaint that on January 5, 1893, plaintiff recovered judgment against the defendant for \$12,113.25 damages, together with its costs amounting to \$38.10 in the circuit court for the county of Cook and state of Illinois; that theretofore, and on or about June 15, 1892, defendant in error had filed a bill in said last-named court against plaintiff and others, and on January 6, 1893, obtained an injunction restraining plaintiff from proceeding further with said judgment and from assigning the same until after said equity suit was finally disposed of, which injunctive order remained in full

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

force up to March 17, 1908, at which date said bill was dismissed for want of equity and said injunctive order vacated; that afterwards, and on August 4, 1904, said judgment was duly revived and constitutes the cause of action herein. Judgment for \$12,151.35, principal, together with interest and costs, is asked.

To this complaint demurrer was filed and overruled. Thereupon defendant made answer that on or about January 5, 1893, the "plaintiff and defendant, in consideration of said defendant allowing the said plaintiff to recover said judgment in said United States Circuit Court without in any manner contesting the same, entered into parol agreement wherein and whereby the said plaintiff, Marinette Sawmill Company, agreed that it would not levy execution against said defendant, Edward Scofield, upon the said judgment obtained on the said 5th day of January, 1893, in the said Circuit Court of the United States, or against the property and effects of said Scofield, and that said plaintiff, Marinette Sawmill Company, would not assign said judgment, or in any manner dispose of the same, and would not commence any suit at law or in equity upon said judgment either in the state of Illinois, or any other of the United States, until the final disposition of said suit for an accounting," meaning the said suit in equity instituted on June 15, 1892. The answer further alleged "that said action in said circuit court of Cook county has not been finally disposed of, and that an appeal has been taken and allowed from the said circuit court of Cook county to the Appellate Court of Illinois for the First District in said action."

On hearing had the Circuit Court ordered the suit abated. Motions for a new trial and for judgment for plaintiff notwithstanding the court's finding were successively made, overruled, and ruling excepted to by plaintiff. The errors assigned are: That the court erred in entering judgment for defendant and in not entering judgment for plaintiff; that neither the pleadings nor the facts are sufficient to support the judgment; that the court erred in denying plaintiff's motion to exclude all evidence under the answer, and in permitting evidence to be introduced as to the oral agreement not to take any steps to enforce the judgment as above stated; that the court erred in not granting a new trial, and in not giving judgment in favor of plaintiff, notwithstanding its findings.

Herbert Pope, for plaintiff in error.

Fred C. Ellis, for defendant in error.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). In the absence of any bill of exceptions, it may be assumed that the agreement set up in the answer is established. The circuit judge in his opinion says:

"Here an agreement is relied upon whereby, upon a meritorious consideration, it was stipulated that no suit should be brought upon the judgment in the federal court at Chicago until the happening of a given event."

The record properly presented the question as to whether the pleadings support the finding and judgment of the court below. *Slacum v. Pomery*, 6 Cranch, 221, 3 L. Ed. 205; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *World's Columbian Exposition Co. v. Republic of France*, 91 Fed. 64, 33 C. C. A. 333; *Streeter v. Sanitary District*, 133 Fed. 124, 66 C. C. A. 190.

Section 1011 of the Revised Statutes (U. S. Comp. St. 1901, p. 715) reads:

"There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the court, or for any error in fact."

Plaintiff in error contends that the answer aforesaid did not constitute a plea in abatement, either in form or in substance. The strict rule of the common law in regard to the form of pleas in abatement does not prevail under the Wisconsin code practice. In *Raymond v. City of Sheboygan*, 70 Wis. 318, 35 N. W. 540, the court says:

"Under the Code the defendant may unite in the same answer a defense which was formerly a plea in abatement, and one which was a plea in bar, and we suppose a plea in abatement or an answer in the nature of such a plea must be liberally construed with a view to substantial justice, like any other pleading."

We therefore conclude that as to matter and form the question of abatement is properly before the court. *Roberts v. Lewis*, 144 U. S. 656, 12 Sup. Ct. 781, 36 L. Ed. 579. Whether this court may review the pleadings for the purpose of ascertaining the sufficiency of the plea was before the Court of Appeals for the Eighth Circuit in *Green v. Underwood*, 86 Fed. 427, 30 C. C. A. 162. A plea in abatement was filed setting up another suit pending in a state court. Demurrer to the plea was filed and overruled, and the suit was dismissed. On appeal the plea was pronounced bad in law and in substance, but the upper court held the action of the lower court unreviewable on writ of error, citing *Piquignot v. Railroad Co.*, 16 How. 104, 14 L. Ed. 863, and *Stephens v. Bank*, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. Ed. 399. In *Barnsdall v. Waltemeyer*, 142 Fed. 418, 73 C. C. A. 515, the same court holds that, even though the Circuit Court may have erred in deciding that the facts did not constitute a good plea in abatement, that was a ruling upon a plea in abatement, and as such it could not be reviewed. So far as the courts have passed directly upon the question, the rule laid down in the foregoing cases is sustained.

Plaintiff in error cites a number of authorities to show that an oral agreement not to sue for a limited time upon a judgment cannot be set up by plea in abatement in an action at law upon the judgment, brought before the expiration of the time named in the agreement, and that the remedy, if any, is by suit for breach of contract not to sue, or by injunction. These cases hold unequivocally that an independent collateral contract not to sue for a limited time or until the happening of a stated event may not be pleaded in abatement. *Gibson v. Gibson*, 15 Mass. 106, 8 Am. Dec. 94; *Reed v. Stoddard*, 100 Mass. 425; *Newkirk v. Neild*, 19 Ind. 194, 81 Am. Dec. 383; *Nelson v. White*, 61 Ind. 139; *Williams v. Scott*, 83 Ind. 405; *Millett v. Hayford*, 1 Wis. 411; *Guard et al. v. Whiteside*, 13 Ill. 7.

There is, however, authority for a more liberal application of the plea in abatement. In *Culver v. Johnson*, 90 Ill. 91, it is held that, "when an action is prematurely brought because of an agreement to extend the time of payment which has not elapsed, it is matter for abatement only * * *"—citing *Archibald v. Argall*, 53 Ill. 307. In the former case the agreement to extend was made after the maturity of the note. In *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466, an agreement to extend time of payment of note was held, in an action to foreclose a mortgage, to be proper matter for plea in abatement. In *Millett v. Hayford*, 1 Wis. 401, the court held that an agreement to

extend time of payment of two notes was properly taken advantage of by plea in abatement. The contract set up herein shows the promise of extension of time to have been based upon and coincident with defendant in error's consent that judgment should be entered against him without contest on his part. Here is not a mere case of independent agreement. So far as an oral undertaking may enter into a judgment as between the same parties, this provision should be enforced. *Franklin Savings Institution v. Reed*, 125 Mass. 365. The lower court dealt with the defense as in abatement. Under the authorities that was a ruling upon a plea in abatement, and therefore not reviewable.

The writ of error is therefore dismissed.

NOTE.—The following is the opinion of Quarles, District Judge, in the court below:

QUARLES, District Judge. This is a motion for leave to reargue the plea in abatement which some time since was sustained by the court. Objection is made that the court is powerless to entertain the motion, because the same was not made within two days after the decision of the court, as required by rule 22. This objection is not sound. Rule 22 is not intended to impose a restriction upon the power of the court to grant a reargument in a case that has been heard by the court without a jury. It appearing that no appeal lies from an order sustaining a plea in abatement, I have been solicitous to ascertain whether my original conclusion was just. I have examined the authorities cited in the elaborate briefs of counsel, and have carefully reviewed the arguments. For lack of time I cannot prepare an elaborate opinion, but must content myself with a short statement of the reasons why I feel constrained to adhere to the views orally expressed in disposing of this plea on a former hearing. Personally I would be glad to open a way to an appeal, but I cannot see my way clear to change the conclusions originally reached.

The proposition laid down by the plaintiff in argument is too broad, and would lead to conclusions that are untenable. The suggestion that, because under certain circumstances a bill in equity would lie to grant the desired result, therefore under no circumstances could the matter be pleaded in an action at law, is unsound. The fact that an equitable action would lie to vacate an instrument for fraud would not prevent the defendant from setting up the fraud as a bar to an action at law brought upon such instrument. The principles of pleading involved in this case are simple and not difficult of application. Neither has there been any change in the application of the rule since the time of *Chitty*. If any reason exists why a suit at law ought not presently to be brought, such facts may be brought to the attention of the court, without necessarily calling in question the merits of the cause of action. If such facts are from their nature justiciable in a court at law, they may be suggested by a plea in abatement in the legal action. If, on the other hand, they involve considerations peculiarly within the jurisdiction of a court of equity, a resort to the equitable side of the court may be necessary. When, as here, the objection is predicated upon a simple agreement, there is no reason why the parties should be driven to resort to the chancery side of the court. Here an agreement is relied upon whereby, upon a meritorious consideration, it was stipulated that no suit should be brought upon the judgment in the federal court at Chicago until the happening of a given event. When, contrary to the spirit and letter of such stipulation, a suit at law is brought upon such judgment, I can see no reason why a plea in abatement is not sufficient to raise the contention.

There is no merit in the suggestion that the Supreme Court of Wisconsin in the case cited has invoked a modern and different application of these simple rules. Mr. Justice Marshall bases his opinion upon a paragraph quoted from *Chitty on Pleading* and upon other early authorities. I have examined with some care the two cases cited by plaintiff which were supposed to rule in this case. It is true that the case of *Moore v. Barclay*, 16 Ala. 158, involved

a question whether a judgment that had been entered by confession could be enforced, notwithstanding an oral agreement that no execution should issue except upon the happening of a certain event. Without entering into the details, the facts suggested to the court were complicated and of such a nature that it was impossible for a court of law to render any judgment thereon, as is expressly stated in the opinion. The rights and equities of the respective parties were such that a resort to chancery was absolutely necessary. The reasoning of the court clearly indicates that, if it had been an action at law to sue the judgment over, a suitable legal defense might have been interposed. The case of *Walker v. Kendall*, 3 Ky. 312, when carefully studied, throws no light upon this controversy. It is true that it arose in a case where a suit was brought to sue over a former judgment; but no sufficient plea in abatement was interposed. The plea that was entered by the executor was *plene administravit*, which at law is a well-known plea in bar. Interjected into this plea, however, was an allegation that the defendant was induced to allow the judgment to be entered by a promise that it should not be enforced until the happening of a certain event. The plea was objected to as being double. It was ruled as a plea in bar, as, indeed, it must have been. The averments which might well have been framed into a plea in abatement were merged in the plea in bar, and lost their identity and were of no avail.

I also adhere to the former ruling on the second proposition. The oral agreement relied upon was broad and explicit in its terms. In order to secure the injunction, it was necessary only to interpose by way of stipulation a portion of such original agreement. It was not intended to supersede the original engagement, but merely to carry the same out *pro tanto*. I do not feel at liberty to ignore so much of the oral understanding as it became unnecessary to frame in the written stipulation.

For these reasons the motion for reargument will be denied.

YORK MFG. CO. v. BREWSTER. †

(Circuit Court of Appeals, Fifth Circuit. December 7, 1909.)

No. 1,831.

1. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD UNDER CONDITIONAL SALE CONTRACT.

A reservation of title in a contract of conditional sale, which, although the contract is unrecorded, is good as against a bankrupt, is good as against his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 199; Dec. Dig. § 140.*]

2. CORPORATIONS (§ 448*)—CONTRACTS OF PROMOTERS—CONDITIONAL SALES.

Where associates, who hold property subject to a lien or under a conditional sale, combine to create a corporation to take the property and to which they transfer it, such associates being the only persons who have any substantial interest in the corporation, the corporation stands in no better position than that in which the associates stood.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1789-1791; Dec. Dig. § 448.*]

3. CORPORATIONS (§ 448*)—CONTRACTS OF PROMOTERS—CONDITIONAL SALES.

Appellee made an agreement with a partnership for the organization of a Texas corporation to manufacture ice, for which the partners were to furnish the machinery, receiving stock in payment. A part of such machinery was afterward purchased by the partners from appellant under a contract of conditional sale by which appellant reserved title. The corporation was organized by appellee and the partners, to whom practically all of the stock was issued; appellee, who held more than one-third, be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
† Rehearing denied January 4, 1910.

coming vice president and the active manager. The machinery was shipped to the corporation, but the sale contract was not recorded, as required by Rev. St. Tex. 1895, art. 2549, to render it valid as against bona fide purchasers. Subsequently appellee made advances to the company, for which he took mortgages on its property, including the machinery, and the company was afterwards adjudged bankrupt. *Held*, that under such facts appellant's title was good against the company and its trustee in bankruptcy, and that appellee, as one of its promoters, incorporators, and active officers, was charged with notice of appellant's rights, and took his mortgage subject thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1789-1791; Dec. Dig. § 448.*]

Acts of corporators and promoters, see notes to *Yeiser v. United States Board & Paper Co.*, 46 C. C. A. 576; *El Cajon P. Cement Co. v. Robert F. Wentz E. Co.*, 92 C. C. A. 450.]

Appeal from the District Court of the United States for the Southern District of Texas.

In the matter of the Home Ice Company, bankrupt. Appeal by the York Manufacturing Company from an order confirming a report of the referee. Reversed.

Newton C. Abbott, for appellant.

Sterling Myer (Hunt, Myer & Townes, on the brief), for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The ultimate question to be decided here is whether the appellant or the appellee has the title and ownership of certain ice-making machinery, the subject of the suit.

The appellant claims title as the original owner, who sold it to W. O. Drake & Co. and retained the title till the purchase money was paid. The appellee claims title as bona fide purchaser from the Home Ice Company, Drake & Co. having passed the machinery on to the Ice Company; and he also claims as purchaser at a judicial sale, it having been sold as a part of the ice plant of the Home Ice Company, bankrupt. The claim of appellant was interposed before the appellee's purchase at the bankruptcy sale, and the plant is still under the control of the bankruptcy court.

The case was begun by an intervention filed by the appellant in the matter of the Home Ice Company, a Texas corporation, which had been adjudicated an involuntary bankrupt by the court below. The intervening petition showed that the York Manufacturing Company, a Pennsylvania corporation, on May 13, 1905, sold to W. O. Drake & Co., a partnership composed of W. O. Drake and J. L. Clarke, certain ice-making machinery, which is described; that the machinery was to form a part of an ice plant at Houston, Tex.; and that it was so used in the ice plant of the Home Ice Company. The price to be paid for the machinery was \$5,650, one-fourth cash, which was paid. The written contract of sale and the notes given for the unpaid purchase money were made exhibits to the petition. The contract provided:

"That the title to and ownership of the machinery * * * shall remain in the York Manufacturing Company until the entire purchase price herein

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agreed to be paid, and all notes and other securities given to secure the same, or any part thereof, shall be actually paid in cash."

The petition concluded with a prayer for an order directing the trustee of the bankrupt estate to deliver the machinery to the intervening petitioner, or that the claim shown by the notes and contract be paid.

The appellee, E. J. Brewster, filed an answer contesting the appellant's claim. He contended that the appellant had no claim to the machinery or lien on it, there being no contractual relation between the appellant and the Home Ice Company. He also contended that, if appellant ever had any lien on or claim to the property as against W. O. Drake & Co., it had none as against the Home Ice Company, because it—

"had become the purchaser for value from Clarke and Drake of all of said machinery without notice and in good faith, * * * and that thereafter said Brewster did by reason of mortgages and deeds * * * become the innocent purchaser for value and without notice of said machinery. * * *"

The testimony of witnesses was taken, and the referee made a report on the facts and the law. There was no controversy in the evidence nor denial in the referee's report of the fact that appellant made the sale upon the terms stated in the intervening petition; that is, that it retained title till the purchase money was paid, and that the purchase money remained unpaid, as alleged. The referee reported that the appellee had the superior claim to the machinery, and, as we understand it, he did so on the theory that the appellee was a bona fide purchaser for value.

The Texas statute provides that:

"All reservations of the title to or property in chattels as security for the purchase money thereof shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered as required of chattel mortgages. * * *" Rev. St. Tex. 1895, art. 2549.

The appellant failed to have the contract reserving title recorded until July 26, 1906. In the meantime the machinery had been received from the purchasers by the Home Ice Company, and that company had borrowed large sums of money from the appellee, and had executed to him several mortgages to secure the sums borrowed, one of which the referee held embraced the machinery in suit. There is no doubt but the reservation of title by the appellant as seller was good against the buyers of the machinery, W. O. Drake & Co. (*Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285); and, if the title has remained in appellant, it did not pass by the bankruptcy proceedings to the trustee. The trustee obtained no better or other title than the bankrupt had. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

The contention of the appellee is that the position of the Home Ice Company and the position of himself is better than that of the buyers, W. O. Drake & Co.; that, while the written contract or conditional sale was withheld from record, they became bona fide purchasers for value without notice. That contention presents the pivotal

question in the case. To decide whether or not the appellee is entitled to protection as a bona fide purchaser without notice requires an analysis of the evidence, divesting it of all extraneous considerations and presenting only the material facts which relate to this one question.

W. O. Drake & Co. was a partnership composed of W. O. Drake and J. L. Clarke. Its business and purpose was to organize, equip, and promote the organization of ice factories. In 1905 Drake and Clarke began negotiations with the appellee, E. J. Brewster, for the organization of a corporation to erect an ice plant in Houston, Tex. The firm claimed to have in Pennsylvania an ice plant worth \$100,000. Brewster made an agreement with the firm that they were to furnish an ice plant of 90 tons' capacity, complete, worth \$100,000 and fully paid for; that a corporation was to be formed to which the plant would be transferred; that \$80,000 was to be the capital stock of the corporation, and all the stock was to be issued to Drake and Clarke for the plant, but that they were to transfer \$30,000 of the stock to Brewster for his assistance in organizing the corporation, and because he agreed to advance money needed to buy a site and for other purposes, his advances, however, to be secured by mortgages. Their plant not being complete, it was to carry out this agreement and furnish a complete plant that W. O. Drake & Co. bought the ice machinery involved in this suit on the terms already stated. Pursuant to the agreement between the appellee and Drake and Clarke, the corporation which was to receive and own the ice plant was formed and named the "Home Ice Company," and it received the plant from Pennsylvania, to which was added the machinery in suit. The articles of incorporation conformed to the Texas statutes, and were signed by W. O. Drake, E. J. Brewster, and W. B. Jones as incorporators. The company elected as directors E. J. Brewster, W. O. Drake, J. L. Clarke, W. B. Jones, and B. B. Gilmer, and Clarke was made president and Brewster vice president and treasurer. The \$80,000 of stock was issued—\$30,000 to E. J. Brewster, the appellee, and \$50,000 to Drake and Clarke, except that out of the shares of Drake and Clarke one share was issued to Jones and one share to Gilmer to qualify them to act as directors. The appellee, Brewster, remained an officer and stockholder of the Home Ice Company from its organization till its bankruptcy. He managed its finances, advanced money to it, and apparently had chief control of it. It was soon after the incorporation of the Home Ice Company that W. O. Drake & Co., or W. O. Drake and J. L. Clarke, surrendered to the company, or caused to be placed in its plant, the machinery in suit.

It must be remembered that the property had been bought to comply in part with the contract between Brewster and W. O. Drake and J. L. Clarke, and no one had any substantial interest in the corporation formed to receive the ice plant except Brewster, Drake, and Clarke. Unquestionably the lien or retention of title by appellant was good against Drake and Clarke. It would be passing strange if the buyers could destroy the lien or title retained by the seller by forming a corporation to take the property and having issued to themselves stock in

lieu of the property. And we cannot see that the situation is made greatly different by the fact that part of the stock, \$30,000, is issued to Brewster for aiding in the organization of the corporation and for promises by him of further aid. It may be true that notice to a promoter of a corporation is not notice to the corporation itself when formed; but where associates, who hold property subject to a lien or under a conditional sale, combine to create a corporation to hold the property, and to which they transfer it, such associates being the only persons who have any substantial interest in the corporation, the corporation stands in no better position than that in which the associates stood. *Davis, etc., Wagon Wheel Co. v. Davis, etc., Wagon Co. (C. C.) 20 Fed. 699.*

But it is further urged that the appellee became a bona fide purchaser by reason of cash advances to the Home Ice Company, to secure which he received a mortgage on the machinery. In considering this contention, reference must be had to the facts already stated. The appellee was an associate of the promoters of the Home Ice Company, made with them the agreement which led to its organization, was one of the three incorporators, was one of its largest stockholders, holding more than a third of its stock, was an active director, vice president, and treasurer, and, in fact, its chief controller. Under these circumstances, and in view of the facts in the record, we hold that he was charged with notice of the manner in which the Home Ice Company obtained the machinery in suit, and of the fact that the title was retained by the appellant to secure payment of the purchase money, and that, as mortgagee of the company, he obtained no better title than the company had.

A different conclusion would deprive the seller of the benefit of his forethought in reserving title as security, and enable the buyer to pass the property to a corporation to hold it for him. He could enter the corporation's doors, and so deal with it as to pocket the spoils; but the doors would be locked against the seller seeking the price. To avoid a result so unjust, equity will disregard forms, ignore the corporate entity, and treat the buyers, promoters, and their associates in the enterprise as the parties really interested.

The appellant is entitled to have its property restored (*In re Great Western Mfg. Co.*, 152 Fed. 123, 125, 81 C. C. A. 341); or, in lieu of the property, to payment of the debt due to it according to the terms of the contract and notes exhibited with the intervening petition. If the property is surrendered, the appellant should place in court, subject to the court's order, the stock which the record shows is held as collateral; if the machinery is not delivered to appellant, and the moneyed decree in lieu of it is to be entered, the collateral aforesaid must be sold, and the proceeds applied to the payment of the debt due appellant, and decree taken only for the remainder left unpaid.

The decree of the District Court, confirming the referee's report is reversed, and the cause remanded for further proceedings in conformity to the opinion of this court.

DIAMOND v. COWLES et al.

(Circuit Court of Appeals, Third Circuit. November 24, 1909.)

No. 32.

1. MUNICIPAL CORPORATIONS (§ 705*)—STREETS—INJURY TO PEDESTRIANS—AUTOMOBILE ACCIDENT—NEGLIGENCE.

Where defendant, driving an automobile on a city street, struck plaintiff while approaching him from the rear as plaintiff was crossing diagonally, and there was evidence that the accident could have been avoided by defendant's slackening speed or swerving to the right, it appearing that plaintiff was in full view of the car and that he continued straight on until he was struck, defendant was chargeable with negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—INJURY TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

A pedestrian crossing a public street diagonally, being entitled to assume that the driver of an automobile approaching him from the rear would run the same at a controllable speed and would avoid running him down while he was on his original course, plaintiff was not negligent as a matter of law in failing to take steps to avoid the injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

3. MUNICIPAL CORPORATIONS (§ 705*)—STREETS—INJURY TO PEDESTRIANS—AUTOMOBILE ACCIDENT—INSTRUCTION.

An instruction that the driver of an automobile approaching a pedestrian crossing the street, in case such pedestrian does not increase his speed after blowing the horn or any other signal, must slacken the speed of the automobile and take no risks of the pedestrian increasing his speed, was correct.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

4. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—AUTOMOBILE ACCIDENT—ISSUES AND PROOF.

Where plaintiff was struck and injured in an automobile accident as he was crossing a street, allegations that, notwithstanding defendant's duty in the premises, he negligently drove the car at such unlawful speed, without keeping a proper lookout, and without giving proper signals of his approach, as to cause the car to strike and run over plaintiff, would not be construed as pleading excessive speed as the sole act of negligence, treating the words "without keeping a proper lookout, and without giving proper signals," as mere qualifying incidents of the driving at an unlawful speed, but would be construed as alleging three acts of negligence, viz., unlawful speed, failure to keep a lookout, and failure to give proper signals.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by Ely Cowles, by his next friend and father, Charles A. Cowles, and by Charles A. Cowles individually, against Patrick Diamond. Judgment for plaintiffs, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Alexander Simpson, Jr., and W. W. Snithers, for plaintiff in error.
Thomas Leaming, for defendants in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. The facts disclosed by the record brought up by this writ of error are as follows:

Bryn Mawr avenue, 60 feet broad, 42 feet from curb to curb, runs approximately north and south in Montgomery county, on the outskirts of Philadelphia. It is crossed at right angles by Union avenue, 40 feet wide, running east and west. On the afternoon of the accident, Ely Cowles (hereinafter called the plaintiff), a mute boy of about 18 years of age, an inmate of a nearby Home for the Feeble-Minded, left the southwest corner of these two avenues, and was crossing Bryn Mawr avenue diagonally in a southeasterly direction, toward a person who was waiting for him on the east side of said avenue, at a point 97 feet south of said Union avenue. Consequently, his back was almost squarely presented to any vehicle approaching from the north on Bryn Mawr avenue. Such a vehicle would be visible to him only upon turning around, or at least looking backward over his left shoulder. Patrick Diamond, the plaintiff in error and defendant below (hereinafter called the defendant), was driving an automobile, containing his wife and another lady, both sitting back of him, upon the west side of Bryn Mawr avenue, the side from which the boy attempted to cross, thus approaching him from behind. Defendant's machine was therefore on the right-hand side of the road and was running about 15 feet from the curb. Plaintiff, while thus crossing Bryn Mawr avenue diagonally, "at a good gait," was reading a note, which he held in both hands. The boy, though somewhat feeble-minded, was in appearance normal and robust. The testimony shows that the defendant was driving his machine at not an excessive rate of speed. There is testimony that, as the motor car approached the north side of Union avenue, the ladies in the car were laughing loud enough to attract attention of persons on the avenue, and to cause the defendant to turn his head around. This is denied by the defendant and by the occupants of the car.

There is also testimony that, as the car was on the north crossing of Union avenue, at about the time the plaintiff started to cross Bryn Mawr avenue, there was a scream as of alarm from the ladies in the motor car. The plaintiff kept straight on his diagonal course across Bryn Mawr avenue, and the car continued straight in the direction in which it was going, without slackening speed or swerving from its course until it struck the plaintiff. The evidence is conflicting as to whether the plaintiff was still continuing on his course at the moment of contact with the motor car, or whether, looking around and seeing the car, he stepped back on its course. There is also evidence tending to show that the accident could have been avoided by slackening the speed of the motor car after it had passed the north side of Union avenue and when the boy had commenced to cross Bryn Mawr avenue; also, that there was room for the car to have swerved to the right and thus have avoided the accident. There was also evidence

tending to show that the defendant was an inexperienced driver of a motor car; in fact, was just learning to manage one, although this fact, if there was no evidence tending to prove negligence, would be unimportant.

The assignments of error relied upon are the refusal of the court, on all the evidence, to give peremptory instructions in favor of the defendant, and, after the verdict, refusing the motion of defendant for judgment non obstante veredicto.

We do not think, however, that these assignments of error can be sustained. There was abundant testimony tending to show that, as the defendant was about to cross Union avenue, the plaintiff was in full view from the car, as he was in the act of crossing diagonally Bryn Mawr avenue, and that defendant saw, or should have seen, the plaintiff in this situation. We think also there was evidence from which the jury could infer that the accident could have been avoided by the defendant slackening the speed of the car or by swerving to the right, provided they believed the testimony that the plaintiff kept straight on until he was struck, and disbelieved the testimony that he had stepped back in front of the car.

Nor do we think that there was any proof of such contributory negligence on the part of the plaintiff, as would warrant the court in taking the case from the jury. The evidence as to whether plaintiff turned back into the path of the car, is conflicting. Assuming that both the defendant and plaintiff were rightfully using the public street, the one for his car and the other in crossing it, the latter had a right to expect that the former, by running his car at a controllable speed, would avoid running him down while he was rightfully on his original course. The learned judge of the court below, in his charge to the jury, correctly said:

"The pedestrian has just as much right on the highway as the automobile, and the driver of the automobile must pay attention to pedestrians who are on the highway, and if it assumes to take the risk of a pedestrian, who is crossing the highway, getting out of its course, and the pedestrian does not increase his speed after the blowing of the horn or any other signal, but keeps on his speed, it is the duty of the automobile to slacken its speed and to take no risks as to the pedestrian increasing his speed."

But the defendant urgently contends that, under these assignments of error, the judgment below should be reversed, because of an alleged variance between the allegata and probata. The plaintiff, in his statement of claim, thus charges the negligence of the defendant:

"Notwithstanding his duty in the premises the said defendant did on the day aforesaid so negligently, carelessly and recklessly drive said motor car upon said avenue at such unlawful rate of speed, without keeping a proper outlook before him and without giving the proper signals of his approach, as to cause said automobile to strike and run over the plaintiff, Ely Cowles, who is a minor and who was then and there lawfully crossing said Bryn Mawr avenue at or about the intersection of Union avenue."

The defendant contends that the only charge of negligence is, that the defendant so negligently, carelessly and recklessly drove his motor car at such unlawful rate of speed as to cause the accident, and that the words "without keeping a proper outlook before him and without

giving the proper signals of his approach" are mere qualifying incidents of the driving at an unlawful rate of speed. In other words, that it is not an averment of three separate and distinct kinds of negligence, but of one only, viz., "the alleged unlawful rate of speed," and as it is admitted that there was no excessive rate of speed, the only negligence alleged in the statement was not proved, and the jury should have been instructed for the defendant, or judgment should have been entered in his favor on the motion for judgment non obstante veredicto.

The reasoning by which this contention is supported is ingenious, though in our opinion unsound. It is to be remarked that the argument is made for the first time in this court, and was not called to the attention of the court below, by objection, when the evidence of the plaintiff was being adduced, or otherwise. Though this charge in the statement of claim might have been framed with more precision, it is apparent that the case was tried in the court below with the understanding on all sides that the meaning intended to be conveyed by the language of the pleader was that the "defendant negligently drove his motor car at an unlawful rate of speed; that he negligently drove it without keeping a proper outlook, and negligently drove it without giving the proper signals of his approach." That is, that he was negligent in these three respects. We think the charge referred to, though awkwardly expressed, may be grammatically construed so as to express this meaning. It cannot be pretended that defendant was actually misled as to the nature of the negligence charged against him, and the theory upon which the trial was conducted abundantly proves that he was not so misled.

The judgment below is therefore affirmed.

FIRESTONE et al. v. HARVEY.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1909.)

No. 1,962.

BANKRUPTCY (§ 408*)—GROUNDS FOR REFUSAL OF DISCHARGE—"FALSE STATEMENT IN WRITING" TO OBTAIN CREDIT.

A bankrupt was operating a private bank, and on daily settlements with another bank it was the custom when the difference either way exceeded \$500 for the debtor bank to give the other a draft therefor on some other bank. Several times the bankrupt had given such drafts when he did not have a deposit to meet them, but all except the last two were provided for and paid on presentation. The last two were drawn when he was insolvent by his assistant cashier without his knowledge and were not paid. *Held*, that such drafts were not materially false statements in writing made by the bankrupt for the purpose of obtaining property on credit within the meaning of Bankr. Act July 1, 1898, c. 541, § 14b, subd. 3, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427) as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1310]), which barred his right to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*]

Appeal from the District Court of the United States for the Northern District of Ohio.

In the matter of George B. Harvey, bankrupt. On appeal by Solomon J. Firestone and others from an order granting a discharge. Affirmed.

This is an appeal from an order granting a discharge to a bankrupt. The appellants, being creditors of the bankrupt, Harvey, objected to his discharge and filed specifications.

The specifications were as follows:

"(1) On January 23, 1908, said George B. Harvey, doing business as the Lisbon Banking Company, fraudulently obtained from said Firestone Bros. on credit valuable property of the value of \$2,808.03, consisting of checks by sundry persons on money deposited by them in said banking company upon the materially false statement in writing, which is draft No. 8,497, hereinafter mentioned, signed by W. L. Armstrong, assistant cashier of said banking company, with the knowledge, consent and direction of said George B. Harvey that said banking company had a deposit of \$2,808.03 in the Columbus Savings & Trust Company of Columbus, Ohio, and that said money would be paid to said Firestone Bros. upon due presentation upon a draft given by said banking company to said Firestone Bros., of which the following is a copy:

"The Lisbon Banking Company of Lisbon.

"No. 8497.

"Lisbon, Ohio, January 23, 1908.

"Pay to the order of Firestone Bros. \$2,808.03, twenty-eight hundred and eight 03-100 dollars.

"Columbus Savings & Trust Co.

W. L. Armstrong,

"Columbus, Ohio.

Assistant Cashier."

"Said banking company did not have said money on deposit in said Columbus Savings & Trust Company at or subsequently to that time, and said banking company and said George B. Harvey were then insolvent, and obtained said property of the value of \$2,808.03 from said Firestone Bros. upon said credit, fraudulently and without the means of paying for the same, all of which said George B. Harvey then and there well knew.

"Said draft was refused payment on January 25, 1908, by said Columbus Savings & Trust Company, and has not been paid.

"(2) On January 24, 1908, said George B. Harvey, doing business as the Lisbon Banking Company fraudulently obtained from said Firestone Bros., on credit, valuable property of the value of \$800.28 consisting of checks by sundry persons on money deposited by them in said banking company upon the materially false statement in writing which is draft No. 8,498 hereinafter mentioned, signed by W. L. Armstrong, assistant cashier of said banking company, with the knowledge, consent, and direction of said George B. Harvey, that said banking company had a deposit of \$800.28 in the Columbus Savings & Trust Company of Columbus, Ohio, and that said money would be paid to said Firestone Bros., upon due presentation upon a draft given by said Banking Company to said Firestone Bros. of which the following is a copy:

"The Lisbon Banking Company of Lisbon.

"No. 8498.

"Lisbon, Ohio, January 24, 1908.

"Pay to the order Firestone Bros., \$800.28, eight hundred and 28-100 dollars.

"Columbus Savings & Trust Co.

W. L. Armstrong,

"Columbus, Ohio.

Assistant Cashier."

"Said banking company did not have said money on deposit in said Columbus Savings & Trust Company at or subsequently to that time, and said banking company and said George B. Harvey were then insolvent, and obtained said property of the value of \$800.08 from said Firestone Bros. upon said

credit fraudulently and without the means of paying for the same, all of which said George B. Harvey then and there well knew.

"Said draft was refused payment on January 27, 1908, by said Columbus Savings & Trust Company, and has not been paid."

The reply of the bankrupt was in these words:

"George B. Harvey, for answer to the specifications filed by Firestone Bros. in opposition to his discharge, says that he admits that on January 23 and 24, 1908, he was doing business as the Lisbon Banking Company; that W. L. Armstrong, as assistant cashier of said banking company, executed and delivered to said Firestone Bros. the two drafts, Nos. 8,497 and 8,498, on the Columbus Savings & Trust Company, copies of which are set out in said specifications; that neither at the time said drafts were issued, nor subsequently thereto, did the Lisbon Banking Company have on deposit in said Columbus Savings & Trust Company money sufficient to meet either of said drafts; that at the time said drafts were issued said banking company and said George B. Harvey were insolvent; that payment of said drafts was refused by the Columbus Savings & Trust Company at the times alleged in said specifications, and they have not since been paid; that Firestone Bros. is a partnership consisting of the persons mentioned in the specifications in opposition to the discharge.

"Said George B. Harvey denies each and every allegation in said specifications not hereinbefore expressly admitted."

The hearing was upon the specifications and the answer, and upon an agreed statement of facts in these words:

"(1) That on and for some time prior to the 24th day of January, 1908, George B. Harvey was doing business at Lisbon, Ohio, in the name of the Lisbon Banking Company, and that he was the sole proprietor of said bank and acting as cashier thereof, W. L. Armstrong acting as assistant cashier.

"(2) That 'Exhibit A' hereto attached is a correct exhibit of the account of the Lisbon Banking Company with the Columbus Savings & Trust Company from December 31, 1907, up to the time of the assignment made by George B. Harvey on January 25, 1908, as shown by the books of said trust company.

"(3) That the copies of drafts set out in the specifications are true copies of drafts executed and delivered by W. L. Armstrong, as assistant cashier of the Lisbon Banking Company, to Firestone Bros. on the days on which they, respectively, bear date; and said copies are admitted in evidence.

"(4) That the consideration for said drafts was the delivery to the Lisbon Banking Company by Firestone Bros. of checks drawn on, and a certificate of deposit issued by, said Lisbon Banking Company against funds then on deposit with said Lisbon Banking Company by the drawers of the checks and the holder of said certificate of deposit, that the amount of said checks and certificate of deposit for the \$2,808.03 draft was \$2,808.03, and that the amount of said checks for the \$800.28 draft was \$800.28.

"(5) That Firestone Bros. would not have surrendered said checks and certificate of deposit and accepted said drafts had they known that the money to meet said drafts was not upon deposit at said times in the Columbus Savings & Trust Company.

"(6) That on the presentation of said drafts to the drawee payment was refused, and they were protested for nonpayment.

"(7) That on and for some years prior to January 24, 1908, the Lisbon Banking Company and Firestone Bros. were engaged in the banking business in Lisbon, Ohio, and had daily settlements of balance between them, and usually settled such balances, when the amount thereof exceeded \$500, by the debtor bank giving the creditor bank a draft for the amount on some other bank. The drafts mentioned in the specifications were given in accordance with said custom.

"(8) That George B. Harvey had no actual knowledge of the execution and delivery of the drafts, copies of which are set out in the specifications, until after both of them had been delivered, but did know the condition of the account with said trust company, and that said Armstrong had previously issued some drafts on said trust company when said banking company did not, at the time said drafts were drawn, have funds on deposit with said trust company sufficient to meet said drafts.

"(9) That Solomon J. Firestone and Edward Firestone are partners doing business as Firestone Bros."

The objections were overruled and the discharge granted.

W. G. Wells, for appellants.

N. B. Billingsley, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). The objection to the discharge of the bankrupt is based upon the contention that the drawing of the two drafts by Armstrong, the assistant cashier, was ground for refusing a discharge under subdivision 3 of section 14b (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) of the bankruptcy act, namely, that the bankrupt had thereby "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." The words quoted came into the law by the amendment of the act made in 1903. Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310). This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a buyer or borrower for the purpose of obtaining from the person to whom such false statement is made, in writing, the articles or money desired "on credit." The false statement in writing which is enough to deny a discharge implies a statement knowingly false, or made recklessly, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain from the person to whom it is made property upon a credit.

In *Gilpin v. Merchants' National Bank*, 165 Fed. 607, 611, 91 C. C. A. 445, 449, 20 L. R. A. (N. S.) 1023, the Circuit Court of Appeals for the Third Circuit, speaking by Circuit Judge Gray, said of this clause, that:

"The written statement made by the bankrupt for the purpose of obtaining credit, etc., should be knowingly and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, 'false statement' connotes a guilty scienter on the part of the bankrupt. The primary and ordinary meaning of the word 'false' cannot be ignored. It is the primary meaning given in the ordinary lexicons of the English language. Webster gives as its primary meaning: 'Uttering falsehood; unvarnished; given to deceit; dishonest.' As an adjective, it is correlative with the noun 'falsehood.' To charge a person with making a false statement is equivalent to charging him with uttering a falsehood, and imputes moral delinquency to the person so charged. It is true that the word may have a secondary meaning in certain collocations, and be merely equivalent to 'untrue' or 'incorrect.' But this is not the ordinary or usual signification attached to the word. To charge a person with making false entries in books of account means something more than that incorrect or untrue entries have been made, and it has been so held by the courts in the consideration of offenses of that character. The last edition of Bouvier's Law Dictionary says of the word 'false' that, when 'applied to the intentional act of a responsible being, it implies a purpose to deceive.' In Black's Law Dictionary, under the title 'false,' it is said: 'In law, this word means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud.' In a recent and well-accepted publication called

'Words and Phrases,' the word 'false' is thus defined: 'False means that which is not true, coupled with a lying intent.' Wood v. State, 48 Ga. 192, 297, 15 Am. Rep. 664. 'False in jurisprudence usually imports something more than the vernacular sense of 'erroneous' or 'untrue.'"

The theory upon which Harvey is to be held as having made a false statement, in writing, made by Armstrong, assistant cashier who drew these drafts, is based upon the fact of Harvey's actual insolvency at the time, his knowledge of the state of the account with the Columbus Bank, and that he knew also that Armstrong had before drawn drafts upon the same bank when there were no funds to meet them. But does it follow that, because Harvey had upon other occasions drawn such drafts when there were no funds to meet them, these drafts, drawn confessedly without Harvey's direction, or knowledge, are enough to constitute them a false statement, knowingly false and made by Harvey with intent to mislead or deceive and thereby obtain checks against his bank about which he actually knew nothing? We think that is going too far. Does it even follow that if Armstrong himself were the bankrupt that the drawing of these drafts under the circumstances here in evidence would constitute a false statement within the meaning of this clause of the bankruptcy act? Had Armstrong no ground for an honest belief that these drafts would be met? Counsel for the appellants in their brief say that he had "the habit of drawing on the Columbus Bank when there were no funds with which to meet such drafts"; that "he had done this some 16 times between December 30, 1907, and January 22, 1908." Exhibit A seems to bear out this statement. But the inference from the same exhibit is that all such prior overdrafts were in some way provided for, the account showing deposit of funds shortly thereafter, so that at the end of the 16 transactions referred to there appeared a balance to the credit of Harvey's Bank of \$192.83.

The appellants, as well as the appellee, seem to have been engaged in the banking business at Lisbon, and one of the facts in the agreed statement was that the two banks had daily settlements between them, and that, when the amount of any balance due from one to the other exceeded \$500, the debtor bank would give the other bank a draft on some different bank for the amount. The drafts here involved were thus given under this clearing house plan of settlement.

Harvey may be civilly liable for drafts drawn by Armstrong in the course of such a business, but it is quite another thing to say that the drafts drawn by Armstrong under the circumstances of this case constitute that willful kind of false statement by Harvey necessary as a ground for preventing a discharge in bankruptcy.

Judgment affirmed.

In re NATIONAL CASH REGISTER CO.

(Circuit Court of Appeals, Sixth Circuit. December 18, 1909.)

No. 1,961.

1. LIENS (§ 7*)—NATURE AND INCIDENTS OF LIENS IN EQUITY—"LIEN."

The term "lien" is used in equity in a broader sense than at law, and denotes any right of a special nature over a thing, which constitutes a charge or incumbrance upon it, and may be enforced by proceeding against it, and to the existence of such a lien possession is not essential. An equitable lien is distinct from the general title, and may exist separate from it, or both may be vested in the same person.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 26-28; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4144-4153; vol. 8, p. 7707.]

2. SALES (§ 479*)—CONDITIONAL SALES—REMEDIES OF SELLER—FORECLOSURE OF LIEN IN EQUITY.

In equity the title reserved by a vendor in a contract of conditional sale is regarded as in the nature of a security, which, on default by the purchaser, he may at his option enforce by a proceeding in court to subject the property to the payment of the purchase money, as in case of any lien, instead of asserting his legal title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

3. SALES (§ 479*)—CONDITIONAL SALES—REMEDIES OF SELLER—OHIO STATUTE.

Rev. St. Ohio, § 4155-3, which provides that it shall be unlawful for the vendor of property sold on condition "to take possession of said property" without tendering or refunding to the purchaser, if he has paid 25 per cent. of the purchase price, the amount so paid, less a reasonable compensation for the use of the property, not exceeding 50 per cent. of such amount, does not apply where the seller, instead of taking possession and asserting his legal ownership, proceeds in equity, or by application to a court of bankruptcy having possession, to subject the property to sale for the payment of the remainder due thereon, in which case the purchaser's equity, which it was the purpose of the statute to preserve, is protected by the court by awarding him, or his estate, all of the proceeds of the property above his debt.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

Petition to Review an Order of the District Court of the United States for the Southern District of Ohio, in Bankruptcy.

In the matter of Max Goldman, bankrupt. On petition of the National Cash Register Company to review an order of the District Court. Reversed.

Harrison Wilson, for petitioner.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges

SEVERENS, Circuit Judge. The petitioner intervened in the proceedings in this matter of bankruptcy by filing a petition setting forth that it had before the bankruptcy sold a cash register to the bankrupt by a contract which among other stipulations contained a condition

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the title should not pass until the price of the register should be fully paid; the price being payable in installments, and the register delivered at the time it was sold. It was further stated that a down payment was made at the time, and one installment later on, but that the remainder of the price was not paid when due, and had never been paid, and that the register came into the possession of the trustee from the bankrupt. On these facts the petitioner prayed that, if the trustee would not complete the purchase by paying the part of the price still due, the court would order it sold, and in making the order should direct the proceeds to be paid over to the petitioner to the extent necessary to complete the payment of the price of the register. The trustee did not elect to pay the balance due, but made no objection to the proposed sale, claiming, however, that the court, in ordering it, should direct the trustee to retain one-half of the amount which the bankrupt had paid on the purchase price of the register. The sum involved is small, but the question involved is important, in view of the fact that such transactions have become common.

The claim made by the trustee was founded upon a statute of Ohio, in which state the transaction occurred. This statute contains a provision requiring contracts for conditional sales to be put to record in the office of the recorder for the county in order to render it valid against purchasers and creditors, and then proceeds (Rev. St. Ohio, § 4155—3) to declare that:

"Whenever such property except machinery equipment and supplies for railroads and contractors, and for manufacturing brick, cement and tiling, and for quarrying and mining purposes, is so sold or leased, rented, hired or delivered it shall be unlawful for the persons who so sold, leased, rented, hired or delivered or his assigns or the agent or servant of either their agent or servant to take possession of said property, without tendering or refunding to the purchaser, lessee, renter, or hirer thereof or any party receiving the same for the vendor, the sum or sums of money so paid after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed 50 per cent. of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed, in such contract or not, unless such property has been broken, or actually damaged, and then a reasonable compensation for such breakage or damages shall be allowed. Provided, that the vendor shall not be required to tender or refund any part of the amount so paid unless said amount so paid to the vendor exceeds 25 per cent. of the contract price of the property."

The referee made the order of sale requested, but refused the direction to apply the proceeds to the payment of the balance due the petitioner as prayed, and instead directed the trustee to retain the proceeds to the extent of one-half the amount of the purchase price which the bankrupt had paid. The petitioner brought this order for review before the District Judge, who confirmed it.

The referee based his order upon the construction given to the above statute by the superior court of Cincinnati in the case of *Krug, Receiver, v. National Cash Register Co.*, 1 Ohio N. P. (N. S.) 429. The District Judge cites that case in his opinion, as well as other decisions and dicta which he thought supported the same conclusion. The decisions of the subordinate courts of Ohio, several of which are reported, are in conflict upon the question whether the provisions of the

statute have application to a case, where the vendor has not sought and is not seeking to recover the possession of the thing sold, but is seeking his remedy through the action of a court of equity. It is admitted that there is no decision of the Supreme Court of the state as to whether in such a case as this the statute applies and gives the exclusive remedy to which the vendor may resort, although there are dicta of the judges on which the parties respectively rely. We have, therefore, to rely on our own judgment as to what the statute should be construed to mean.

In equity the reserved title of the vendor is regarded as in the nature of a security for the payment of the price, and in some states it is held that such a conditional sale is the equivalent of an out and out sale and a mortgage back to secure the payment of the purchase money. At law the transfer of the property gives to the vendee the right to the possession so long as he is performing his agreement to pay. But, when he fails to do this, his right to the possession ceases, and he then holds it for the vendor. But in equity these considerations are regarded as technical merely, and the court will look to see whether the vendor has such a hold or claim upon the property as entitles him to subject it to the payment of the purchase money. The maxim that equity follows the law is inapt where the legal remedy is inadequate to the enforcement of equitable rights. 16 Cyc. 137. There are many instances in the law of sales where even at the common law a lien is implied for the protection of the vendor in cases of ordinary sales. Although the agreement is perfected so as to pass the title for most purposes, still the vendor is allowed a lien for the price, while it remains in his own possession; or where he has delivered it to a common carrier according to agreement and the carrier is held to be the agent of the vendee for the purpose of accepting delivery, the vendor is allowed the privilege of recaption in transitu if the vendee becomes insolvent or becomes bankrupt, and in equity the vendor of real property is given a lien, a claim, a hold upon it, notwithstanding it has gone into the possession of the vendee, and no agreement for a lien has been made.

In the *Krug Case*, *supra*, the court lays stress on the rule that in order that there should exist a lien the possession must be in the person asserting it, and, further, that a man cannot have a lien on his own property. These are general rules of the common law concerning liens. But neither of them is regarded as important in cases where the lien claimed is asserted in a court of equity and is of an equitable nature. The terminology of the common law where a lien is spoken of is inadequate to describe a large class of rights in or to a subject arising from the express or implied contracts of parties which are recognized and enforced in courts of equity. The difference in the meaning of the term when used to describe an equitable right is thus stated in 3 Pom. (1st Ed.) 230, § 1233:

"It is simply a right of a special nature over the thing, which constitutes a charge or incumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien ex-

ists. It is the very essence of this condition that, while the lien continues, the possession of the thing remains with the debtor or the person who holds the proprietary interest subject to the incumbrance. The equitable lien differs essentially from the common-law lien, which is simply a right to retain possession of the chattel until some debt or demand due to the person thus retaining is satisfied, and possession is such an inseparable element that, if it be voluntarily surrendered by the creditor, the lien is at once extinguished."

This doctrine was recognized and applied in *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, and in *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208. See, also, *Bispham's Principles of Equity* (4th Ed.) § 351; *Ex parte Linden*, 1 Mont. D. & D. 435.

Nor is it true that a man may not have an independent equitable interest in property of which he holds the legal title. His legal title may be qualified or doubtful, or subordinated to the claims of another, and he may acquire an outstanding interest which will not be merged in it, if equity requires that the interest acquired should be preserved. This is only one of the instances in which the court recognizes the special right or interest in property as distinct from the general title, although both are vested in the same person. If another person claims an interest which the first is bound, or is willing, to admit, there can be no reason why he may not proceed to enforce an equitable interest which he has growing out of his dealings with the other concerning things of which the first has the general title.

In order to rightly understand the meaning of this statute, we should look to see what were the rights and remedies of the parties to a contract for the conditional sale of property at the time of its enactment. From such an examination we shall be prepared to understand what injustice the statute was intended to remedy. By the then existing law the vendor, when the condition was that the price should be paid before the title to the property should pass, had the right to recover the possession, treat the contract as at an end, and the right of the vendee to such part of the price as had been paid as forfeited (6 Am. & Eng. Enclyp. of Law, 458, and the cases there cited), or, as sometimes held, he might, on recovering the property, sell it for what he could get, and, applying the proceeds to the unpaid part of the price, recover the deficit, if any should remain, from the vendee. But he was not obliged to do this. He could simply recover possession and keep what he had been paid. These were the doctrines of the common law. And it is evident that the Legislature of Ohio assumed that to be the law, for it was the exceeding harshness of such a doctrine that the statute ameliorates. It does not provide a remedy which is precisely according to the principles of equity, for it is provided that the refunding by the vendor shall not be required unless the amount he has received exceeds 25 per cent. of the contract price. If the vendor, instead of taking back the property, should foreclose the vendee's right by a proceeding in equity, there would be no such limitation. On the other hand, as the law then stood, the vendor, treating the title of the property reserved by the contract as a security for the payment of the price, might file his bill in equity to obtain a judicial sale of the property and an appropriation of the proceeds to the payment of the debt.

By the latter course the equity of the vendee was protected by the conscience of the court and its power of control over the sale. He suffered no wrong of which he could complain. That the vendor has the right to proceed in this manner, we think, cannot be doubted. It is a favorite jurisdiction of equity to relieve against forfeitures, and the practice of this remedy will subserve the purposes of justice in such cases. *Ross-Meehan, etc., Co. v. Pascagoula Ice Co.*, 72 Miss. 608, 18 South. 364; *Briggs v. Oliver*, 68 N. Y. 336; *Campbell Printing Press Co. v. Powell*, 78 Tex. 53, 14 S. W. 245; *Boynton v. Payrow*, 67 Me. 587.

The vendee had agreed to buy the property at the price named. The petitioner had a claim upon it, which it might treat as in the nature of an equitable lien for the unpaid balance of the price. It had the right to proceed in equity, but for the fact that the property was in the custody of the bankruptcy court. It was the consequence of the first of these methods, namely, the recaption of the property by the vendor and the forfeiture of the purchase money paid by the vendee, which induced the Legislature to pass this law. There was no other appreciable wrong to be remedied.

Looking next to the words of the statute, it is seen the language is apt to express its application to a case where the vendor elects to retake the property. The statute says "it shall be unlawful for the persons who so sold * * * to take possession of said property without tendering or refunding to the purchaser the sum or sums of money so paid," with a certain limitation to the application of the statute, which is expressed in the proviso. There is no provision which applies to a case where the vendor does not "take possession," but seeks to enforce his security at arms' length by judicial proceedings. And we can see no excuse for extending the statute by so violent an implication as would be necessary to reach a case where there is no obvious need of a remedy.

In the present case the vendor has not taken possession. The trustee has succeeded the bankrupt in the possession of the property, and the vendor is seeking an order requiring the trustee to sell it. As the property is in the custody of the court in bankruptcy, it is the only forum in which the remedy can be obtained. The court will control the sale in like manner as a court of chancery would control the sale of property under its disposition. The vendor asks that the proceeds of the sale shall be applied to the payment of the debt for which it holds the title as security. The trustee demands that the statute be applied, and that he should be given the right to retain out of the proceeds one-half of the amount of the purchase price paid by the vendee, and that this right be declared to be paramount to the right of the vendor to share in the proceeds. But the earlier equity of the petitioner must prevail.

For the reasons given, the order of the court below must be reversed in respect to the matter complained of, and the court below instructed to grant the prayer of the petition.

WOODRUFF v. SHIMER.

(Circuit Court of Appeals, Third Circuit. August 20, 1909.)

No. 41.

1. CORPORATIONS (§ 316*)—ACTS OF PRESIDENT—ASSIGNMENT OF CONTRACT—AUTHORITY.

Where the president and principal owner of the stock of a corporation, individually, had a contract with W. for the purchase of limestone and ore to be smelted at the corporation's furnace, and without any authority from the corporation's board of directors attempted to assign such contract to the corporation by executing a purported assignment, signed by him as an individual and as president of the corporation, such assignment was insufficient to transfer the obligation to the corporation, which had authority to act only by its corporate officers, under proper corporate authority from the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1402, 1403; Dec. Dig. § 316.*]

2. CORPORATIONS (§ 573*)—ORGANIZATION—CHANGE OF FORM—CORPORATION SOLE.

A corporation, which under the laws of the state of its organization was required to have shares of stock, stockholders, directors, and officers, could not have its entire form and corporate existence changed to a corporation sole by the mere will of the majority stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2293-2296; Dec. Dig. § 573.*]

3. CORPORATIONS (§ 406*)—SUPPLIES—CORPORATE LIABILITY.

Where W. furnished limestone and iron ore used by a corporation under a contract between W. and B. as an individual, the fact that B. was also president and principal owner of the corporation, that the material was tagged and billed to it, charged to it on W.'s books, and statements of weights and analyses were sent by it to W., did not make it liable to him therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1612; Dec. Dig. § 406.*]

Appeal from District Court of the United States for the Eastern District of Pennsylvania.

In the matter of the Roanoke Furnace Company, bankrupt. From an order reversing a referee's finding allowing the claim of Thomas L. Woodruff, he appeals. Affirmed.

For opinion below, see 166 Fed. 944.

Charles F. Eggleston and Turner K. Hackman, for appellant.
Samuel W. Cooper, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

YOUNG, District Judge. This is an appeal from the decision of the District Court reversing the finding of the referee in allowing the claim of Thomas L. Woodruff, the appellant, as a creditor of the Roanoke Furnace Company, the bankrupt. It appears from the referee's report that one Baird was the owner of two iron furnaces at Roanoke, Va. These furnaces were operated by him under the firm name of Roanoke Furnace Company. In December, 1899, Baird secured a charter of incorporation for the Roanoke Furnace Company, at Roanoke, and entered into an agreement with the corporation whereby

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he sold to it all of his right, title, and interest in the furnace plant formerly operated by the Roanoke Iron Company at Roanoke, Va., in consideration of the transfer to him and his nominees of all of the 5,000 shares constituting the capital stock of the said corporation. Of these shares, according to the agreement, Baird received 4,969; the balance of 31 shares being distributed among four other persons. Baird and his four associates were elected directors, and he became its president.

Woodruff, the claimant, and Baird, on August 30, 1900, entered into an agreement by which Woodruff was to mine the ore at mines of which Baird was the owner or lessee and quarry the limestone at the Buchanan quarry for Baird, and to sell and deliver the iron ore from the Rye Valley mines, of which Woodruff was the lessee, to Baird. All of the ore and limestone mined or quarried by Woodruff was to be delivered on cars either on the Norfolk & Western Railroad or the Marion & Rye Valley Railroad. The agreement further provided that Woodruff was to be paid by Baird for all iron ore and limestone mined and quarried at certain rates. Acting under this agreement, Woodruff took complete charge of the mines, mined the ore, and quarried the limestone, and shipped the same to the Roanoke Furnace Company, at Roanoke, Va., pursuant to Baird's orders.

Upon October 13, 1900, the following assignment of the agreement of August 30, 1900, was made by Baird to the Roanoke Company:

"This agreement, made the 13th day of October, 1900, between Chester R. Baird, trading as C. R. Baird & Co., of the first part, and Roanoke Furnace Co., a corporation duly incorporated under the laws of the state of New Jersey and authorized to do business in the state of West Virginia, of the second part.

"Whereas, the said Chester R. Baird, in the execution of the contract hereinafter referred to, acted for the use and benefit of the said Roanoke Furnace Company:

"Now this agreement witnesseth that the said Chester R. Baird, in consideration of the premises, and of the covenants and agreements of the said Roanoke Furnace Company hereinafter contained, assigns, sets over, and transfers unto the said Roanoke Furnace Co. all his right, title, and interest in and to the agreement made and entered into on the 30th day of August, 1900, by and between Thomas L. Woodruff, of Roanoke, Virginia, and the said Chester R. Baird, trading as C. R. Baird & Co.

"And this agreement further witnesseth that the said Roanoke Furnace Company, in consideration of the said assignment, covenants and agrees to and with the said Chester R. Baird, to hold him harmless on all of the covenants and agreements made by him in the said contract with Thomas L. Woodruff.

"In witness whereof, the said Chester R. Baird has hereunto set his hand and seal and the said Roanoke Furnace Company has hereunto caused its corporate seal to be affixed.

Chester R. Baird.

"Roanoke Furnace Co.,

"By Chester R. Baird, Prest."

It thus appears that Baird by this paper sought to bind the Roanoke Furnace Company for all the provisions of the contract of August 30, 1900. The corporate seal was not affixed, and there was no corporate action authorizing, or approving, or ratifying the transaction. The whole case turns upon the question whether or not the assignment above referred to bound the Roanoke Furnace Company and made it

liable for the contract price of the ore and limestone mined and delivered by Woodruff to the Roanoke Furnace Company.

The contract which is the basis of the claim was between Woodruff and Baird. There never was an assignment of that contract to the Roanoke Company, accepted or ratified by it. That company, being a corporation, in either the acceptance or ratification of the contract, could only act by its corporate officers under or by authority granted to them so to act. *Humphreys v. McKissock*, 140 U. S. 312, 11 Sup. Ct. 779, 35 L. Ed. 473. There is no pretense that the assignment of the 13th of October, 1900, was signed by the Roanoke Furnace Company, or that Baird, in signing the Roanoke name by Charles R. Baird, had any authority from the corporation to so sign the name. This agreement must be regarded as an attempted assignment of Baird's interest to the Roanoke Furnace Company, unaccepted by that company, and by which Baird, evidently intended to save himself personally harmless from the consequences for which he might be liable under the agreement of August 30, 1900, between himself and Woodruff. Can it be seriously argued that Baird could shift from his own shoulders all the burdens and liabilities of the contract of August 30, 1900, by making an assignment of his interest in it, and then, without authority, signing the name of the Roanoke Furnace Company thereto by himself as president, without any authority to sign, and so incur the obligation for the company?

The vice of the referee's conclusion and the vice of appellant's argument, as is so plainly presented and pointed out by the court below, is the assumption that, because Baird owned the majority of the stock of the company, he could do as he pleased with the affairs of the corporation—that a corporation, which under the laws of the state of its incorporation was required to have shares of stock, stockholders, directors, and officers, could have its entire form and corporate existence changed to a corporation sole by the will of the majority stockholder. It is not a corporation sole. It makes for nothing to call it a corporation sole in fact. It has the character which the law of its being, the corporation law of its origin, fixes upon it. It must act according to those laws laid down for its government. It cannot act as a corporation sole. It cannot get rid of its identity. It is an entity separate and apart from Baird individually, separate and apart from him as president. The paper of October 13, 1900, has no binding force upon the corporation. It is simply a declaration of Baird that he was acting for the use and benefit of the Roanoke Company. Nothing that Baird did before or after that assignment would bind the corporation, either in accepting or ratifying the assignment of the contract, unless he was thereto authorized by resolution of the directors or otherwise showing that the corporation assented thereto. He could not, as president, without authority delegated to him by the corporation, either accept or ratify the acceptance of the contract, as he sought to do by the assignment. The court was clearly right in finding that there was not sufficient evidence to warrant a conclusion of acceptance or ratification of acceptance of that contract. The court might have said that there was no evidence to

warrant the conclusion that the contract was accepted. All the evidence produced in support of the assumption that the contract from the beginning as a contract of the Roanoke Company was entirely consistent with the theory that Baird was selling the ore and limestone after it was mined by Woodruff to the Furnace Company, he to be liable to Woodruff and the Furnace Company liable to him.

We are asked to infer a contract between Woodruff and the Furnace Company because Woodruff tagged and billed the ore to the Furnace Company and charged it to that company on his books, and because the Furnace Company received the ore, made statements of weights and analyses to Woodruff, and credited the ore to Woodruff on its books, although we have on the other side the written contract made at the time, speaking for itself, not dependent on any human testimony, and all the sequence of facts entirely consistent with this document or contract. Clearly the weight of the evidence is that the debt is due Woodruff from Baird and that Baird is entitled to the money owing for ore by the Roanoke Furnace Company. True, the Roanoke Company got the ore and used it in its business; but there was no privity of contract between Woodruff and the Roanoke Furnace Company, and Woodruff must look to Baird for his money, and Baird may collect his money from the Roanoke Company.

The order of the District Court, disallowing the claim, is therefore affirmed.

DEMPSTER et al. v. COCHRAN.

(Circuit Court of Appeals, Third Circuit. December 6, 1900.)

No. 14.

1. PLEADING (§ 117*)—TRAVERSE—DENIAL.

Where, in an action for brokers' services, plaintiff's verified statement alleged defendants' indebtedness to amount to \$14,382.45, from which defendants were entitled to a credit of \$547.50, the amount remaining in plaintiff's hands of money advanced by defendants to purchase certain land, an affidavit of defense alleging that plaintiff received on defendants' behalf an amount largely in excess of the amount of money paid out by plaintiff on defendants' behalf did not constitute a direct or specific traverse of plaintiff's allegation as to the credit.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 117.*]

2. WITNESSES (§ 275*)—CROSS-EXAMINATION—THEORY OF CAUSE—RELEVANCY.

Where, in a suit for brokers' commissions on an express contract, plaintiff was denied the right to give evidence on a quantum meruit, the court did not err in excluding the cross-examination of plaintiff as to the balance left in plaintiff's hands out of moneys advanced to him by defendants to purchase certain lands from previous owners under a contract distinct from that sued on.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 967-975; Dec. Dig. § 275.*]

3. BROKERS (§ 82*)—ACTION FOR SERVICES—ISSUES.

Where, in a suit for brokers' services, plaintiff's verified statement alleging that defendants were entitled to a credit of \$547.50, while incorrect, was not specifically denied, the fact that plaintiff discovered a mistake on the trial and admitted that he owed defendants on an extraneous

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

account \$808.67 more did not give defendants an additional right to extend the inquiry to cover such question.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 82.*]

4. APPEAL AND ERROR (§ 1057*)—REVIEW—HARMLESS ERROR—EVIDENCE.

In an action for brokers' services, the exclusion of a statement of the account showing an additional credit due from plaintiff to defendants and other extraneous transactions if error was harmless to defendants; plaintiff having admitted before the jury the amount of the additional credit as claimed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4197, 4198, 4205; Dec. Dig. § 1057.*]

5. BROKERS (§ 82*)—ACTION FOR COMMISSIONS—ISSUES—EVIDENCE.

Where, in a suit for brokers' commissions under an express contract, plaintiff claimed that he was to receive all of the selling price above \$30 per acre, and defendants denied any contract for commissions, asserting that they employed plaintiff as an attorney only, they could not on the trial prove an express contract different from the one sued on, to wit, that they were to receive a net profit of 50 per cent. on the transaction.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 82.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Assumpsit by C. S. Cochran against Alexander Dempster and others. Judgment for plaintiff, and defendants bring error. Affirmed.

S. S. Mehard, for plaintiffs in error.

Thomas Patterson, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. This is an action in assumpsit brought by the plaintiff, the defendant in error here, against the defendants, Alexander Dempster, J. E. Barnes, and W. A. Edeburn, the first two of whom are the plaintiffs in error here, to recover a sum of money alleged to be due to the plaintiff as commissions for the sale of certain of the defendants' coal lands. By the statement of his claim the plaintiff declared on an express contract by which he averred he was to receive for his commissions all the selling price above \$30 per acre. He also averred that the quantity of lands sold by him was 2,876.49 acres; that the selling price was \$36 per acre; that, by a supplemental agreement, the defendants properly paid to one Williams \$1 per acre for certain services rendered by him, and that the remaining \$5 per acre over and above the \$30 to be retained by the defendants, amounting to \$14,382.45, was due to the plaintiff, less, however, a credit of \$547.50, which, the plaintiff averred, was a sum remaining in his hands of moneys advanced to him by the defendants for the purchase of the lands from previous owners. The amount of the claim, therefore, according to plaintiff's statement, was the sum of \$13,834.95, on which interest was also demanded from December 2, 1905, the date of sale by the plaintiff. The plaintiff's statement was verified by affidavit.

There is a rule of the Circuit Court for the Western District of Pennsylvania to the following effect:

"In all actions * * * of assumpsit the plaintiff's statement of claim may be verified by affidavit; and, if so verified, the defendant's affidavit of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defense, or his affidavit in traverse thereof, shall be deemed and taken to be a pleading in the case, and upon trial no evidence on the part of the defendant shall be admitted in defense except such as may be alleged in his affidavit; and such items of claim and material averments of fact of the plaintiff's statement as are not directly and specifically traversed and denied by the defendant's affidavit shall be taken as admitted."

The defendants by their affidavit of defense, after stating that the plaintiff had been employed as their attorney in their negotiations for the purchase of the lands from the previous owners, and the nature of such services, declared that he "received large sums of money from Alexander Dempster and from others on behalf of said defendants, in connection with the transactions relating to the said coal lands, and that the amount of money which the plaintiff so received was largely in excess of the amount of moneys paid out by plaintiff on account of or on behalf of the defendants." There is no other allegation in the affidavit of defense that has any possible relation to the credit of \$547.50 allowed in the plaintiff's statement. It is clear that such an allegation did not directly or specifically traverse or deny the averment of fact in plaintiff's statement that the correct credit was the sum of \$547.50.

It appeared on the trial, however, that in the spring of 1907, a year before this action was commenced and more than a year and a half before the trial, the plaintiff had given to the defendants a statement of his account with them concerning the moneys advanced to him for the purchase of the coal lands, and also his bank books and returned checks, all which the defendants had retained in their possession, without disputing the correctness of the account, until the time of the trial. The statement was shown to the plaintiff on his cross-examination, and he then admitted that a further credit of \$808.67 was due to the defendants. This reduced the amount demanded by him to the sum of \$13,026.28, with interest from December 2, 1905, the date of sale, to December 10, 1908, the date of trial, being \$15,384.04, for which a verdict was rendered. Owing to an application for a new trial, the entry of judgment was postponed until March 22, 1909, when judgment was entered, with accumulated interest, for the sum of \$15,645.57.

The first question presented by the assignments of error is whether the trial court erred in excluding the cross-examination of the plaintiff as to the balance left in his hands out of moneys advanced to him by the defendants for the purchase of the lands from previous owners. The plaintiff was suing on an express contract for commissions. The record shows that, when he attempted to put in evidence on a quantum meruit, he was stopped by the court on the objection of the defendants' counsel that the plaintiff's statement of claim was "based wholly and solely upon a specific contract; there being no averment or allegation in the statement of claim of anything excepting a right to recover upon a special contract." It is true that in his statement the plaintiff had allowed a credit of \$547.50, and that on the trial he had added to that credit the additional sum of \$808.67, but these sums represented, according to the theory on which the action was brought, a balance due from the plaintiff to the defendants on an account wholly distinct and separate from the contract sued on. Moreover, the defendants had

been in possession of the plaintiff's statement of his account, which showed the additional credit of \$808.67 for a year before the action was commenced. They knew, or were bound to know, that according to that account the credit of \$547.50 in the statement of plaintiff's claim was incorrect. The averment as to the credit was a material averment, yet it was not "directly and specifically traversed and denied by the defendants' affidavit," as the rule of court required. They contented themselves with the general statement that the moneys received by the plaintiff had been "largely in excess" of the moneys paid out by him. In such circumstances, the defendants could not demand, as a matter of right, that they be permitted to inquire as to the correctness of the credit allowed by the plaintiff's statement of claim. Nor did the fact that the plaintiff discovered on the trial that he owed the defendants on this extraneous account \$808.67 more than he had allowed in the statement of his claim invest the defendants with any additional rights of examination or inquiry. By not denying in their affidavit of defense the correctness of the credit allowed, they were excluded from the right to deny it on the trial.

The second question is: Did the trial court err in refusing to admit in evidence the statement of account, above referred to, which showed the additional balance of \$808.67 due from the plaintiff to the defendants? The statement showed very much more than the mere fact that such an additional credit was due from the plaintiff to the defendants. It showed transactions with a large number of persons from whom 46 different tracts of land had been purchased, and to whom the plaintiff, as attorney for the defendants, had made purchase-money payments, as well as payments for taxes, surveys, recording fees, and other purposes. When the statement of account was shown to the plaintiff, he promptly admitted that the additional credit of \$808.67 was due to the defendants, and it was allowed by him, his counsel declaring that the claim, instead of being \$13,834.95 as shown by the plaintiff's statement, was \$13,026.28, with interest from December 2, 1905. With that admission before the jury, the error in excluding the account, if any, was harmless.

The third and last question is whether the trial court erred in refusing to permit the defendants to show the cost of the coal lands to the defendants. This question arises from the fact that the plaintiff stated that in the interviews between him and the defendants leading up to the alleged contract for commissions the net price of \$30 per acre to be realized by the defendants was suggested, because the average cost to the defendants was \$20 per acre and they desired a profit of 50 per centum in the transaction. There was nothing in the plaintiff's testimony to indicate that the amount of his commissions was to be reduced in case the cost to the defendants exceeded \$20 per acre. Nor in their affidavit of defense had the defendants presented any such defense. They denied absolutely that any express contract had been made for commissions. They asserted that the plaintiff was employed by them as an attorney at law to examine the titles to the tracts of land the purchase of which they were contemplating, to attend to the conveyances thereof, and to the proper payments of purchase moneys to the

grantors, that all the services of the plaintiff, including his services for the sale of the lands, were rendered by him in the course of his employment as their attorney, and that in the whole of his employment, from the beginning to the end, the only agreement they had with him was that implied by law, namely, that he was to receive a fair and reasonable compensation for his services. Having thus in their affidavit of defense denied the making of any express contract whatever, they were not in a position to offer evidence of an express contract different from the one sued on. When, therefore, they offered to show what the cost of the lands had been to the defendants for the purpose it must be presumed of proving that such cost with the addition of 50 per centum thereto exceeded \$30 an acre, and thereby reduced the commissions to which the plaintiff was entitled, the offer was outside of the issue involved. Under the rule of the court, the affidavit of defense was deemed and taken to be a pleading in the case. It limited the defense under the only formal plea filed, which was non assumpsit, to the single issue as to whether the particular express contract sued on was or was not made. It follows that the court properly overruled the offer to prove an express contract different from the one sued on.

Upon the whole case, we are of opinion that the judgment of the Circuit Court should be affirmed, with costs; and it is so ordered.

PITTSBURGH RYS. CO. v. THOMAS.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 49.

1. MASTER AND SERVANT (§§ 170, 171*)—INJURIES TO SERVANT—EMPLOYMENT OF COMPETENT FELLOW SERVANTS.

A master is liable for failure to exercise the care of an ordinarily prudent man to select servants competent for the performance of duties required of them in accordance with the character of the employment and the dangers to be anticipated; such being a primary and nondelegable duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 336, 341; Dec. Dig. §§ 170, 171.*]

2. MASTER AND SERVANT (§ 216*)—RISKS ASSUMED BY SERVANT.

While a servant assumes the risk of negligence of a fellow servant, he does not assume the risk of negligence of the master in employing an incompetent servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 567; Dec. Dig. § 216.*]

3. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—BURDEN OF PROOF.

Where a servant's injuries were alleged to have been caused by the master's negligence in employing or retaining an incompetent servant, the burden of proof thereof was on plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 906; Dec. Dig. § 265.*]

4. MASTER AND SERVANT (§ 287*)—INJURIES TO SERVANT—INCOMPETENT FELLOW SERVANT—EMPLOYMENT—NEGLIGENCE.

In an action for injuries to a street car conductor by the alleged negligence of his motorman, evidence *held* to require submission to the jury

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the question of the railroad company's negligence in employing the motorman or retaining him in its employ with knowledge of his alleged incapacity.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1054-1056; Dec. Dig. § 287.*]

5. MASTER AND SERVANT (§ 271*)—INJURIES TO SERVANT—FELLOW SERVANTS—INCOMPETENCY—EVIDENCE—SPECIAL ACTS.

On an issue as to a master's negligence in retaining a servant with notice of his incompetency, previous specific acts of the servant, indicating incompetency or unfitness, which were or should have been known to the master, are admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 930; Dec. Dig. § 271.*]

6. MASTER AND SERVANT (§ 279*)—FELLOW SERVANTS—NEGLIGENCE—NEGLIGENT EMPLOYMENT—SPECIFIC ACTS.

In order that prior specific acts of negligence by a fellow servant should be sufficient to establish the master's negligence in retaining the servant in his employ, the acts must be the result of incompetence, or of such a character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 974; Dec. Dig. § 279.*]

7. MASTER AND SERVANT (§ 297*)—INJURIES TO SERVANT—FELLOW SERVANT—NEGLIGENT EMPLOYMENT—SPECIAL FINDINGS.

Where a master was charged with negligence in retaining in its employ plaintiff's fellow servant by whose negligence plaintiff was injured, prior specific acts committed by such fellow servants were inadmissible to show negligence, but only to show his incompetency; and hence the court erred in submitting such acts to the jury under interrogatories: "Would you, if you were trying that case, say that the motorman was guilty of negligence, or was it the result of his incapacity, which would mean the same thing?" "Was he incompetent in the operation of his car?" "Was his conduct negligence?" "That if he could have avoided either of the accidents with the skill that a motorman is supposed to have in running a car, then it would be the result of his negligence and evidence of his incompetency."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

8. MASTER AND SERVANT (§ 271*)—INCOMPETENCY OF FELLOW SERVANT—CHARACTER—REPUTATION IN A PARTICULAR CALLING.

Where it was claimed that a motorman was so incompetent that the street railway company was negligent in employing him, evidence that his reputation for competency as a motorman, among the conductors and motormen who daily congregated to the number of 30 or 40 in the car barn, was bad, was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 931; Dec. Dig. § 271.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by David T. Thomas against the Pittsburgh Railways Company. From a judgment for plaintiff, defendant brings error. Reversed.

James C. Gray, for plaintiff in error.

Rody P. Marshall, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GRAY, Circuit Judge. The defendant in error, David F. Thomas (hereinafter called the plaintiff), brought suit against the Pittsburgh Railways Company, the plaintiff in error (hereinafter called the defendant), to recover damages for injuries to the said plaintiff, occasioned by the alleged negligence of the defendant. There was a verdict, and judgment thereon, in favor of the plaintiff. From the record brought up by the writ of error sued out by the defendant, it appears that the defendant was a corporation of the state of Pennsylvania, operating certain electric street railways in what was formerly called the city of Allegheny, but what is now a part of the city of Pittsburgh. On the 27th day of November, 1907, the plaintiff was a conductor on a motor car on one of the lines in said city. When he arrived at the end of said line, it became his duty to attach a trailer car, which was standing there, to what was then the front of his car but which would be the rear of his car on the return trip to the city. The motorman, one Conway, having stopped the car a distance of from two and a half to five feet from the trailer car, the plaintiff went between the two cars for the purpose of coupling them, and, standing somewhat to one side and holding the drawhead and pin, one in each hand, made a signal to the motorman to move his car up in order to make the coupling. The plaintiff says that after the signal was given, the car came so quickly that he remembered nothing, except that it caught him and crushed him between it and the trailer. The plaintiff had been for some time running on this particular line, but says that he had never before had Conway as a motorman. Conway testifies that when he received the signal to close up on the trailer, he put on only what is called one notch of power, the least that would serve to move the car. The plaintiff says that from his five years' experience in motor cars, it could not have come as quickly as it did without more than two notches of power. He also says that it was slightly upgrade at that point, and more power would be required on that account. There was testimony of two or three witnesses, who were $1\frac{1}{2}$ or 2 blocks away, that their attention was called to the accident by hearing the crash of the two cars coming together.

The negligence charged by the plaintiff's statement of claim is the primary negligence of the defendant, as master, in employing Conway, the motorman, who, it was alleged, was incompetent, to the knowledge of the defendant, or in retaining him in its employ after it had, or should have had, knowledge of his incompetence. The charge of negligence is not entirely clear or apt in the language employed to express it. The rule of law invoked, however, is the undoubted one, that it is the duty of the master to use due care, that is, the care that would be exercised by an ordinarily prudent man, under the circumstances of the particular case, to select servants competent and fit for the performance of the duties required of them. This care, of course, must have regard to the character of the employment and to the dangers that may result to others, including co-employés, from the lack of such competence or fitness. This, as we have said, is a primary duty of the master, and cannot be delegated by him so as to avoid responsibility for its due performance. While one who enters

the service of another takes, as a risk of his employment, the risk of negligence of a fellow servant, he never assumes the risk of the negligence of the master.

The charge here made, that the injuries suffered by the plaintiff were due to the negligence of the defendant, in employing or retaining in his employ one who was incompetent or unfit for the service required of him, and that such incompetence or unfitness was known, or ought to have been known, to the defendant prior to the accident, must be proved, like every other charge of negligence, by a preponderance of testimony to the satisfaction of the tribunal trying the same. The burden of proof, of course, is always on the plaintiff.

After the conclusion of the testimony, counsel for the defense asked for binding instructions that, under all the evidence, the verdict should be for the defense, and, after verdict in favor of the plaintiff, made a motion for judgment non obstante veredicto, under the Pennsylvania statute. Assignments of error to the refusal of the court to allow these motions were duly filed.

After a careful reading of the testimony, we think that these assignments should not be allowed. The question was a close one, but we think there was evidence to be submitted to the jury, tending to show the incompetence and unfitness of the motorman for the position in which he was placed; also tending to show that the defendant had knowledge, or might have had knowledge, by due inquiry, of such incompetence and unfitness; and also evidence tending to show that the action of the motorman, which occasioned the accident, was due to such incompetence and unfitness. As to all three of the points just mentioned, it is incumbent upon the plaintiff to satisfy the jury. We by no means intend to be understood as saying that there was such a preponderance of evidence as should satisfy the jury on this point, or that the jury might not have found that the specific negligence charged against the defendant had not been proved, but merely that there were facts proved in the case from which the jury might, in the exercise of their judgment, infer such negligence, and that the court were therefore justified in submitting, with proper instructions, the question to the jury.

The third specification of error raises the interesting question, whether prior specific acts of alleged negligence on the part of the motorman can be submitted to the jury, in order to establish his incompetency or unfitness. This question is a difficult one, and the decisions of the courts have not been uniform in regard to it. On the one hand, it is held that only evidence of general reputation of incompetency or unfitness, and not knowledge of specific acts of negligence, can be admitted to make a master amenable to the charge of negligence in selecting a servant. "Character," says the Supreme Court of Pennsylvania, in *Frazier v. P. R. R.*, 38 Pa. 104, 80 Am. Dec. 467, "grows out of special acts, but is not proved by them. Indeed special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. * * * Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary." This

is true, and the courts constantly make the discrimination, where the question is as to the veracity of a party or witness, between character or reputation and specific acts of falsehood. But it would be unphilosophical and do violence to the common sense and experience of mankind, to say that there may not be repeated specific acts showing incompetence or unfitness in a particular employment, or a continued line of conduct amounting to a habit of negligence in the performance of a given duty, as would render one, with knowledge of such specific acts or such a habit on the part of the person he was about to employ, negligent of his duty to those who should thereafter come within the danger of such incompetence or negligence. But we have no hesitation, where the question is as to negligence of the master in retaining a servant in his employ after he knows, or has reason to know, that he is incompetent or unfit for the service for which he is employed, in holding that previous specific acts of the servant, tending to show incompetence or unfitness on his part, which were or should have been known by the master, are admissible in proof of the master's negligence. The practical application of this proposition requires to be guarded by such instructions from the court as shall make clear the essential difference between mere negligence and incompetency. A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must be either shown that the so-called negligent acts were the result of incompetence, or were of such a character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position, for unfitness, as well as incompetency, is a disqualification for employment. A man may be in the abstract competent for the work in hand; that is, he may be mentally alert, quick of comprehension and understanding, and possessing the requisite experience and skill for the performance of the duty assigned him, but he may be so unfit, by reason of habits of intoxication or reckless carelessness, as to render a master negligent who knowingly employs him.

Keeping in mind these distinctions, we come to consider the specifications of error pertinent thereto. The two specific accidents in which the motorman, Conway, was concerned, and which were adduced to show incompetence on his part, taken by themselves, hardly present sufficient ground for the inference sought to be drawn from them. Their character is principally proved by the motorman himself, and his explanation of the circumstances under which they occurred would seem to exonerate him from responsibility or blame. In one case, he testifies that he ran into the rear of a car which had suddenly stopped by reason of bumping into another car ahead of it. As it was in the early hours of a November morning, and very foggy, he testifies that he could only see ahead as far as his headlight shone, about 15 yards, and that the fog had made the rails so slippery that, by reason thereof, he was unable to stop his own car in time to avoid the collision. In the other case, which happened in the previous September, he testified as follows:

"The Rebecca Street car was going ahead of me, up Preble avenue, and there is a bridge there for the people going up California avenue, and just as his

car was passing, an old man got off the bridge and signaled for the motorman ahead of me to stop the car. It was not a regular stop, and I was coming after him about 50 yards, and before I could stop my car, I slightly touched him."

This is practically the only evidence as to the happening of the two accidents, evidence of which was introduced, not to show negligence, for that would not have been pertinent, but to show incompetence. Standing alone, they do not have probative force in that respect, and should have been withdrawn from the consideration of the jury.

There was, however, other evidence undoubtedly pertinent, as tending to show incompetence. This was the testimony of several of the conductors and motormen who daily congregated, to the number of 30 or 40, in the car barn, to the effect that the reputation of Conway, for competence as a motorman, was bad. This testimony was objected to, on the ground that it was not general reputation and only confined to a class. We think, however, that reputation or character in a special employment or calling, is competently proved—indeed, is best proved, as it exists among those of the same calling. It is the general reputation among those best capable of forming an opinion in regard to the same. This testimony, however, is not conclusive, and should be of such a character as to satisfy the jury that it should have come to the knowledge of the defendant.

Undoubtedly, great weight was added to this evidence of reputation by the admission of the testimony in regard to the previous accidents to which reference has been made, and the court, with entire correctness and fairness, submitted to the jury the general questions as to reputation and as to the facts surrounding the accidents. But our attention has been called to certain language used by the learned judge of the court below, as set forth in the last four assignments of error. Speaking of the first of the two prior accidents, the learned judge used this language:

"Would you, if you were trying that case, say that the motorman was guilty of negligence, or was it the result of his incompetency, which would be the same thing?"

This, of course, is erroneous, in view of the distinctions which we have heretofore endeavored to point out. A merely negligent act, and an act which is the result of incompetence, are not the same thing. As we have already pointed out, he may have been entirely competent, and yet have committed an act of negligence. In speaking of the second accident, this language is used:

"Was he incompetent in the operation of his car on Preble avenue? Was his conduct negligent? Now you see you must determine the fact of this accident as bearing upon the question of incompetency. Of course, if he could have avoided either of these accidents with the skill that a motorman is supposed to have, in running a car, then it would be the result of his negligence, and it would be evidence of his incompetency, so, you see that you are to determine that."

The use of this language was evidently the result of inadvertence on the part of the trial judge, but this inadvertence, in the course of the delivery of an oral charge, could hardly fail to confuse in the minds of the jury the distinction that exists between incompetence and the mere

negligence of one who is competent, and tended to give a probative force to the occurrence of these prior accidents, to which they were not properly entitled. Special care is required in a case like the one at bar, to avoid possible confusion in this regard, by fully explaining to the jury the distinction to which we have adverted.

For the reasons stated, the judgment below is reversed, and a venire de novo ordered.

CHESAPEAKE & O. RY. CO. v. HAWKINS, Sheriff.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 803.

1. RAILROADS (§ 359*)—TRESPASSERS—DUTY OF RAILROAD COMPANY.

A railroad company owes no duty to a trespasser on a track except not to injure him maliciously or with gross or reckless carelessness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 359.*]

2. RAILROADS (§ 359*)—TRESPASSERS—CHILDREN ON TRACK—NEGLIGENCE—CARE REQUIRED.

Where a brakeman alighted from a car and removed a child four years and three months old from between the rails of a spur track, and the engineer and conductor testified that when they passed a lumber pile adjoining the track they saw the child and another boy standing thereon, but when the engine returned about two minutes afterwards nothing was seen of the children, nor until a half hour later, when the child's body was found lying across the rail next to the lumber, badly mutilated, and the front wheels of the engine covered with blood, it was the duty of the brakeman after first finding the child so situated with no one in charge of him, either to see that he was placed in the care of a competent guardian, or to take such care in the movement of the engine and car as would be required from the knowledge of the child's situation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1239; Dec. Dig. § 359.*]

3. RAILROADS (§ 359*)—TRESPASSERS—CHILDREN—NEGLIGENCE.

Where a child of tender years was removed from a spur track by a brakeman early in the evening on the day of his death in January, and the conductor and engineer of the train as it passed the point saw the child and his companion unattended on a lumber pile close to the track, and after the car had been pushed only 110 feet further up the track the engine returned and ran over the child at the same place, it appearing that the headlight was so placed as to throw its light some distance ahead of the engine leaving a dark space in front of and between the engine and the illuminated ground, the operatives of the train, having seen the child in a place of danger were bound to exercise reasonable care not to run the engine past the place without knowing that the child was safe.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1239; Dec. Dig. § 359.*]

4. DEATH (§ 95*)—CHILDREN—DAMAGES.

Code W. Va. 1899, c. 103, § 5 (Code 1906, § 3488), authorizes an action for wrongful death, and section 6 (section 3489), provides that in every such action the jury may give such damages as they may deem fair and just, not exceeding \$10,000, etc. *Held*, that the fact that a child of tender years was without earning capacity did not limit his administrator's recovery for wrongful death to nominal damages; the jury being entitled to award such sum as in their opinion, under all the facts and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

circumstances of the case, was a proper allowance within the statutory maximum.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 115, 120; Dec. Dig. § 95.*]

Goff, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Huntington.

Action by E. B. Hawkins, Sheriff, as administrator of Harlow Winterstein, deceased, against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Herbert Fitzpatrick (Simms, Enslow, Fitzpatrick & Baker, on the brief), for plaintiff in error.

R. T. Hubbard, Jr. (Hubard & Lee and Osenton & McPeak, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge. This writ of error brings for our examination the rulings in a judgment rendered in the Circuit Court of the United States for the Southern District of West Virginia awarding \$3,000 damages against a railroad company for the death by negligence of a boy playing on a railroad track. The action was originally brought in the state court, the circuit court for Fayette county, W. Va., and was removed to the federal court at the instance of the defendant on the ground of diverse citizenship.

At the point where the accident happened, there was a spur track running from the main line for the distance of a few hundred feet. By the side of this track about three or four feet from the right-hand rail looking toward the main track there was a pile of lumber about five feet high. On the same side as the lumber pile, and directly opposite, at a distance of 50 feet from the track, was the dwelling house where the deceased lived with his grandfather. The county road ran between the dwelling and the lumber pile. There was no fence or other obstruction. The spur track was at this point straight and practically level. The time of the accident was about half past 6 on an evening in January by Central time (or "slow" time in that locality). A box car was detached from a train on the main line by a flying switch and was "kicked" upon the spur track to a point just below the lumber pile. An engine was then backed up the spur track and attached to the car, and the car was pushed 110 feet further up the spur track and left there; the engine alone coming back past the lumber pile to a point near the main line. A brakeman was on the front end of the box car when it was first "kicked" up the spur track and when it stopped just below the lumber pile. The deceased was about four years and three months old and was observed by the brakeman playing with another boy, a little larger, at the lumber pile picking up some pieces of coal and playing with them; the deceased being on the track in front of the car. The brakeman "got off and made him get from between the two rails." The brakeman then went back

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the car, and about 12 minutes elapsed before the engine came up. As the car and engine were passing the lumber pile, the brakeman testified that he saw the children standing on the further side of the lumber pile. The engineer and conductor testify that they saw them as they passed standing on the lumber pile. The engineer spoke to the boys as he passed them on the lumber pile. The placing of the car occupied about two minutes from the time the engine with the car passed the lumber pile until it returned. Nothing was seen of the children as the engine came down. About half an hour later the body of the deceased was found lying across the rail next to the lumber pile badly mutilated; the front wheels of the engine on the right-hand side being also found covered with blood.

The exceptions and the errors assigned all relate to the refusal of the court to direct a verdict in favor of the defendant, to its refusal to grant the defendant's instructions, and to certain portions of the charge given by the court.

The instructions asked for, with the exception of the measure of damages, all involve substantially the same question and can be considered together. The defendant's contention is that, the child being upon the track as a trespasser, no liability could arise except for wanton or gross negligence. The principle thus stated is well recognized by the decisions.

In *Morrissey v. Eastern Railroad Co.*, 126 Mass. 377, 380, 30 Am. Rep. 686, the Supreme Judicial Court of Massachusetts said in reference to an injury to a four year old boy playing on the track:

"The plaintiff at the time of the accident was a mere intruder and trespasser upon the railroad track. No inducement or implied invitation to him to enter upon it had been held out. He was neither a passenger nor on his way to become one, but was there merely for his own amusement, and was using the track as a playground. The defendant corporation owed him no duty, except the negative one not maliciously or with gross and reckless carelessness to run over him."

See, also, the cases of: *Wright v. Boston & Albany R. R.*, 142 Mass. 296, 7 N. E. 866; *Cleveland, etc., R. R. v. Adair*, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822; *McDermott v. Kentucky Central R. R. Co.*, 93 Ky. 408, 20 S. W. 380; *Mitchell v. Phila. W. & B. R. R.*, 132 Pa. 226, 19 Atl. 28.

But we concur in the opinion of the Circuit Court that this principle is not decisive of this case. There is another important element involved, and that is the duty of the employes of the railroad company after they had found the child in a dangerous position. When the car was first run up the spur track and stopped below the lumber pile, the deceased was seen by the brakeman in a position of danger. The brakeman testifies in one place that the child was between the rails, and in another place that he was between the rail and the lumber pile in the three-foot space. In either situation he would have been struck when the car proceeded. What, then, was the duty of the brakeman after finding the child so situated and without any one in charge of him? We think his duty was to do either one of two things: Either to see that the child was placed in the care of some one competent to take charge of him, or else to take such care in the

movement of the engine and car as would be required from the knowledge of the child's situation. The child was not returned to any guardian, and the question of the exercise of due care under the state of facts disclosed and the state of knowledge by the defendant's servants was for the jury. The portion of the court's charge relating to this question was as follows:

"Now the plaintiff claims that under those circumstances he has shown a case that indicates, that proves, that the railway company by its employes was negligent, after first having discovered this child, in not using due and proper care in passing out there, to see that the child was not injured. That is a question that is for you to answer. Undoubtedly the railway company through its agents had knowledge of the first danger of this child, and it was its duty to notify the child of its danger (which it is legally presumed the child itself could not appreciate), and see that the child went to a place of safety at that time, and this, from the testimony, was done.

"Now in dealing with this case, gentlemen, you must always keep in mind the fact that this child cannot be presumed to be sensible of its danger. The question therefore before you is this: Were the circumstances such as to impose on that railway company the further duty of seeing that the child had not again gone into danger on its track, when they took their engine out? The measure of that duty would be: What would a prudent man under the same circumstances do? Would he run his engine out—they went slowly it is true—but would he run it without such investigation as would enable him to discover whether or not this child was on the track? When you have settled that question, you have settled the question in this case that will determine whether or not a verdict should be returned.

"If you find that a prudent man should and would have seen that this child was in a place of safety before taking that train out, or would have approached this point with that in mind, then that will be the measure of the duty of the railway company, and if you find that the railway company, through their employes, did not perform this duty, you may say they were negligent and so find; if, on the other hand, you find that they approached with the care that a prudent man under the circumstances would have done, then it would be your duty to return a verdict in favor of the company."

We find no error in this instruction. The principle involved is succinctly expressed by the Supreme Court of Minnesota, in *Hepfel v. St. Paul, M. & M. Ry. Co.*, 49 Minn. 263, 265, 51 N. W. 1049, 1050, as follows:

"A railway company is not bound to keep a lookout for trespassers on its track or cars, nor to presume that they will expose themselves to danger thereon; but having notice of their presence and that they are liable to such danger, the company is bound to use reasonable care to avert it."

The case of *Gunn v. Ohio River Railroad Co.*, 42 W. Va. 676, 681, 26 S. E. 546, 36 L. R. A. 575, draws the distinction that, where an adult is seen upon the track, the presumption is that he will get off; but this is not so with little children. When they are seen on the track, the duty is to stop and save them.

Now in the case before us it was known to the brakeman that the child was on the track, that when ordered off the track he remained on the lumber pile till the car had passed, and that no person of sufficient discretion was near. It was also known to two other employes, one of whom was the engineer in charge of the engine which ran over the child a few minutes later, that the child was playing unattended close to the track. The car was pushed only 110 feet up the track, a large portion of which distance was occupied by the engine and ten-

der. The headlight was so placed as to throw its light some distance ahead of the engine leaving a dark space between the front of the engine and the illuminated ground further down the track. It would be quite possible, in fact probable, that, as soon as the engine had passed, the child would return to his former playground and resume the picking up of pieces of coal which had been interrupted by the passing of the car and engine. We do not think there was any error in leaving it open to the jury to find that a prudent man, under these circumstances, in returning past the danger point where the child was seen unattended a few minutes before, would have taken some means to ascertain that he was in a position of safety. The evidence tended to show that there was no vigilance at all adequate to the situation exercised in running the engine at the time the child was run over.

The duty of vigilance cast upon the railroad's employes by their actual knowledge of the situation of the child on or near the track in a position of danger eliminates entirely the question of how it got there in the first instance. A new duty has arisen from the situation of the child and the train hands' observation of that situation; and it is immaterial to inquire further how the situation arose. It was the province of the jury to determine the action of a prudent man in the situation as it existed after the initial trespass and after the child had been allowed by his grandfather or his 12 year old sister to get into danger. This renders it unnecessary to enter into a discussion of the somewhat conflicting decisions as to the extent of the imputation of the negligence of the custodian as a bar to recovery. It is analogous to the familiar doctrine of the "last clear chance," which allows recovery notwithstanding contributory negligence of the plaintiff if, after and independently of such contributory negligence, the defendant by the use of due care could have avoided the injury or fatality sued upon.

The first instruction asked by the plaintiff in error directing a verdict in its favor and the second, third, fourth, fifth, and sixth instructions negative the controlling principle of the case and were properly refused.

The plaintiff in error further contends that, by reason of the tender age of the deceased and his want of earning capacity, only nominal damages could be recovered by his administrator, and this question is raised by the refusal of the seventh and eighth instructions and the court's charge to the contrary. The brief of the plaintiff in error contains no authorities substantiating this contention, nor do we find any ground for it in the West Virginia statutes.

The statute (Code W. Va. 1899, c. 103, §§ 5 and 6 [Code 1906, §§ 3488, 3489]) reads as follows:

"Sec. 5. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person, who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

"Sec. 6. Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Provided, that every such action shall be commenced within two years after the death of such deceased person."

The court of last resort of West Virginia has several times held that the plain meaning of the statute is to leave to the jury the determination of the amount of damages within the \$10,000 limit, and the distinction is drawn between the phraseology employed and that of the English statute and the statutes of many other states making the measure the "pecuniary injury resulting from such death." Indeed, the prior West Virginia statute of 1863 (Acts 1863, p. 113, c. 98) did contain the latter phraseology, and the change to the present form is significant of the intent to leave the question to the jury. *Kelley v. Railroad Co.*, 58 W. Va. 216, 222-224, 52 S. E. 520, 2 L. R. A. (N. S.) 898.

In *Turner v. Norfolk & Western Railroad Co.*, 40 W. Va. 675, 688, 22 S. E. 83, 87, the court said of section 6 of the statute:

"By the enactment of this law the Legislature, as it had power to do, gave the jury absolute control over the question of damages, within the limit fixed. The courts are clothed with no authority to disturb their findings, but are inhibited from so doing as positively as though plainly expressed in the language of the statute."

See, also, *Thomas v. Electrical Co.*, 54 W. Va. 395, 404, 46 S. E. 217.

There is also a very full discussion of the same question in the case of *Matthews v. Warner*, 29 Grat. (Va.) 570, 574-578, 26 Am. Rep. 396, construing the similar statute of Virginia, and holding, similarly, that the statute was expressly designed to substitute such damages "as to the jury may seem fair and just," instead of requiring them to ascertain the pecuniary damages resulting to the next of kin.

The seventh and eighth instructions were properly refused, and the court's charge:

"That the law requires no measure of damages other than the opinion of ordinary jurors, guided by all the facts and circumstances in the particular case, recognizing the fact that, while no minimum is fixed in any case, a maximum of \$10,000 is fixed"

—is a correct interpretation of the statute.

The judgment is affirmed.

Affirmed.

GOFF, Circuit Judge, dissents.

CARPENTER et al. v. CUDD et al.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 844.

1. BANKRUPTCY (§ 68*)—INVOLUNTARY BANKRUPT—"WAGE-EARNER."

Bankr. Act July 1, 1898, c. 541, § 4, subd. "b," 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), provides that any natural person, except a wage-earner and certain others, may be adjudged an involuntary bankrupt, and section 1, subd. 27, defines a wage-earner as an individual who works for wages, salary, or hire at a compensation not exceeding \$1,500 a year. *Held*, that where an alleged involuntary bankrupt nominally drew a salary of \$900 a year as salary, but owned two-thirds of the stock of the corporation, and drew more than \$2,000 a year preceding the institution of bankruptcy proceedings against him, and was also in the business of buying and selling real estate, his holdings outside the corporation being worth nearly \$90,000, he was not a wage-earner within the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 68.*]

For other definitions, see Words and Phrases, vol. 8, p. 7365.

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank of Mattoon, Ill., v. First Nat. Bank*, 42 C. C. A. 4.]

2. BANKRUPTCY (§ 93*)—PROCEEDINGS—JURY—APPLICATION.

Bankr. Act July 1, 1898, c. 541, § 19, subd. "a," 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429), provides that a person against whom an involuntary petition has been filed shall be entitled to a jury trial on the filing of a written application therefor at or before the time within which an answer may be filed. *Held*, that it is the province of the judge to determine all the issues in bankruptcy without the intervention of a jury, unless the alleged bankrupt makes a seasonable application for a jury trial.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 140; Dec. Dig. § 93.*]

3. BANKRUPTCY (§ 93*)—PROCEEDINGS—ISSUES—JURY TRIAL.

Bankr. Act July 1, 1898, c. 541, § 18, subd. "d," 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429), provides that, if a petition is contested, the judge shall determine the issues without the intervention of a jury, except where a jury trial is given by the act. Section 19, subd. "a," gives an involuntary bankrupt a right to a trial by jury on the question of his insolvency, except as otherwise provided, and as to any act of bankruptcy alleged in the petition on filing a petition before time to answer; and subdivision "c" declares that the right to submit controverted facts to the jury shall be determined and enjoyed, except as otherwise provided by the act according to the laws of the United States with reference to jury trial. *Held*, that an involuntary bankrupt is only entitled to a jury trial as of right in respect to his insolvency and any act of bankruptcy alleged against him, and that any other issue of fact involved, as whether the alleged bankrupt is a wage-earner, may in the court's discretion be submitted to a jury, but the jury's finding thereon is only advisory.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 140; Dec. Dig. § 93.*]

In Error to the District Court of the United States for the District of South Carolina, at Charleston, in Bankruptcy.

Involuntary petition by J. N. Cudd and others against W. C. Carpenter and others. From an order adjudicating Carpenter a bankrupt, he and certain former creditors bring error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. P. Sanders (J. C. Otts and Sanders & De Pass, on the brief), for plaintiffs in error.

Howard B. Carlisle, for defendants in error.

Before GOFF and PRITCHARD, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge. On January 31, 1908, a petition in involuntary bankruptcy was filed by certain unsecured creditors against W. C. Carpenter in the District Court of the United States for the District of South Carolina. The petition charged that Carpenter, while insolvent, had permitted certain creditors to obtain a preference through judicial proceedings, namely, judgments, under which levies had been made and his property advertised for sale. To this petition Carpenter filed an answer denying insolvency, and certain of the judgment creditors interposed the defense that he was a wage-earner, earning less than \$1,500 per annum, and therefore not subject to the provisions of the bankruptcy law.

At the conclusion of the evidence taken upon the trial of the case before court and jury, the court refused the request of the judgment creditors to instruct the jury that the bankrupt was a wage-earner within the meaning of the act of Congress, and therefore incapable of being adjudged an involuntary bankrupt, but ruled that under the facts in the case Carpenter could not be considered a wage-earner, and that the sole question for the jury to determine was whether or not he was insolvent at the time of the filing of the petition. The jury found that Carpenter was insolvent, and the court adjudged him a bankrupt.

The appeal involves two questions: (1) Whether under the circumstances of the case Carpenter was a wage-earner; and (2) whether this question should have been submitted to the jury for its determination. The evidence showed that Carpenter had been interested in a mercantile business for upwards of 20 years, first as a partner and subsequently as sole owner; that in January, 1907, one year before the bankruptcy proceeding was instituted, he converted this enterprise into a corporation under the name of the W. C. Carpenter Company, with a capital stock of \$25,000, of which he retained \$17,600. Small lots of stock were also sold to other persons, for the most part employes of the company. He became president of the corporation, and his salary was fixed at \$900 per annum; but in addition to this sum, although no dividends were declared, he drew about \$2,000 from the business during the year. According to his own testimony, he had other and more valuable interests than his holdings in this corporation. He was engaged in collecting the outstanding accounts due the firm which formerly conducted the business then incorporated—his share of which he estimated to be worth \$25,000. He had a one-third interest, estimated by him to be worth more than \$8,000, in a copartnership engaged in the lime business, although he was not actively engaged in the management of its affairs. He was joint owner of numerous pieces of real estate, town lots and farm lands, most of which were in or near the town of Gaffney, where the mercantile business was lo-

cated. He was the holder, with others, of options upon 385,000 acres of land in Kentucky, and from his real estate ventures he expected to realize large profits. In all Carpenter estimated his property to be worth about \$106,000.

Subdivision "b" of section 4 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]) provides as follows:

"Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default, or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

Subdivision 27 of section 1 provides that "wage-earner" shall mean:

"An individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year."

It is contended by the appellants that inasmuch as the bankrupt was the president of the W. C. Carpenter Company, and as such was paid a salary of \$900 per year, he was a wage-earner under the definition cited above. But every individual who is paid a salary of less than \$1,500 per year is not therefore necessarily a wage-earner within the meaning of the law. A person extensively engaged in some mercantile or manufacturing business might at the same time incidentally earn a salary less than \$1,500 per year in some collateral employment; or the individual owner of a large business might incorporate it, and, being entitled as the holder of a great majority of the stock to practically all of the dividends earned, might prefer that his salary as president and head of the business should be placed at a nominal figure, or at a figure less than \$1,500 per year, and much less than he would expect to draw for his services in the management of the business. Manifestly Congress did not intend to exempt persons such as these from the operation of the law.

In the case at bar Carpenter was nominally drawing only \$900 salary per year, but he owned two-thirds of the stock of the corporation and had such control over its affairs that he actually drew more than \$2,000 additional during the year preceding the institution of bankruptcy proceedings. His own testimony justifies the conclusion that he was also in the business of buying and selling real estate. He estimated the value of his holdings outside of the W. C. Carpenter Company to be worth nearly \$90,000. Under these circumstances he cannot be held to be a wage-earner in the sense of the statute, and the decision of the court upon the evidence offered upon this point was correct.

But it is urged that the court should have submitted this matter to the jury for determination. It appears from the transcript of record that at the beginning of the trial it was agreed between counsel that the question of whether the bankrupt was a wage-earner was to be taken from the jury and left with the court. Subsequently in addressing the court during the trial counsel for the appellants seem to have

assumed that all of the questions in the case were to be submitted to the jury; but there is nothing else in the record to show that the agreement entered into at the outset of the case had been abandoned. It must therefore be presumed that the appellants waived any right that they might have had to have the jury decide this issue.

Aside from this, the provisions of the bankrupt law did not entitle the bankrupt or his creditors in this case to the trial of the issue as to whether or not Carpenter was a wage-earner by a jury as a matter of right. Subsection "d," § 18, of the bankrupt act, provides as follows:

"If the bankrupt, or any of his creditors, shall appear within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition."

Subdivision "a" of section 19 provides:

"A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived."

Subsection "c" of section 19 provides:

"The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury."

Under these provisions it is clear that it is the province of the judge to hear and determine without the intervention of a jury all issues in cases of contested bankruptcy, unless the alleged bankrupt shall make seasonable application for a jury trial, in which case he is entitled as of right to a jury trial in respect to his insolvency and any act of bankruptcy alleged to have been committed by him. Any other issue of fact involved in the question of bankruptcy, such, for instance, as that in this case, may in the discretion of the court be also submitted to the jury; but the finding of the jury upon such an issue, as in cases submitted to a jury by the chancellor in a court of chancery, is merely advisory, and not binding upon the court. *Oil Well Supply Company v. Hall*, 128 Fed. 875, 63 C. C. A. 343; *In re Neasmith*, 147 Fed. 160, 77 C. C. A. 402; *Barton v. Barbour*, 104 U. S. 134, 26 L. Ed. 672.

There was therefore no error in not submitting to the jury the question as to whether or not the bankrupt was a wage-earner.

Affirmed.

NORFOLK & P. TRACTION CO. v. MILLER.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 864

1. COURTS (§ 372*)—FEDERAL COURTS—RULES OF DECISION—MATTERS OF LOCAL LAW.

Whether a carrier is liable for exemplary damages for wanton and oppressive conduct by a servant toward a passenger is a question of general jurisprudence, and not of local law, on which the federal courts, in the absence of express statutory regulation, will exercise their own judgment uncontrolled by the decisions of state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 977; Dec. Dig. § 372.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. DAMAGES (§ 91*)—EXEMPLARY DAMAGES—ELEMENTS—GUILTY INTENTION.

In actions of tort, exemplary damages may be awarded if defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, but a guilty intent must be proved in order to justify such allowance.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

3. PRINCIPAL AND AGENT (§ 159*)—MISCONDUCT OF AGENT—LIABILITY OF PRINCIPAL—EXEMPLARY DAMAGES.

A principal, though liable to make compensation for injuries done by his agent within the scope of his employment, is not liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the agent, nor unless such misconduct has been so ratified as to make the principal particeps criminis of the agent's act.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 159; *Damages, Cent. Dig. § 208.]

4. CARRIERS (§ 314*)—INJURIES TO PASSENGERS—PUNITIVE DAMAGES—PLEADING.

Under the rule that, though punitive damages need not be demanded in name in the declaration, facts showing a right to recover such damages must be pleaded, a declaration for injuries to a passenger alleging gross insults by the motorman and conductor of defendant's car, culminating in assault on plaintiff by another of defendant's servants, failing to allege that such wrongful acts were either participated in, authorized, or ratified by defendant company, was insufficient to authorize a recovery of punitive damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1276; Dec. Dig. § 314.*]

5. PLEADING (§ 403*)—CURE BY SUBSEQUENT PLEADING—DEFECTS IN DECLARATION.

Where, in an action by a street car passenger for an assault committed by one of defendant's servants, the declaration did not allege any facts showing that defendant had ratified the alleged misconduct of its servants so as to authorize a recovery of punitive damages, the fact that defendant pleaded justification in defense did not supply such defect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. APPEAL AND ERROR (§ 1031*)—REVIEW—HARMLESS ERROR.

An error will not be regarded immaterial or harmless unless it appears beyond a doubt that it did not and could not have prejudiced the rights of the objecting party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Action by Hugh Gordon Miller against the Norfolk & Portsmouth Traction Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Venable and Eppa Hunton, Jr. (Henry W. Anderson, on the brief), for plaintiff in error.

Hugh Gordon Miller, for defendant in error.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

McDOWELL, District Judge. This is an action for damages, tried before the late Judge Purnell, brought by the defendant in error, who will be hereafter referred to as the plaintiff, against the plaintiff in error, who will be referred to as the defendant, resulting in a verdict and judgment for plaintiff for \$3,000 and costs. The declaration alleges repeated and gross insults to the plaintiff by the motorman and conductor of an electric car of defendant's on which plaintiff was a passenger, culminating in an unprovoked assault upon the plaintiff by a lineman (another subordinate employé of the defendant's) who was as is alleged incited and induced to make said assault by the motorman and conductor aforesaid. The declaration wholly fails to allege that the wrongful acts of these subordinate servants of the defendant's were participated in, authorized, or ratified by the defendant.

The defendant filed a plea of not guilty and a plea of justification. An instruction asked for by plaintiff and given, over the objection of defendant, reads as follows:

"That if the jury find that the injuries were committed in a reckless and willful disregard of the rights of the plaintiff as charged in the declaration, and that the defendant, after receiving notice of the facts, continued to retain the said conductor and motorman in its service, thereby intending to ratify such acts, the law allows the jury to give punitive or exemplary damages as a punishment to the defendant; that the object of exemplary damages is to punish a willful offender, and also to deter others from committing like offenses; that such damages may be made adequate as a punishment, and sufficient in amount to accomplish such object."

The following instruction asked for by defendant was refused:

"The court instructs the jury that under the law of this case the plaintiff is not entitled to punitive damages or smart money as punishment to the defendant."

Exceptions were duly taken by the defendant, and these rulings are *inter alia* assigned as error.

In *Lake Shore R. Co. v. Prentice*, 147 U. S. 101, 106, 13 Sup. Ct. 261, 37 L. Ed. 97, it is said:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger.

"This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment—is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states. *Railroad Co. v. Lockwood*, 17 Wall. 357, 368, 21 L. Ed. 627; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443, 9 Sup. Ct. 469, 32 L. Ed. 788; *Myrick v. Michigan Central Railroad*, 107 U. S. 102, 109, 1 Sup. Ct. 425, 27 L. Ed. 325; *Hough v. Railway Co.*, 100 U. S. 213, 226, 25 L. Ed. 612."

There is, so far as we are advised, no Virginia statute regulating this subject. Consequently we need not concern ourselves as to the Virginia doctrine on this point.

The rule which should have governed the trial court is thus expressed (at page 107 of 147 U. S., and page 263 of 13 Sup. Ct. [37 L. Ed. 97]) in the case above mentioned:

"In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. *The Amiable Nancy*, 3 Wheat. 546, 558, 559, 4 L. Ed. 456; *Day v. Woodworth*, 13 How. 363, 371, 14 L. Ed. 181; *Philadelphia, &c., Railroad v. Quigley*, 21 How. 202, 213, 214, 16 L. Ed. 73; *Milwaukee & St. Paul Railway v. Arms*, 91 U. S. 489, 493, 495, 23 L. Ed. 374; *Missouri Pacific Railway v. Humes*, 115 U. S. 512, 521, 6 Sup. Ct. 110, 29 L. Ed. 463; *Barry v. Edmunds*, 116 U. S. 550, 562, 563, 6 Sup. Ct. 501, 29 L. Ed. 729; *Denver & Rio Grande Railway v. Harris*, 122 U. S. 597, 609, 610, 7 Sup. Ct. 1286, 30 L. Ed. 1146; *Minneapolis & St. Louis Railway v. Beckwith*, 129 U. S. 26, 36, 9 Sup. Ct. 207, 32 L. Ed. 585.

"Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though, of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the agent."

And again at pages 114 and 115 of 147 U. S., and page 265 of 13 Sup. Ct. [37 L. Ed. 97], it is said:

"The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction to the jury that 'punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed.' This instruction was held to be right, for the following reasons: 'In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such willfulness, recklessness, or wickedness on the part of the party at fault as amounted to criminality, which for the good of society and warning to the individual ought to be pun-

ished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent's act. No man should be punished for that of which he is not guilty.' 'Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant.' *Hagan v. Providence & Worcester Railroad*, 3 R. I. 88, 91, 62 Am. Dec. 377."

The declaration in the case at bar was drafted on the theory that the master is responsible in punitive damages, although not having authorized, participated in, or ratified the act of the servant, if such act was grossly wanton and oppressive. Such declaration, under the rule of substantive law governing the trial court, states no fact showing a right to recover punitive damages from the master, and gave the defendant no notice that it would have to meet evidence tending to show ratification. While punitive damages need not be demanded *eo nomine* in the declaration, still the facts showing a right to recover such damage, must be set out in the declaration. *Norfolk & Western R. Co. v. Reeves*, 97 Va. 284, 288, 33 S. E. 606; *Wood v. Bank*, 100 Va. 306, 310, 40 S. E. 931.

In the course of the trial there was evidence introduced by the plaintiff showing that the offending employes had been retained in the service of the defendant, and some evidence in behalf of the defendant tending to disprove ratification by the defendant of the acts of the offending employes. But how much more evidence the defendant could have introduced, had it had notice that there would be such an issue, we have no way of knowing.

It is argued that the fact that there was evidence such as is above mentioned discriminates this case from *Lake Shore R. Co. v. Prentice*, *supra*. While it is true that in that opinion the fact is mentioned that there was no evidence of facts justifying punitive damages, such fact is not the reason for the ruling there made. Where A. sues in ejectment for Whiteacre, the introduction of evidence and counter evidence concerning a claim by him to Blackacre also would not justify an objection to instruction authorizing a recovery of both tracts. The declaration here alleges only such facts as show a right to recover compensatory damages. To allow the plaintiff on such a declaration to have an instruction such as was given on the subject of punitive damages was clearly erroneous.

It is argued that the fact that the defendant filed a plea of justification excuses the want of sufficient allegation in the declaration of facts showing a right to recover punitive damages. In this contention we can perceive no merit. How such a plea can convert a declaration showing only a right to recover compensatory damages into a declaration alleging facts showing a right to punitive damages we cannot understand. Where a right to recover punitive damages from a master arises from a ratification by the master of the act of the servant, as-

surely the act must have been ratified before the action was instituted. With the effect of a plea of justification to a declaration which alleges a previous ratification, we are not here concerned. That such plea cannot supply the entire lack of allegation of ratification in the declaration is sufficient for this case.

We do not feel called upon to express an opinion upon the contention that the verdict is excessive. The instruction given the jury concerning punitive damages was erroneous, and we cannot say that it did not prejudice the defendant.

"We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But, whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights." *Deery v. Cray*, 5 Wall. 795, 807, 18 L. Ed. 653. " * * * While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting. *Deery v. Cray*, 5 Wall. 795, 807, 18 L. Ed. 653; *Gilmer v. Higley*, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62." *Railroad Co. v. O'Reilly*, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006.

The judgment below must be reversed and the cause remanded for such further proceedings as may be proper, with costs in this court to plaintiff in error.

Reversed.

THOMPSON et al. v. MAUZY.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 880.

1. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS BY COURT.

Where issues are tried by the court without the intervention of a jury, the court's findings of fact are entitled to great weight on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

2. BANKRUPTCY (§ 451*)—PROCEEDINGS—REVIEW—"CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS"—"PROCEEDINGS IN BANKRUPTCY."

Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), confers on the appellate federal courts jurisdiction of "controversies arising in bankruptcy proceedings," and section 24b declares that the Circuit Courts of Appeal shall have jurisdiction in equity to superintend and revise in matter of law the "proceedings of the several inferior courts of bankruptcy" within their jurisdiction. *Held*, that "controversies arising in bankruptcy proceedings" appealable under section 24a embrace questions between the trustee representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, not directly affecting the administrative orders and judgments ordinarily known as "proceedings in bankruptcy," which are confined to questions arising between the bankrupt and his creditors and are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, including intermediate administrative steps,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and such controversies as arise between the parties to the bankruptcy proceedings as are involved in the allowing of claims and fixing their priorities, sales, allowances, and other matters which are disposed of summarily, and hence the term "controversies arising in bankruptcy proceedings" does not include an order dismissing a petition for the revocation of the bankrupt's discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 451.*

For other definitions, see Words and Phrases, vol. 1, pp. 703, 704.]

3. BANKRUPTCY (§ 461*)—APPEALS—TIME.

Under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), authorizing an appeal from a judgment granting or denying a bankrupt's discharge if applied for within 10 days after a judgment is rendered, an appeal from an order denying an application to revoke a bankrupt's discharge, not taken within 10 days, was unsustainable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 920; Dec. Dig. § 461.*

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Northern District of West Virginia.

In the matter of M. Mauzy, bankrupt. From an order denying the application of Charles Thompson and others to set aside the bankrupt's discharge, they appeal. Dismissed.

C. O. Strieby, for appellants.

Fred. O. Blue and B. H. Hiner, for appellee.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

KELLER, District Judge. On February 3, 1906, the appellee filed his voluntary petition in bankruptcy, having theretofore, on December 3, 1904, made a general assignment to B. H. Hiner, trustee, for the benefit of his creditors, which general assignment is referred to in the schedule of assets attached to his petition.

On July 24, 1906, an order of discharge was granted to him; there having been no appearance entered on behalf of any creditor, before the referee.

On June 7, 1907, the appellants presented their petition seeking a revocation of the order of discharge under the provisions of section 15, Bankr. Act 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), which section reads as follows:

"The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."

This petition and the answer of the bankrupt thereto were referred to George P. Sherley, one of the referees of the district, as a special master, to take the testimony and make report thereof to the court, and of his findings of fact, together with his recommendations in respect thereto.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Said special master made his report sustaining some of the allegations of fraud, and made recommendations concerning certain specific property claimed in the petition to be property of the bankrupt which had been fraudulently placed in the hands of others; but the special master made no recommendation relative to the revocation of the discharge, without which action no jurisdiction could vest in the court to do or perform any acts recommended in the report of the special master, in relation to the administration of the property alleged in the petition to be the property of the bankrupt's estate.

Upon exceptions by the bankrupt to the report of the special master, a trial was had before the judge of the District Court, upon all the evidence taken before the special master, and, for reasons assigned in a full and able written opinion, made a part of the record in this case, the judge entered an order, dated October 17, 1908, finding for the bankrupt upon the issues made by the petition and answer, and accordingly dismissed the petition for revocation of the discharge.

On November 18, 1908, the petitioners filed a petition for appeal to this court, together with an assignment of errors, and on the same day said appeal was allowed by the trial court.

The learned judge below based his action in refusing the revocation of this discharge upon the ground that the petitioning creditors failed to show themselves free from laches and knowledge of the facts prior to the granting of the discharge.

For reasons hereafter assigned, we do not and cannot pass upon the correctness of this finding; but we do not regard it as improper to point out that, inasmuch as the issues were tried without the intervention of a jury, the findings of the court as to the facts are entitled to great weight upon appeal.

However, the question arises at the threshold of this investigation: Under what provision of the bankruptcy act is this appeal before us?

The statutes which seem in any way applicable to this question are the following sections of the bankruptcy act:

"Sec. 24a. The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

"Sec. 24b. The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

"Sec. 25a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation as the case may be."

While the Supreme Court of the United States has not, so far as we are aware, directly decided what proceeding, if any, is appropriate

to review the decision of a District Court declining to revoke a discharge, there have been numerous decisions by District Courts, Circuit Courts of Appeal, and the Supreme Court of the United States, construing the several sections above quoted, and from the general trend of these decisions we make the following statement of conclusions:

That there is a clear distinction between "controversies arising in bankruptcy proceedings," as mentioned in section 24a, and the "proceedings in bankruptcy," which, by section 24b, the Circuit Courts of Appeal are given jurisdiction to superintend and revise "in matter of law"; the former being generally held to embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, and not directly affecting those administrative orders and judgments ordinarily known as "proceedings in bankruptcy," and the latter being confined to those questions arising between the bankrupt and his creditors which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps, and such controversies as arise between parties to the bankruptcy proceedings as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily.

This distinction is emphasized by the provisions of section 23a, prescribing limitations of the Circuit Courts of the United States in controversies at law and in equity between trustees in bankruptcy, as such, and adverse claimants, concerning the property acquired or claimed by such trustees. In *re Friend*, 134 Fed. 778, 67 C. C. A. 500, and cases there cited.

The distinction between "controversies at law and in equity between trustees and adverse claimants," and "proceedings in bankruptcy," is pointed out and dwelt upon in *Bardes, Trustee, v. First National Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; and, although that case was decided prior to the amendment of 1903 (section 23), it is quite as authoritative upon the question of this fundamental distinction as when it was rendered.

In *Holden v. Stratton*, 191 U. S. 119, 24 Sup. Ct. 45, 48 L. Ed. 118, the Supreme Court says:

"The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in sections 23, 24, and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be considered in view of that distinction."

Having adverted to some of the decisions emphasizing this distinction, it remains to classify the proceeding sought to be brought here by the appeal, and to determine whether it is properly before us. Clearly this is not one of the controversies arising in proceedings in bankruptcy provided for in section 24a, as to which the appellate courts are invested with appellate jurisdiction as in other cases, for the latter by judicial definition are limited to cases of the class referred to in section 23, Bankr. Act, as amended. Hence it becomes apparent

that the appeal to the Circuit Court of Appeals provided by said section 24a is not appropriate from an order dismissing a petition to revoke a discharge granted to the bankrupt.

Such an order is made in the course of "proceedings in bankruptcy," as broadly distinguished from "controversies arising out of proceedings in bankruptcy," and, if the right of appeal exists at all, it must be found in section 25a, which provides for appeal in three cases, viz.: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of \$500 or over.

The question whether an order such as the one appealed from is, in effect, an order granting a discharge, is, in view of the state of the record in this case, a matter of no direct consequence, because the appeal was not sued out in accordance with the provision of section 25a, not having been applied for within 10 days after the judgment was rendered.

No authoritative decision upon the question as to whether an order of this character is an order granting or denying a discharge has been found by us, and the text-writers seem to hold different views on the subject. See: *Brandenburg on Bankruptcy* (3d Ed.) § 598; *Collier* (7th Ed.) p. 297; 2 *Remington, Bank.* 1680, 1681.

We express no opinion upon this question because a decision upon that point is not required in this case, as we are perfectly clear that, if an appeal does lie in such a case, it is the appeal provided for in section 25a (upon the theory that such an order is, in effect, an order granting a discharge), and such an appeal must be taken within 10 days after the judgment is rendered.

The record shows that in this case the judgment was entered October 17, 1908, and the appeal was not applied for until November 18, 1908.

It results that the appeal must be dismissed for want of jurisdiction of this court to entertain it.

Appeal dismissed.

WALSH v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909. Petition for Rehearing Denied December 3, 1909.)

No. 1,469.

1. CRIMINAL LAW (§ 100*) — JURISDICTION — CHANGE OF BOUNDARIES OF JUDICIAL DISTRICT.

Act March 3, 1905, c. 1427, §§ 2, 3, 23, 33 Stat. 992, 997 (U. S. Comp. St. Supp. 1909, pp. 123, 130), which authorize the appointment of an additional district judge for the Northern district of Illinois, change the boundaries of said district in creating the new Eastern district, and provide that "all prosecutions for crimes or offenses heretofore committed within either the Northern or Southern districts of Illinois as hitherto constituted shall be commenced and proceeded with in each of said dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tricts the same as if this act had not been passed," make the new judge appointed thereunder a judge of the old district in respect to past offenses as well as judge of the new district.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 100.*]

2. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES AS EVIDENCE OF INTENT.

Where fraudulent intent is an essential element of the offense charged, evidence of other acts of the defendant of a kindred nature are competent to illustrate the character of the transaction in question and throw light on the intent with which this particular act was done.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836-837; Dec. Dig. § 371.*]

3. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—MISAPPLICATION OF FUNDS BY OFFICERS.

For an officer of a national bank who is also a promoter of various enterprises to obtain the funds of the bank on the security of unmarketable bonds of his own enterprises, at the risk of the interest of the bank, is a misapplication of the funds which cannot be covered up by entering the transactions on the books as loans and investments.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 958-964, 967; Dec. Dig. § 256.*]

4. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—PROSECUTION OF OFFICER FOR MISAPPLICATION OF FUNDS—QUESTIONS FOR JURY.

In a prosecution of an officer of a national bank for misapplying its funds, where the transactions as shown by the books of the bank were legitimate and proper on their face, the question of intent is one for the jury under proper instructions.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 257.*]

5. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In determining the correctness of instructions on a given subject-matter, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

6. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Instructions considered in a prosecution of an officer of a national bank under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), for willfully misapplying funds of the bank, and, taken together, *held* to correctly submit to the jury the question of wrongful intent.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 822.*]

7. CRIMINAL LAW (§ 878*)—TRIAL—VERDICT—INCONSISTENT FINDINGS.

Where the gravamen of the charge in several counts of an indictment is the same, a verdict of guilty on each is not inconsistent because they differ in respect to immaterial particulars concerning the means by which the crime was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

8. CRIMINAL LAW (§ 957*)—TRIAL—VERDICT—IMPEACHMENT BY JUROR.

A juror in a criminal case cannot afterward impeach a verdict in which he joined.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.*]

In Error to the District Court of the United States for the Northern Division of the Northern District of Illinois.

John R. Walsh was convicted of a criminal offense, and brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John S. Miller, for plaintiff in error.

Edwin W. Sims, U. S. Dist. Atty., Fletcher Dobyns, Sp. Asst. U. S. Atty., and Francis G. Hanchett and Robert W Childs, Asst. U. S. Attys.

Before GROSSCUP and BAKER, Circuit Judges, and HUMPHREY, District Judge.

HUMPHREY, District Judge. Plaintiff in error was found guilty upon each of 54 counts of an indictment, charging him with a violation of section 5209, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3497), by willfully misapplying moneys, funds, and credits of the Chicago National Bank with intent to injure and defraud the said bank.

The record is voluminous, and a large number of errors are assigned. Only the more serious contentions will be discussed here.

It is contended that the court was not legally organized. This involves a construction of Act March 3, 1905, c. 1427, 33 Stat. 992 (U. S. Comp. St. Supp. 1909, p. 123), changing the boundaries of judicial districts in Illinois, and we think presents no difficulties.

Judge Landis had power to call the grand jury, which returned the indictment. The statute under which he was appointed is couched in broad general terms, and it is evident that the term "Northern district of Illinois" is used to designate the district as it existed both before and after the passage of the act. The purpose of the statute was to give to the new judge all the power possessed by a judge for the Northern district of Illinois.

The provisions of section 23 of the act (U. S. Comp. St. Supp. 1905, p. 96; Supp. 1909, p. 130) support this view:

"That all prosecutions for crimes or offences heretofore committed within either the Northern or Southern districts of Illinois, as hitherto constituted, shall be commenced and proceeded with in each of said districts respectively, the same as if this act had not been passed."

In other words, for past offenses, the old Northern district of Illinois was preserved, and in creating the office of district judge for the Northern district of Illinois Congress created the office of judge for the old Northern district for past offenses and of judge for the new Northern district for future offenses.

The same reasoning applies in answer to the objections made to Judge Anderson, who presided upon the trial in the court below, sitting by assignment for the Northern district of Illinois.

It is urged on behalf of plaintiff in error that the verdict is not sustained by the evidence because the record as a whole does not show any guilty intent, and also that the trial court erred in permitting the jury to consider evidence of other acts of the defendant of a kindred nature, not counted upon in the indictment.

Where fraudulent intent is an essential element of the offense charged, evidence of other acts of defendant of a kindred nature are competent to illustrate the character of the transaction in question, and throw light on the intent with which this particular act was done. We see no error in admitting evidence of similar transactions to prove intent.

We cannot agree with counsel for the plaintiff in error in calling the transactions complained of in the indictment "legitimate and proper banking transactions." For a promoter of various enterprises to obtain the funds of a bank on the security of unmarketable bonds of his own enterprises at the risk of the interests of the bank is not proper and legitimate banking, and the entries on the books of the bank as loans and investments do not conceal the fraud thus perpetrated upon the bank.

The language of Judge Archbald in his concurring opinion in *Lear v. U. S.*, 147 Fed. 359, 77 C. C. A. 537, is applicable:

"A reckless act, moreover, is always regarded as the equivalent of a willful one, and that at least was here. The possibility of injury was apparent on the face of the transactions, notwithstanding which the interests of the institution of which he was the trusted head were put aside, and his own made paramount in utter disregard of the outcome."

But even if the transactions were legitimate and proper per se, we see no error. Evidence of similar transactions was admissible on the question of intent, and we think the instructions of the lower court correctly laid down the law on the point of criminal intent. This question was left to the jury under instructions which were unexceptionable as matter of law and were applicable to the facts of the case, and the finding of the jury is supported by the record. *Agnew v. U. S.*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; *Coffin v. U. S.*, 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; *U. S. v. Harper* (C. C.) 33 Fed. 471; *Peters v. U. S.*, 94 Fed. 127, 36 C. C. A. 105; *United States v. Allis* (C. C.) 73 Fed. 165.

Objection is made to the charge of the court, and especially to the following:

"The law presumes that every man intends the natural, legitimate, and necessary consequence of his acts. Wrongful acts, knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud may be presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed."

The parts of the charge excepted to must be read in context with and interpreted by the paragraph preceding and the paragraph following the parts excepted to, because they relate to and are explanatory of the same subject-matter. *Coffin v. U. S.*, 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; *Agnew v. U. S.*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624.

Neither detached phrases nor detached sentences relating to a given subject-matter may be singled out for construction or interpretation without reference to the context, involving the same subject-matter.

The complete instruction as given by the court on this subject was as follows:

"If the defendant withdrew moneys from the bank for the use of the Illinois Southern Railway Company, the Southern Indiana Railway Company, the Chicago Chronicle Company, the Bedford Quarries Company, the Equitable Trust Company, or the Wisconsin & Michigan Railway Company, or any of them, by means of checks drawn by these companies on said bank when the company drawing the check had no funds or moneys on deposit against which

to draw, if the defendant acted in good faith, honestly believing that the corporation or company so withdrawing the funds or moneys would be able to repay the same, when required, then the defendant would not be guilty of the intent to defraud the bank as charged; but, on the other hand, if the defendant acted in bad faith, and did not believe, and had no reasonable ground to believe, that the company or corporation so withdrawing such moneys or funds could repay such overdrafts when required to do so, then the defendant had no lawful right to make such overdrafts, or allow them to be made.

"The acts constituting criminal misapplication must be done or committed with intent to injure or defraud the bank. This intent to injure or defraud is made by the statute an ingredient or element in this offense. In directing that this offense, or the acts constituting it, must be committed with intent to injure or defraud the bank, the statute does not mean that it must be made to appear that the accused had malice or ill will toward the bank. These terms, as used in the statute, mean that general intent to injure or defraud which always arises, in contemplation of law, when one willfully or intentionally does that which is illegal and fraudulent, and which, in its necessary and natural consequences, must injure another. So that while the offense of willful misapplication of the moneys, funds, or credits of the bank must be committed by the accused with intent to injure or defraud the bank, that intent may be shown or be presumed from the doing of the wrongful, fraudulent and illegal acts which in their necessary results naturally produce loss or injury to the bank.

"The law presumes that every man intends the natural, legitimate, and necessary consequences of his acts. Wrongful acts, knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud may be presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed.

"If therefore the moneys, funds, or credits of the Chicago National Bank are shown to have been willfully misapplied by the defendant and converted to the use of himself or some corporation other than the bank, whereby, as a necessary, natural, and legitimate consequence, the bank was injured and defrauded as charged, you would be authorized to find that such was his intent, if such intent is in harmony with the other proofs in the case."

Counsel have singled out the words excepted to and argue that they contain reversible error on authority of *Hibbard v. U. S.* (decided by this court at the January session, 1909) 172 Fed. 66.

Here the parts excepted to were directly modified by the two paragraphs preceding and the paragraph immediately following the sentences excepted to, and the jury are advised that they are authorized "to find the intent to injure or defraud if such intent is in harmony with the other proofs in the case." This clause saves the instruction from being assailed as was a similar instruction in *Hibbard v. U. S.* There was no suggestion here, and no language from which the jury could possibly infer, that the burden of proof shifts to the defendant; or that, on proof of an unlawful act knowingly committed, it thereupon became the duty of the defendant to overcome this presumption of guilty intent by evidence excluding every reasonable doubt of guilty intent. The language was that the intent to injure or defraud "may be shown or be presumed"—not that it is shown or necessarily is presumed—"from the doing of the wrongful, fraudulent, and illegal acts knowingly or intentionally committed," and that the jury would be authorized to find that such was his intent, not solely from proof of the illegal act knowingly committed, but "if such intent is in harmony with the other proofs in the case."

Also, the *Hibbard Case* is distinguishable on the difference between

the specific statutory intents described in sections 5480 and 5209, Rev. St. U. S., respectively (U. S. Comp. St. 1901, pp. 3696, 3497). Under section 5480, proof of individual instances where victims of the scheme were defrauded would raise no *prima facie* presumption that the scheme was devised to defraud; it may be that the ordinary and legitimate consequences of the acts of defendant in defrauding persons who used the mail to correspond with him in relation to his scheme would not establish the specific intent of "having devised a scheme to defraud by use of the mails."

Under section 5209, there could be misapplications of bank funds by an officer which would be innocent and not criminal, and there could be misapplications which under the statute would be criminal. What would show the difference between misapplications which were criminal and those which were not, what would show innocence or guilt, good faith or bad faith, the court sought by the instruction carefully to define and we think did fairly define.

The objection to the verdict on the ground of inconsistency and repugnancy we do not think is well taken. None of the alleged inconsistencies are substantial, nor of such a character as the law will recognize. A verdict will not be set aside as inconsistent, because it finds differently as to counts in which there is no material difference. So long as there is no inconsistency in the verdict as to the substance of the matter charged in the various counts, the verdict will not be disturbed. If the gravamen of the charge in each count, on which there has been a verdict of guilty, is the same, there is no inconsistency in the verdict. If, in contemplation of law, the legal effect of the allegations in the various counts on which there has been a verdict of guilty is the same, the courts will not upset the verdict on the ground of inconsistency, where the only inconsistency is in respect to immaterial particulars concerning the means by which the crime was committed. *Griffin v. State*, 18 Ohio St. 438; *Reg. v. O'Brian*, 1 Brit. Crown Cases, 9; *Hudson v. State*, 1 Blackf. (Ind.) 317; *Hathcock v. State*, 88 Ga. 91, 13 S. E. 959; *Tabler v. State*, 34 Ohio St. 127; *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353, 93 Am. St. Rep. 582; *Lyons v. People*, 68 Ill. 271; *Langford v. People*, 134 Ill. 444, 25 N. E. 1009.

By law each one of the counts in a given group is considered to state the same offense, and the gravamen of the offense stated in each count of these groups is the same. In finding the defendant guilty under all the counts in one of these groups, the jury have found him guilty of the same offense under each count. Here the gravamen of the offense was the misapplication of funds, and the method by which this misapplication was accomplished is immaterial.

It is entirely immaterial whether plaintiff in error made loans on bonds or on certificates for bonds. It is immaterial whether bonds were unsecured or insufficiently secured. It is immaterial whether plaintiff in error bought bonds from himself or from the Illinois Southern Railway Company. It was immaterial whether the bonds were unmarketable bonds or worthless as bank assets, or worth much less than the sum applied to the purchase thereof. In either of the contingencies

in any of these alleged inconsistencies the substance of the offense, misapplication of funds, was the same, and in legal effect the offenses were identical.

Objection is made to the verdict because of improper influences working upon the jury during the trial and during the deliberations of the jury, and also because of the hesitancy and vacillation of one juror upon the polling of the jury after the verdict was returned. The record does not show that any improper influence worked upon the jury. The return made to the court was in fact the verdict of 12 jurors. The attempt by one of them afterwards to impeach his verdict can have no consideration. This doctrine is well established and is based upon reason as well as upon authority.

In the other point on which assignments are based we find no reversible error.

The judgment of the court below is affirmed.

WALSH v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 28, 1909.)

No. 1,469.

BAIL (§ 44*)—CRIMINAL PROSECUTIONS—RIGHT TO RELEASE ON BAIL PENDING REHEARING IN APPELLATE COURT.

A defendant convicted of a criminal offense, and whose conviction has been affirmed by the Circuit Court of Appeals while he was at large on bail, will not be remanded to custody pending a motion for rehearing unless some unusual reason is shown why he is not likely to remain within the jurisdiction.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 44.*]

John R. Walsh was convicted of a criminal offense, and his conviction was affirmed by the Circuit Court of Appeals. Pending a petition for rehearing, a petition was filed by the United States for a rule requiring him to appear in person to show cause why his bail should not be set aside and he be remanded to the custody of the marshal. Petition denied.

John S. Miller, Edward C. Ritscher, Merritt Starr, and Louis E. Hart, for plaintiff in error.

Edwin W. Sims, U. S. Atty.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. Nothing is brought to our attention in the petition that shows any greater likelihood that the plaintiff in error will not remain in the jurisdiction of the court, to answer to the final order of the court, than ordinarily exists in criminal cases at this stage of the procedure. To sustain therefore the prayer of this petition would be to say that no convicted man, whose conviction has been affirmed, shall be allowed to be out on bail pending a petition for rehearing, or an application to the Supreme Court for writ of certiorari. This is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not the attitude that Courts of Appeal ought to take toward parties whose appeals have not been finally passed upon.

The petition is denied.

This action does not, however, preclude the government from keeping plaintiff in error under such surveillance as it may deem proper; nor for asking for increased bail; nor from renewing this motion in case plaintiff in error does not remain continually in the Northern district of Illinois.

BOSSELMAN v. RICHARDSON.

(Circuit Court of Appeals, Second Circuit. December 14, 1909.)

No. 30.

1. COPYRIGHTS (§ 69*)—INFRINGEMENT—BURDEN OF PROOF—LIBRARIAN'S CERTIFICATE.

Rev. St. § 4952 (U. S. Comp. St. 1901, p. 3406), provides that the author of a painting, or his assigns, on complying with the law, shall have the sole liberty of printing, publishing, copying, and vending a copyrighted painting; and section 4956 (U. S. Comp. St. 1901, p. 3407) requires the person entitled to the copyright of a painting, on or before the day of publication in the United States or in a foreign country, to deliver a description and a photograph to the Librarian of Congress. *Held*, that where plaintiff, as assignee, sued for the infringement of an alleged copyright on certain paintings, the burden was on him to prove that his assignor was the author, and that neither plaintiff nor his assignor had published the paintings before copyright, which burden he did not sustain by offering in evidence the certificate of the Librarian of Congress, acknowledging that descriptions and photographs of the paintings had been deposited by plaintiff in his office, and concluding with the words, "the right whereof he claims as proprietor in conformity with the laws of the United States respecting copyrights."

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 69.*]

2. COPYRIGHTS (§ 69*)—PAINTINGS—AUTHORSHIP—NONPUBLICATION.

Evidence of a neighbor of plaintiff's assignor that witness saw the assignor frequently while painting certain pictures, but did not see him use any paintings, pictures, drawings, or other pictorial works in so doing, and that witness and plaintiff did not know that the assignor ever exhibited the paintings outside his own parlor, or ever gave any one permission to copy them during the 30 years before they were copyrighted, was incompetent and insufficient to establish original authorship and non-publication before copyright, in an action for infringement.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 69.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by George S. Richardson against Andreas C. Bosselman. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 164 Fed. 781.

Rudolph Marks (Louis C. Raegener, of counsel), for plaintiff in error.

Philip J. McCook (Anson T. McCook and Hans von Briesen, of counsel), for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. The plaintiff in the court below recovered a verdict of \$20,000 against the defendant under section 4965, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3414), being a penalty of \$10,000 for the sale of over 1,000 postal cards reproducing each of two pictures painted by the plaintiff's father in 1875, describing the burning of the Norfolk Navy Yard and the ramming of the "Cumberland" by the "Virginia" in 1862, assigned to the plaintiff in 1905, and by him copyrighted in 1906. A great many exceptions were taken at the trial, which have been argued in this court, only two of which we think it necessary to consider, viz., that the complaint should have been dismissed on the ground, first, that there was no proof that Richardson, Sr., was the author of the pictures; second, that there was no proof that he had not published them before copyright. Upon this latter point the trial judge held that the burden lay upon the defendant to prove publication before copyright, and not upon the plaintiff to prove nonpublication.

Rev. St. U. S. § 4952 (U. S. Comp. St. 1901, p. 3406), provides that the "author" of a painting or his assigns, upon complying with the provisions of law, shall have the sole liberty of printing, publishing, copying, and vending the same. Section 4956 (U. S. Comp. St. 1901, p. 3407) requires the person entitled to the copyright of a painting "on or before the day of publication in this or any foreign country" to deliver a description and a photograph of it to the Librarian of Congress. The plaintiff rightly and necessarily averred in his complaint that Richardson, Sr., was the author of the paintings, that he assigned them to the plaintiff with full power to copyright, and that the plaintiff did before the publication of them anywhere comply with the provisions of law regulating copyrights. The answer denied all these allegations.

The certificate of the Librarian of Congress under section 4957, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3409), after acknowledging that descriptions and photographs of the paintings have been deposited by the plaintiff in his office, concludes with the words, "the right whereof he claims as proprietor in conformity with the laws of the United States respecting copyrights." Such a certificate is wholly unlike letters patent, which are issued under section 4884 after a quasi judicial examination of the applicant's rights, and which grant him, his heirs or assigns, the exclusive right to make, use, and vend the invention patented. A patentee accordingly makes out a prima facie case when he puts his letters in evidence and proves infringement. The owner of a copyright, on the other hand, is bound to prove compliance with all the statutory conditions, viz., in this case that his assignor was the author, and that neither he nor his assignor had published the paintings before copyright. *Wheaton v. Peters*, 8 Pet. 593, 669, 8 L. Ed. 1055, et seq.; *Merrell v. Tice*, 104 U. S. 557, 26 L. Ed. 854; *Bennett v. Carr*, 96 Fed. 213, 37 C. C. A. 453. The certificate of the Librarian of Congress is no proof of compliance with these conditions.

The plaintiff did prove that Richardson, Sr., painted the pictures and gave them to him under circumstances from which a right to copy-

right might be implied; that he did deliver to the Librarian of Congress a description and photograph of each; that he had not published them before doing so; that the defendant sold over 1,000 post cards of each picture, which cards the jury have found infringed. But the proof that Richardson, Sr., was the author—that is, that the paintings were his original work—depends upon the testimony of one Drury, a neighbor, and of the plaintiff, that they saw him frequently while painting the pictures, and did not see him use any paintings, pictures, drawings, or other pictorial works in doing so. The proof that Richardson, Sr., never published them prior to copyright is the testimony of Drury and of the plaintiff that they do not know that he ever exhibited the paintings outside of his own parlor, or that he ever gave any one permission to copy them during the long period of 30 years before copyright was applied for. This negative testimony, particularly as to nonpublication, seems to us incompetent and insufficient evidence to sustain a recovery for the drastic penalties imposed by Rev. St. U. S. § 4965 (U. S. Comp. St. 1901, p. 3414), for violation of copyright of maps, prints, paintings, etc. Exactly what amounts to publication in the case of paintings may not have been very definitely determined. *Werckmeister v. American Lithographic Co.* (C. C.) 134 Fed. 321, affirmed 207 U. S. 384, 28 Sup. Ct. 124, 52 L. Ed. 254. But the plaintiff has supplied no proof at all of nonpublication. Proof of compliance with the statutory conditions should be strictly enforced in a case where no application for copyright was made until more than 30 years after the subjects of copyright were painted, especially where the painter himself, though an old man residing in Norfolk and ill, was neither examined at the trial nor by deposition before trial.

The judgment is reversed.

STATE OF MISSOURI ex rel. DYKES et al. v. HENCKEN et al.

(Circuit Court of Appeals, Eighth Circuit. November 29, 1909.)

No. 2,768.

1. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

An instruction that the jury could consider the declarations of the person in possession of the property seized, at the time of the seizure, in determining who was the owner of it, was erroneous as ignoring the character of the person's possession, whether as owner or as a mere employé.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

2. EVIDENCE (§ 242*)—DECLARATIONS BY AGENTS.

Where an owner of property previously acquired intrusts it to an agent solely to operate, the agent cannot affect his principal's title by adverse declarations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 901; Dec. Dig. § 242.*]

3. SHERIFFS AND CONSTABLES (§ 171*)—SEIZURE OF PROPERTY.

In an action on a sheriff's bond for the alleged unlawful seizure of property under an attachment, an instruction that there was no evidence that the deputy sheriff acted otherwise than was his duty under the writ

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was erroneous under the proofs as amounting to the direction of a verdict for defendants.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 415; Dec. Dig. § 171.*]

4. TRIAL (§ 98*)—RECEPTION OF EVIDENCE—RULINGS.

Where, during the trial, a number of depositions were offered by both parties, it was improper practice for the court to withhold rulings on various objections to questions in the depositions until after they were read to the jury, and just before the instructions to sustain all the objections made by plaintiffs and overrule all those made by defendants.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 98.*]

5. APPEAL AND ERROR (§ 909*)—PRESERVATION OF ERROR—BILL OF EXCEPTIONS.

Where an objection, that the court refused to permit counsel for plaintiff in error to file affidavits of jurors disclosing what occurred with reference to alleged instructions given after the jury had retired, was not supported by anything appearing in the bill of exceptions, it would be presumed that the procedure objected to had not occurred.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3675; Dec. Dig. § 909.*]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Action in the name of the State of Missouri, on relation of Robert K. Dykes and others, against Edmund C. Hencken and others. Judgment for defendants, and relators bring error. Reversed and remanded.

James R. Van Slyke, for plaintiffs in error.

R. L. Shackelford, Joseph S. McIntyre, and J. C. Kiskaddon, for defendants in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. This was an action in the name of the state of Missouri, on the relation of Robert K. Dykes and others, copartners under the firm name of the Tomlinson Captive Balloon Company, upon the bond of the sheriff of St. Louis county, Mo., for damages caused by the wrongful seizure of their property as the property of one Meyer, who was a defendant in an attachment suit. There was a verdict and judgment for defendants, and plaintiffs brought this writ of error.

When the seizure was made by a deputy sheriff, the property was in the possession of George T. Tomlinson, who the sheriff and his sureties claim was a member of plaintiffs' firm, but who plaintiffs say was merely their agent engaged in operating the property for them. The important question of fact in the case was who owned the property, the plaintiffs or Meyer? There was substantial evidence for the plaintiffs that some months before the seizure they had bought the property from Meyer, had paid him for it, and that he no longer had any interest in it. There was no evidence to the contrary except some testimony that Tomlinson at the time of the seizure made certain declarations of that purport. It was admitted in evidence over plaintiffs' ob-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jections. With reference to this proof the trial court charged the jury as follows:

"Tomlinson, it appears by the uncontradicted testimony, was there in possession of this property. His action, his declaration, his statements, made at the time, is proper evidence for you to consider in determining where this property belonged and who the owner of it was."

This was excepted to. It will be perceived that the charge rests solely upon the fact that Tomlinson was in possession, and not upon the character of his possession, whether that of an owner or that of a mere employé. The only evidence that he had a proprietary interest in the property was that he was named as one of the plaintiffs' firm in the first petition filed in the case, but an amended petition was substituted for it in which his name did not so appear. There was other proof well-nigh conclusive that Tomlinson was not a member of the firm, and that his connection with their business was that of an employé upon a salary. The charge of the court was erroneous because it ignored the character of Tomlinson's possession. While declarations of an agent explanatory of his possession are admissible in proper cases, the question of actual ownership of the property here involved was collateral and had no relation to Tomlinson's duty as an employé. It was not contended he was in the service of Meyer, and, as already observed, the proof was clear that he had been employed by the plaintiffs upon a salary to operate the property for them. Whether the property was plaintiffs' or Meyer's depended upon a past transaction with which the agent's possession had no immediate connection. When an owner of property previously acquired intrusts it to an agent solely to operate, he does not thereby give him authority to declare away his right or title or to make competent evidence against it by his mere declarations.

The following instruction was also given and excepted to:

"The court instructs you that there is no evidence before this jury tending to prove that the deputy sheriff acted otherwise than was his duty under the attachment writ."

This was erroneous because it was equivalent to a direction of a verdict for the defendants. If the deputy sheriff did nothing except his duty, the sheriff and his bondsmen were not liable. It was not the duty of the deputy to seize plaintiffs' property under a writ running against the property of Meyer, and if he did so there was a breach of duty for which defendants are liable.

A number of depositions of absent witnesses were offered in evidence, some for the plaintiffs and some for the defendants. The court announced that it would withhold ruling on the various objections to questions in the depositions until after they were read to the jury. At the close of the evidence, and when about to instruct the jury, the court said generally that all objections made by the plaintiffs were sustained and all made by the defendants were overruled. This is not proper practice in a trial to a jury of an action at law. Manifestly when there is considerable evidence and many objections upon divers grounds, as was the case here, it would be impossible for the jury to give due effect to the rulings of the court. The answers to the ques-

tions which were objectionable in law but were read to the jury doubtless made the same lasting impression upon their minds as if no objections had been made and sustained. A court sometimes finds it expedient during the progress of a trial to allow evidence to go to the jury subject to objection, but when the ruling is made the jurors are given to understand what it relates to and how to apply it. That, however, is no precedent for the course pursued below.

Complaint is also made of a matter which, if true, would be a grave error. It is said to have occurred while the jurors were in the jury room. There is nothing in the bill of exceptions concerning it, and though counsel claims in an assignment of error and in his brief that the court refused to permit affidavits of the jurors disclosing what occurred to be filed, or a record to be made of it, it must nevertheless be assumed from the failure of counsel to adopt the appropriate course in such cases that there was no such occurrence.

The other assignments of error are not considered, as the matters mentioned may not arise again.

The judgment is reversed, and the cause remanded for a new trial.

IN RE T. A. McINTYRE & CO.

(Circuit Court of Appeals, Second Circuit. December 7, 1909.)

No. 92.

1. BANKRUPTCY (§ 340*)—PROOF OF CLAIM—STOCKBROKERS—SHARES PURCHASED ON MARGIN—EVIDENCE.

Where bankrupts, who were stockbrokers, on April 15, 1907, purchased 100 shares of certain stock for claimant, on which he had paid margin amounting to \$5,050.05, the fact that their books showed that on July 5, 1909, they received 8,465 shares of such stock and delivered 8,460 shares, was insufficient to establish that the brokers on that day converted claimant's stock, so as to entitle him to recover the total amount of his margins, instead of the amount of a credit balance on the sale of the stock.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

2. BANKRUPTCY (§ 458*)—CLAIMS—PROOF OF CLAIM—PRIMA FACIE EVIDENCE—BURDEN OF PROOF.

Where claimant before a referee in bankruptcy did not stand on his proof of claim and insist that the burden of proof was on the objectors, but offered evidence which was insufficient to establish the allegations in his proof of claim, he could not thereafter on appeal use such allegations to support the deficiencies of his testimony, under the rule that, though proof of claim has probative force, it cannot be regarded as self-proving, unless so relied on.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 918; Dec. Dig. § 458.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of T. A. McIntyre & Co., bankrupts. Application of David A. Niven for the allowance of a claim for margins amounting to \$5,050.05. From an order allowing the claim to the extent of only \$1,350.87, affirmed by the District Court, claimant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Prior to April 24, 1908, the bankrupts were stockholders doing business in the city of New York. On April 15, 1907, the claimant, Niven, purchased through them on margin 100 shares of the Distillers Securities Corporation at \$70 per share. The margin required was paid at the time of the purchase, and additional margin payments were subsequently made. The total amount paid as margin was \$5,050.05.

The brokers failed on April 24, 1908, and at that time the balance due upon the purchase price of said shares was \$1,899.13. This balance was not paid, and the account of the claimant was closed by the sale of said shares at the market price then existing. This left a credit balance due the claimant of \$1,350.87. The claimant never at any time tendered to the brokers the balance due upon the purchase price of said shares and demanded them.

The claimant presented a demand against the bankrupts' estate for said sum of \$5,050.05 paid as margins, alleging, in substance, in his proof of claim, that he had the right to rescind the contract between himself and the brokers and recover the margins paid by reason of their conversion of the said shares on July 5, 1907.

The claimant, without objection, went forward before the referee and offered to support his claim by the books of the brokers. The only evidence, however, presented to establish the fact of conversion, was the testimony of a witness that the brokers' stock record book showed that on July 5, 1909, they received 8,465 shares of Distillers stock and delivered 8,460 shares. There was no testimony upon the question whether upon that day the brokers had other shares of said stock pledged with or in the name of other persons.

The referee allowed the claim of the appellant to the extent of said credit balance of \$1,350.87, and no more. The action of the referee was affirmed by the District Court, and the claimant appealed.

Merrill & Rogers (A. L. Holbrook, of counsel), for appellant.

Irving L. Ernst and D. R. Cobb, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The basis of the claimant's demand is the conversion of his stock. The only evidence tending to establish a conversion is the entries in the stock record book showing that upon one particular day there was a difference of only five shares between the receipts and deliveries of Distillers stock. From this testimony the claimant seeks to draw the inference that on that day the brokers must have disposed of, and consequently have converted, his stock.

But the testimony does not warrant the drawing of this inference. There is nothing to show that, if the claimant had demanded his stock on the day in question, he would not have received it. The entries do not show necessarily that the brokers did not have under their control sufficient shares to make delivery. They may, in regular course of business, have parted with the possession of as many shares as they received, and yet have retained subject to their absolute control in the possession of another sufficient stock to meet the claimant's demand. If they did this, there was no conversion. *Lawrence v. Maxwell*, 53 N. Y. 19; *Horton v. Morgan*, 19 N. Y. 170, 75 Am. Dec. 311; *Douglas v. Carpenter*, 17 App. Div. 329, 45 N. Y. Supp. 219; Am. & Eng. Encyc. of Law (2d Ed.) § 1057; *Jones on Pledges* (2d Ed.) § 507.

Upon the testimony regarding the book entries the claimant failed to establish his claim before the referee. He contends, however, that the allegations of his proof of claim constituted *prima facie* evidence

of conversion, and that the burden was upon those objecting to his claim to show that the bankrupts at all times had the shares or their equivalent in their possession or under their control. Concededly this was not affirmatively shown, and, consequently, he urges that his claim must stand as established.

It is undoubtedly true that a sworn proof of claim has probative force. It is prima facie evidence of its allegations even when objected to. In the recent case of *Whitney v. Dresser*, 200 U. S. 532, 535, 26 Sup. Ct. 316, 317, 50 L. Ed. 584, Mr. Justice Holmes, said:

"The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: 'Objections to claims shall be heard and determined as soon,' etc. Section 57f [Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443)]. It is the objection, not the claim, which is pointed out for hearing and determination. This indicates that the claim is regarded as having a certain standing already established by the oath. * * * We believe that the understanding of the profession, the words of the act and convenient and just administration all are on the side of treating a sworn proof of claim as some evidence even when it is denied."

There would, therefore, be much force in the claimant's contention, if he had taken the same position before the referee. He might properly have stood upon his proof of claim, and have insisted that the objectors should go forward. But he did not do so. He offered to establish the allegations of his proof of claim by the entries in the stock record book, and contended that the inference to be drawn therefrom supported the charge of conversion. Having thus attempted to establish the allegations in his proof of claim, he cannot be permitted to use those very allegations to supply the deficiencies in his testimony. A proof of claim may have some probative force; but it certainly should not be regarded as self-proving, unless relied upon.

The decision of the District Court is affirmed, with costs.

In re GREGORY et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1909.)

No. 75.

BANKRUPTCY (§ 143*)—ASSETS—STOCK EXCHANGE SEAT—PROCEEDS OF CLOSED TRADE.

Where, on the bankruptcy of a member of a stock exchange, his seat is sold and his transactions on the floor closed out under its rules, the proceeds of both pass to the member's trustee in bankruptcy, subject, however, to the rules of the Exchange that they should be appropriated, first, to the payment of the member's indebtedness to the exchange, second, to claims arising against him out of the transactions on the floor of the exchange, and, third, loans from members, as against his general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 202; Dec. Dig. § 143.*]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of Howard Gregory, and others, individually, etc., bankrupts. Petition of the Consolidated Stock Exchange of New York to revise an order of the District Court confirming an order of the referee in bankruptcy directing petitioner, its agents, etc., to pay over to the trustees certain moneys held by the chairman of petitioner's clearing committee. Reversed.

Sullivan & Cromwell (Royall Victor and George H. Stover, of counsel), for petitioner.

Robert G. Perry, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. One of the bankrupts was a member of the Consolidated Stock Exchange of New York, under whose rules, because of his insolvency, his seat was sold for \$850 and certain of his stock transactions on the floor of the Exchange were closed out at a profit of \$315.48. These sums by the rules of the Exchange are to be appropriated to the payment of his indebtedness as a member of the Exchange in the following order: Indebtedness to the Exchange, \$134.50; claims arising against him out of transactions on the floor of the Exchange, \$511.86; loan from a member of the Exchange, \$2,000. The trustee admits that under the case of *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264, the proceeds of the seat cannot be reached by him, but he claims the moneys in the hands of the chairman of the clearing committee resulting from the closing out of the bankrupt's floor transactions. The District Judge, without expressing any opinion himself, has so ordered in deference to the decision of the state court in *Cohen v. Budd*, 52 Misc. Rep. 217, 103 N. Y. Supp. 45, affirmed 117 App. Div. 922, 102 N. Y. Supp. 1133.

The rationale of the decision in *Hyde v. Woods*, supra, is that the purchase of a seat—that is, of a license to do business as a member of an Exchange—is subject to the rules of the Exchange; e. g., that in case of the purchaser's insolvency its proceeds should be first applied to the payment of his Exchange creditors, to the exclusion of his creditors outside of the Exchange. This is a quality which always inheres to his seat or license, though it passes as his property under the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

If the exercise of this license, viz., the purchase and sale of stocks from and to members of the Exchange, resembles the ownership of the license, then the profits on stock transactions should also pass to the trustee, subject to the rules of the Exchange. We see no such difference between the seat and profits from stock transactions as to require a different disposition of the latter from the former. Doubtless they both pass to the trustee in bankruptcy under section 70 (5) of the act, because the bankrupt could have transferred them. But he could not have transferred them, nor could they have been reached by execution, except subject to the claims of creditor members of the Exchange.

In *Ex parte Saffery*, 4 Ch. Div. 555 (1876), the Court of Appeals ordered the official assignees of the London Stock Exchange to pay

over to the trustee in bankruptcy £5,000 which the bankrupt had paid them out of his general estate for the purpose of settling with his Stock Exchange creditors. James, L. J., speaking for the court, held that this act of the bankrupt was a *cessio bonorum* in fraud of the act, because it was a voluntary assignment of a part of the bankrupt's general estate for the benefit of a special class of creditors, as distinguished from his creditors generally. The decision was affirmed in the House of Lords. *Tomkins v. Saffery*, 3 App. Cas. 213 (1877).

On the other hand, in *Ex parte Grant*, L. R. 13 Chan. Div. 667 (1880), the Court of Appeals refused to order the official assignees of the same Exchange, in whose hands were certain credits like those under consideration, to pay them over to the trustee in bankruptcy of the member. James, L. J., who had previously delivered the opinion of the court in *Ex parte Saffery*, thought the official assignees held these credits in their own right, and that the trustee's action, if any, must be against the persons who had paid the money to them. *Baggally and Cotton, L. JJ.*, thought the moneys in the hands of the official assignees were not assets of the bankrupt at all, but an artificial fund created by virtue of certain rules of the Exchange. These two decisions seem to us entirely consistent, and they must have been intended by James, L. J., who decided them both in the Court of Appeals, to be consistent. The transfer in the first case was held invalid because it was a voluntary act of the bankrupt, whereas the credits in the second case were held to be properly applied by the officers of the Exchange in accordance with the rules of the Exchange, of which he was a member when the credits accrued. Whether the reasons given in *Ex parte Grant* are clear and satisfactory, or not, the decision rests fundamentally on the ground that the rules of the Stock Exchange are valid and not in fraud of the bankrupt act.

We think the reasoning of the Supreme Court in *Hyde v. Woods*, *supra*, and *Page v. Edmunds*, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, as to a seat in such an Exchange, more satisfactory, and that it applies equally to credits accruing from transactions of the bankrupt on the floor of the Exchange closed out under the rule. If the rules take the estate of the Exchange member out of the bankruptcy act, as the court held in the case of *Cohen v. Budd*, *supra*, they are clearly invalid; but in our opinion they do not. They simply pass with the estate of the bankrupt for administration under that act.

As it is manifest that nothing will be left under the rules in this case to go to the trustee, the order is reversed.

THE TORONTO.

(Circuit Court of Appeals, Second Circuit. December 7, 1909.)

No. 65.

1. SHIPPING (§ 132*)—DELAY—STAY AT INTERMEDIATE PORT—NEGLIGENCE.

Where a steamer's call at an intermediate port during seven voyages made the previous year had averaged $5\frac{5}{7}$ days, a stay on a subsequent voyage extending to 11 days, including 2 Sundays, a holiday, and $1\frac{1}{2}$ days of rain, was not negligence per se.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*]

2. SHIPPING (§ 117*)—DELIVERY—BILL OF LADING.

Where a bill of lading for the shipment of onions called for delivery at New York, a tender of delivery at Hoboken, in the port of New York, was insufficient.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 429; Dec. Dig. § 117.*]

3. SHIPPING (§ 141*)—BILLS OF LADING—EXEMPTIONS—NEGLIGENCE.

Exemptions in bills of lading are not construed to cover the negligence or default of the carrier, unless it is expressly stipulated for.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 497; Dec. Dig. § 141.*]

4. SHIPPING (§ 141*)—BILLS OF LADING—DELIVERY—EXEMPTIONS—STRIKES.

Where a bill of lading exempted a carrier from delay occasioned by strikes or stoppage of labor "from whatever cause," and on the arrival of the ship delivery was delayed by a general longshoreman's strike, which prevented prompt delivery, which had been in progress for a month before arrival, and continued after she was discharged, with which strike the carrier had nothing to do, it was entitled to the benefit of the exemption.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 497; Dec. Dig. § 141.*]

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel of William N. White and another against the steamship Toronto and Thomas Wilson's Sons & Co., Limited, claimants or owners, to determine damages for the deterioration of a shipment of onions, due to the delay in delivery. Judgment for respondent, and libelants appeal. Affirmed.

For opinion below, see 168 Fed. 386.

Charles Caldwell, for appellants.

Wing, Putnam & Burlingham (Charles C. Burlingham and Jonathan H. Holmes, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The onions were delivered in a damaged condition, and we shall assume that this was due to delay in delivery, as the libel alleges. The bill of lading is an execrable document, owing to the multitude of exceptions it contains, many of them unreasonable and under our law invalid, the small type in which it is printed, the length of the lines, and the lack of any paragraphing to help the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

eye. Still it is the contract of carriage and to be enforced, whether the libelants read it or not, except as to provisions contrary to public policy or our law. It is dated Hull, May 11, 1907, and receipts for 4,000 bags of onions in apparent good order and condition, to be delivered in like good order at the port of Boston, the consignee to have the option of delivery in New York on giving notice before the steamer's arrival at Boston. It contains the following provisions:

"* * * But nothing in this bill of lading (whether written or printed) is to be read as an engagement that the said carriage shall be performed directly or without delays; the ship is to be at liberty either before or after proceeding towards the port of delivery of the said goods, to proceed to or to return to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route to the said port of delivery) once or oftener in any order, backwards or forwards, for loading or discharging cargo, passengers, coals, or stores, or for any purpose whatsoever, whether in relation to her homeward voyage, or to her outward voyage, or to an intermediate voyage and all such ports, places and sailings shall be deemed included within the intended voyage of the said goods."

"* * * Restraints of princes, rulers and people, vermin, jettison, bar-ratry, riots, strikes, tumults, lockouts, stoppage of labor from whatever cause, and consequent delays and loss or damage by force or otherwise. * * *"

The libelants availed themselves of the option in the bill of lading and ordered the onions to be delivered in New York, where a general strike of longshoremen then prevailed. The steamer arrived at Boston May 25th, and after loading 550 tons and discharging 867 tons of cargo sailed thence for New York June 5th. It is claimed that the steamer should not have stayed at Boston more than three days. The proof shows that in 1906 she made seven voyages to Boston, her average stay being five and five-sevenths days, practically six days. We cannot say that a stay of eleven days per se shows negligence. They included two Sundays, one holiday and a day and a half of rain, four and a half days in all on which no work was done. Whether six and a half days were too long for rigging cargo gear and discharging and loading 1,417 tons of cargo depends upon the number of holds into which cargo was loaded or from which it was discharged and in what order the holds had to be worked. Although the steamer had eight hatches, work was done only at Nos. 2, 3, 4, and 7, and not on the same days at those. In the face of the positive testimony that there was no unusual delay and the finding of the District Judge, we cannot say that there was, merely because less time was taken on other voyages as to which we have no particulars. It was certainly to the ship's interest to get away as soon as possible, unless earlier arrival at New York would have given no greater dispatch because of the labor troubles there, which we shall presently consider.

The steamer on arrival at New York June 6th, not being able to get to her own pier, went, as she had a right to do under the bill of lading, to Hoboken, where by June 11th, she discharged all her cargo except the onions, which the libelants insisted must be delivered not only in the borough of Manhattan, but between Piers 48 and 52, North River, claimed by them to be the market for Egyptian onions. The claimant contends that delivery at Hoboken would be a delivery at the port of New York and a performance of the bill of lading, which,

however, called, not for the port of New York, but for New York. The question is not important, because the claimant did deliver eventually at Pier 50, New York, in accordance with the libelants' requirement. The last question, therefore, is whether the delivery ought not to have been made there sooner.

The claimant relies upon the exception of strikes or stoppage of labor "from whatever cause." The libelants say that these last words are broad enough to include the claimant's own negligence, and therefore the whole exception is void under the Harter act. Even if this were so, the words apply only to stoppage of labor, leaving strikes as an independent category. But on familiar principles exemptions contained in bills of lading are never construed to cover the negligence or default of the carrier unless that is expressly stipulated for. We do not think the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) has any application at all.

There is no doubt that there was throughout the port of New York a general strike of longshoremen for higher wages, which lasted from about May 6th to June 17th, that it caused a great congestion of transatlantic freight, and prevented the claimant from delivery in ordinary course after the Toronto arrived there. It is true that by conceding what the strikers demanded the claimant could have had all the labor it needed and could have delivered the onions much sooner. But this can be said of every strike, and so the exception be made valueless. While it would no doubt not cover a strike or stoppage of labor caused by or promoted by the carrier, we do not think we have a right to apply or refuse to apply it accordingly as we find the demand of the strikers reasonable or unreasonable. We feel bound to give it effect. There was a strike and stoppage of labor, ultimately unsuccessful, which did prevent prompt delivery, and the claimant is entitled to the benefit of the exception.

The decree is affirmed.

In re OAKLAND LUMBER CO.

(Circuit Court of Appeals, Second Circuit. December 14, 1909.)

No. 60.

1. BANKRUPTCY (§ 444*)—REVIEW—APPOINTMENT OF RECEIVER—RECORD.

On a petition to review an order denying an application to vacate an order appointing a receiver of an alleged bankrupt, the Circuit Court of Appeals cannot consider as facts statements in the brief of the petitioning creditors, unsupported by the record, since, if the appeal book did not state the facts, it should have been amended on motion.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 444.*]

2. BANKRUPTCY (114*)—RECEIVERS—APPOINTMENT—"ABSOLUTELY NECESSARY."

Bankr. Act July 1, 1898, c. 541, § 2, subd. 3, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), provides for the appointment of receivers by courts of bankruptcy in case the court should find it "absolutely necessary" for the preservation of the assets, etc. *Held*, that the words "absolutely neces-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

sary," as so used, required clear, positive, and certain proof of necessity; and hence, where a bankrupt's property was in the hands of an assignee for the benefit of creditors, and it was not claimed that it was being dissipated or improvidently cared for, or that the assignee was not careful, prudent, or responsible, an ex parte order appointing a receiver was erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164-166; Dec. Dig. § 114.*

For other definitions, see Words and Phrases, vol. 1, p. 45.]

Petition to Review Order of the District Court of the United States for the Eastern District of New York.

In the matter of the Oakland Lumber Company, an alleged bankrupt. On petition of Albert H. Tuttle to review an order of the District Court of the United States for the Eastern District of New York denying a motion to vacate an order appointing a receiver of the alleged bankrupt. Reversed.

Louis H. Strouse, for petitioner.

Thomas C. Hughes, for petitioning creditors.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. On February 16, 1909, certain alleged creditors of the Oakland Lumber Company, a domestic corporation, filed a petition alleging as an act of bankruptcy that the said company

"while insolvent and unable to pay its liabilities, made an assignment for the benefit of its creditors on the 4th day of January, 1909, to Albert H. Tuttle."

On the same day an additional petition made by Patrick F. Cradock, one of the petitioning creditors, was presented to the District Judge asking for the appointment of a receiver. This petition alleged that the assets of the Oakland Lumber Company

"amount to the sum of \$25,000 and consist of stock in trade, and outstanding accounts, and that the liabilities of the said bankrupt exceed the sum of \$25,000. * * * That it is necessary, in order to properly protect and preserve the assets of said alleged bankrupt, pending the adjudication upon said petition and the election and appointment of a trustee, that a receiver be appointed."

The petition further states that the alleged bankrupt has outstanding accounts and negotiable paper and orders for merchandise which should be collected and attended to. It will be observed that these papers contain no averment that the property of the lumber company was perishable or that it was being dissipated or improvidently cared for or that the assignee under the state law was not a careful, prudent and responsible person. In short there was nothing presented to the District Judge but the ordinary creditors' petition supplemented by a statement of one of the petitioners that, in his judgment, a receiver was necessary.

On these papers and without notice to the bankrupt or the assignee, a receiver was appointed and the bankrupt was directed forthwith to deliver to the receiver all its property in its possession or under its control.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

On the 18th of February the alleged bankrupt moved to vacate the order appointing the receiver. Argument was heard on this motion February 26th and on the 18th of March, 1909, it was denied. On the 3d of March the Lumber Company filed an answer denying all the material allegations and demanded a jury trial of the issues thus raised.

The questions here presented must be determined upon the facts as they appear in the record.

Manifestly we are not at liberty to consider as facts, statements made in the brief of the petitioning creditors which are unsupported by the record. If the appeal book did not state the facts a motion should have been made to amend it.

The question, broadly stated, is this—Should the court have vacated the *ex parte* order appointing the receiver?

At the time this motion was made the questions presented by the creditors' petition and the bankrupt's answer were undetermined and, so far as this record discloses, there was nothing to indicate that the assignee under the state law was not an honest, capable and responsible man in whose hands the property was entirely safe.

The direct grant of authority for the appointment of receivers is found in section 2, subd. 3, of the act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]), and is as follows: Courts of bankruptcy are invested with jurisdiction to

"appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of the estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."

The power to take from a man his property, without giving him an opportunity to be heard, is both arbitrary and drastic and should not be exercised except in the clearest cases. Congress recognized the necessity for caution by limiting the appointment of receivers to cases where it is "absolutely necessary" for the preservation of the estate. In other words the reason for such an interference with the rights of property must be clear, positive and certain. Of course cases frequently arise where this remedy may be necessary—cases where there is reason to believe that the property may be stolen or secreted or turned over to favored creditors. But fraud cannot be presumed, neither can danger to the property be predicated of acts which are honest and lawful. It cannot be presumed that an assignee under a state law intends to plunder the fund he is appointed to administer. Unless something be shown to the contrary the presumption is persuasive that during the interval between the filing of the petition and the appointment of a trustee, the property will be entirely safe in the hands of the assignee especially if he be enjoined from disposing of it *pendente lite*. We are informed that it has grown into a well established custom for the attorney for the petitioning creditors, when he files his petition, to apply at the same time for the appointment of a receiver and that the application is usually granted. If such a practice exists we see nothing in the law to warrant it. It seems to us that the rule which obtains in all other jurisdictions where receivers are appointed is equally applicable to courts of bankruptcy and that in no case should a remedy so

far reaching in its effects be resorted to except upon clear and convincing proof. Cases have not infrequently come within the observation of the court where after a receiver was appointed the petitioning creditors were unable to establish their own status or to prove an act of bankruptcy and the petition was dismissed, leaving the court with a receiver on its hands with no proceeding in esse and no funds with which to pay him and the expenses incurred by him. Again the appointment of a receiver creates an additional official to be paid from the estate.

Nothing contributed so much to bring about the repeal of the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 567) as the large expense of administration, the small estates being entirely absorbed in fees. The more economical the administration of the present act the longer will it continue as an important adjunct to trade and commerce.

All these reasons combine in requiring that the power to appoint receivers should be exercised not as a matter of course but cautiously, circumspectly and always upon proof that the appointment is "absolutely necessary."

The question here presented was, upon facts substantially identical, decided by this court in *Re Spalding*, in May, 1905. As the opinion was delivered orally and has not been reported, we quote it at length:

"The fundamental error in the argument for the receiver and of the learned court below seems to be that both regard it as proper that a receiver should be appointed, practically as a matter of course, in every case where a petition in bankruptcy is filed. That is not the law and it is not good sense.

"The court has jurisdiction under the statute to appoint receivers only when it shall find it absolutely necessary for the preservation of estates. The petition upon which this receivership was granted not only fails to show that it was absolutely necessary, but shows affirmatively that it was absolutely unnecessary, as it shows the property to have been in the custody of a receiver appointed by the Supreme Court of the state of New York, and there is nothing in the record to show that the state court receiver is not an entirely proper and competent person to preserve the assets. What could the federal receiver do under such circumstances? He has not title to any property. He is a mere custodian. He could not take the assets from the state court receiver. The bankruptcy court could not make any such order and the assets could only be taken from the state court receiver by an application in the state court itself.

"Furthermore, this appointment of receivers as of course is a great injustice to the bankrupt in the event that the petition is not followed by adjudication. And it is wasteful and an unnecessary expense to the estate in the event that there is an adjudication.

"The papers on this application are wholly inadequate. The order is reversed with instructions to vacate the receivership."

To the same effect are *In re Rosenthal* (D. C.) 144 Fed. 548; *Collier on Bankruptcy* (7th Ed.) 29; *Beach on Receivers*, § 134, 140-142; *Am. & Eng. Enc. of Law*, vol. 23, 1011.

The order of the District Court is reversed with costs.

UNITED STATES v. INTERNATIONAL & G. N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. December 21, 1909.)

No. 1,803.

COMMERCE (§ 27*)—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT—PENALTIES.

Under the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring all cars used in interstate traffic to be equipped with automatic couplers, as amended by Act March 3, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), extending the act to all cars used in interstate commerce and all cars used in connection therewith, a carrier of interstate commerce over an interstate railway is liable for penalty as to all cars and trains operated on such railway, though the defective car is being hauled from one point to another in the same state, provided that it is part of a train engaged in interstate traffic.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.*]

In Error to the District Court of the United States for the Northern District of Texas.

Action by the United States against the International & Great Northern Railroad Company. Judgment for defendant, and the United States bring error. Reversed.

The following is the petition:

"Your petitioners, the United States of America, appearing by William H. Atwell, their attorney for the Northern district of Texas, represent that this action is brought upon the suggestion of the Attorney General of the United States, at the request of the Interstate Commerce Commission, and upon information furnished by said Commission, and complain of the International & Great Northern Railroad Company, a corporation organized and existing under and by virtue of the laws of the state of Texas, and having an office in the city of Ft. Worth, Tarrant county, and state of Texas, with A. W. Montague as its agent in charge thereof.

"Plaintiffs represent that the defendant is a common carrier engaged in interstate commerce by railroad among the several states and territories of the United States, and particularly the states of Texas, Louisiana, and Arkansas, and that the defendant was so engaged at the time of the happening of the matters hereinafter detailed.

"Plaintiffs allege that in violation of the act of Congress known as the 'Safety Appliance Act,' approved March 2, 1893, as amended by an act approved April 1, 1896, and as amended by an act approved March 2, 1903, the said defendant, on or about February 18, 1907, hauled on its line of railroad one car, to wit, C., O. & G. No. 11217, said car being one that was regularly used in the movement and carrying of interstate traffic, but which at the time of said violation being loaded with cotton consigned to points within the state of Texas, but that the defendant's said line of railroad over which said car was to be hauled, and was in fact hauled on said date, is a part of a through highway over which interstate traffic is being continually hauled, and was in fact at that time being hauled from one state in the United States to another state in the United States, to wit, from the state of Texas to the states of Louisiana and Arkansas.

"Plaintiffs further allege that said car on said date was part of a train which carried interstate traffic, to wit, packing house products, consigned from Denver, in the state of Colorado, to Houston, in the state of Texas, in car A. R. T., refrigerator, No. 8773.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Plaintiffs allege that on the said date the defendant hauled said car with the said traffic and freight thereon and therein over its line of railroad from Ft. Worth, in the state of Texas, in a southerly direction and within the jurisdiction of this court, to wit, in Tarrant county, state of Texas, when the coupling and uncoupling apparatus on the 'A' end of said car was out of repair and inoperative in this, namely, the top clevis to the chain connecting the lock-pin or lock-block to the coupling lever being missing on said end of said car, thus necessitating a man or men going between the ends of the cars to couple and uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the safety appliance act, as amended by section 1 of the act of March 2, 1903.

"Plaintiffs allege that by reason of the violation of the said act of Congress aforesaid the defendant became liable to these plaintiffs in the penal sum of one hundred dollars.

"Wherefore, premises considered, plaintiffs pray that the defendant be cited in terms of law, that upon final hearing hereof they have judgment for the said sum of one hundred dollars, and all costs of this suit, and for such other relief as they may be entitled to under the law."

The defendant demurred to the petition, and assigned as grounds:

"(1) It demurs to the petition filed in this cause, and says the allegations therein contained show no cause or right of action against this defendant.

"(2) It specially excepts to said petition, and says the same fails to show any cause of action in this:

"(A) It appears from the allegations of said petition that the car containing the alleged defects was not at the time that same is alleged to have been out of order, engaged in moving interstate traffic, but was at said time moved from one point in Texas to another point in Texas.

"(B) Said petition does not show that said car at the time the alleged defects were found was engaged in moving interstate traffic.

"(C) No allegations are made which show any state of facts making this defendant liable by reason of any law to the United States."

The Circuit Court sustained the demurrer, and the judgment is assigned as error.

Wm. H. Atwell, U. S. Atty., and Luther M. Walter and Philip J. Doherty, Sp. Asst. U. S. Attys.

Geo. Thompson and J. H. Barwise, Jr. (M. A. Spoonts, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). The petition alleges that the defendant in error is a common carrier engaged in interstate commerce between the several states and territories of the United States; that its line of railroad is a part of a through highway over which interstate traffic is being continually hauled; that on a named day it hauled a certain car, No. 11217, loaded with cotton, consigned from one point in the state of Texas to another point in the same state; that this car was hauled in a train one car of which contained interstate traffic; and that at the same time said car No. 11217 had its coupling and uncoupling apparatus in such defective condition as to require the presence of an employé between the ends of the car and the one to which it was attached in order to uncouple them.

The trial court sustained a demurrer to the petition, and, the plaintiff declining to amend, dismissed the cause.

We are of opinion that the petition copied in the statement of the case states a good cause of action under the safety appliance act of Congress of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), as amended March 2, 1903. The effect of the amendment is to apply the provisions and requirements of the act to all cars used on any railroad engaged in interstate commerce and to all other cars used in connection therewith. Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143). If it is so used, it makes no difference if the defective car was empty, or how it was loaded at the time. The act, as amended, applies to all cars and trains operated by a railroad carrier of interstate commerce over an interstate railway, irrespective of whether the defective car is being hauled from one point to another in the same state or not; it being part of a train engaged in interstate traffic. *Wabash R. Co. v. United States*, 168 Fed. 1, 93 C. C. A. 393; *Pacific Coast Ry. Co. v. United States* (C. C. A.) 173 Fed. 448; *Johnson v. Southern Pacific Company*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

The judgment of the District Court is reversed, and the cause remanded, with instructions to overrule the demurrer.

KLEIN v. POWELL et al.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 37.

BANKRUPTCY (§ 408*)—DISCHARGE—OBJECTIONS—CONCEALMENT OF ASSETS—“KNOWINGLY AND FRAUDULENTLY.”

Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), provides that a bankrupt shall be discharged unless he has committed an offense punishable by imprisonment, and section 29b declares that a person shall be punished by imprisonment on conviction of having “knowingly and fraudulently” concealed while a bankrupt, or after his discharge, property belonging to his estate. *Held*, that the words “knowingly and fraudulently,” as so used, must have their natural significance in considering a charge of concealment in opposition to a discharge, and hence, where the bankrupt received \$85.10 as the unearned part of certain insurance premiums on lapsed policies, and he used the same to pay rent after his counsel, who was also counsel for the creditors, had advised him that the money belonged either to an insurance society or to his wife, he did not “knowingly or fraudulently” conceal property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 735; Dec. Dig. § 408.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3937-3939; vol. 3, pp. 2955-2957.]

Appeal from the District Court of the United States for the Western District of Pennsylvania, in Bankruptcy.

Application by John F. Klein, bankrupt, for discharge, to which W.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. Powell and another filed objections. From an order sustaining the objections, the bankrupt appeals. Reversed, with instructions.

L. C. Barton, for appellant.

Charles A. Woods, for appellees.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. On August 7, 1907, a creditors' petition was filed against John F. Klein, the appellant, on which he was, on August 24, 1907, adjudged a bankrupt. On January 28, 1908, he presented his petition for a discharge, and the customary order was made returnable February 28, 1908. On this return day, a claim, which had been proved and allowed by the referee October 11, 1907, was assigned to Powell, the appellee, who thereafter, within the time allowed by the referee as a party in interest, made several objections to the said discharge, all of which thereafter were disallowed by the referee, except the fifth objection, which is, that the said John F. Klein concealed from his trustee the sum of \$85.10, which he received on or about December 31, 1907, proceeds from a policy of life insurance or deposit for premium made thereon prior to bankruptcy. This objection was sustained by the referee in bankruptcy, as special master, in the following language:

"It appears that on or about the date specified, the bankrupt received from the insurance company the sum of \$85.10, to which his trustee was clearly entitled, and that he used it for his own purposes in paying a pressing bill for rent, in spite of the advice of his counsel."

Section 14b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), provides that the application of a bankrupt for a discharge shall be heard, with such proofs and pleas as may be made in opposition thereto by parties in interest, and that the applicant shall be discharged, unless he has (1) committed an offense punishable by imprisonment, as herein provided. This provision is found in section 29b, as follows:

"A person shall be punished by imprisonment * * * upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt or after his discharge from his trustee any of the property belonging to his estate in bankruptcy."

We have carefully examined the testimony contained in the record, and have failed to find any evidence that the money received from the insurance company by the bankrupt, was "knowingly and fraudulently concealed by him." On the contrary, it appears that he had, long before his bankruptcy, borrowed from the insurance company the full amount loanable on his policies, and this \$85.10 was the amount of two partial payments made on account of premiums on April 29, 1907 and on June 5, 1907, respectively, when he was given an extension until November 28, 1907, after which, the balance due not having been paid, the policy lapsed. The policy was a tontine policy, payable at his death to his wife, in case she survived him. It is doubtful from the testimony whether, on account of the loans above referred to, the policy had any cash or surrender value. At all events, the \$85.10 does not appear to have been paid on this account, but as a return of the partial pay-

ments on premium, to which the agent of the company did not think it entitled after the lapse of the policy. The controlling fact, however, appearing in the record, is the uncontradicted testimony of the counsel for the bankrupt, who was also counsel for the creditors and the trustee, that the appellant consulted him in regard to this refund from the insurance society, and was told by said counsel that in his—

"opinion, this money belonged to the Equitable Life Assurance Society, they having an assignment of these policies. I told him this. I advised him not to use the money for this reason, that we doubted the authority of the society to cancel its policies, and if he accepted this check, it would ratify the act, but I told him I thought the money was his wife's or that of the Assurance Society."

There is no other testimony in regard to this payment, that in the least degree impugns the good faith of the appellant, or suggests fraudulent concealment from the trustee. Conceding that not every concealment which is sufficient to bar a discharge will result in an indictment and conviction, it is nevertheless true, that the words "knowingly" and "fraudulently" must have their natural significance given to them, when considering a charge of concealment made in opposition to a discharge. It must at least appear, by a clear preponderance of testimony, that the concealment charged was practiced knowingly and fraudulently. It is noticeable that, of the six reasons for refusing a discharge recited in section 14b, all except the last two (which stand by themselves on a ground that affects the administration of the law) imply moral turpitude on the part of the bankrupt.

For the reason stated, therefore, the bankrupt should have been discharged by the court below, and the order refusing the discharge is hereby reversed, with instructions for the entry of an order discharging the bankrupt.

In re IRWIN et al.

(Circuit Court of Appeals, Third Circuit. December 6, 1909.)

No. 26.

1. BANKRUPTCY (§ 400*)—EXEMPTIONS—ALLOWANCE.

Under Bankr. Act July 1, 1898, c. 541, § 7, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), requiring bankrupts to file with their petition their respective claims for exemptions, exemptions, having been once allowed, could not be increased after the bankrupts' discharge, within the limit allowed by the laws of the state, out of assets subsequently discovered.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

2. BANKRUPTCY (§ 446*)—PETITION TO SUPERINTEND AND REVISE—SCOPE OF REVIEW.

On a petition in bankruptcy to superintend and revise, the appellate court can review only questions of law, and cannot disturb the trial court's findings of fact.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 446.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 446*)—ATTORNEY'S FEES—ALLOWANCE.

An order of a bankruptcy court finding that \$100 was a reasonable attorney's fee in each of two voluntary cases could not be reviewed on a petition to superintend and revise.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 446.*]

On Petition for Revision of Proceedings of the District Court of the United States for the Western District of Pennsylvania, in Bankruptcy.

In the matter of James S. Irwin and George B. Irwin, bankrupts. On petition to superintend and revise certain orders increasing the bankrupt's exemption after discharge. Reversed.

Charles A. Woods, for petitioners.

Albert York Smith, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. James S. Irwin and George B. Irwin were partners in business. On January 14, 1908, they filed their voluntary petition in bankruptcy as a partnership and as individuals. The schedules showed that, exclusive of wearing apparel, the individual assets of James amounted to \$142, and of George to \$95, only. They claimed these assets as property exempt from seizure in bankruptcy under the provisions of section 6 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]). That section gives to bankrupts the same exemptions as are allowed by the state law of their domicile. The law of Pennsylvania, the place of the Irwins' domicile, provides that any debtor, of the class to which the Irwins belonged, may have an exemption of "property to the value of three hundred dollars, exclusive of wearing apparel," and also that he may elect to retain his exemption, or any part thereof, "out of any bank notes, money, stocks, judgments or other indebtedness to such person." They received their discharge in bankruptcy on April 23, 1908. In June, 1908, additional assets were discovered, from which the trustee in bankruptcy realized, for the individual estate of James \$2,086.74, and for the individual estate of George \$2,074.05. On December 8, 1908, James and George each filed with the referee a petition claiming a sufficient sum to make the total exemption to each of them the sum of \$300. The referee refused to allow the additional exemptions prayed for. By an order in each case, the District Court reversed the referee, and allowed to James, in addition to his former exemption of \$142, the sum of \$158, and to George, in addition to his former exemption of \$95, the sum of \$205. These orders are now before us on petition to revise.

It will be observed that the applications for the additional exemptions were made more than seven months after the applicants had received their discharge in bankruptcy and six months after the discovery of the additional assets. They were required by section 7 of the bankruptcy act to file, with their petition to be adjudged bankrupt, their respective claims for exemptions. They did so. Subsequently, on April 23, 1908, they received their discharges. Each of them then

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

departed from the jurisdiction of the court, without claim to any part of his assets except the exempted property set forth in his schedules. While the rule allowing claims for exemptions to be amended is a liberal one, we think it ought not to be allowed after discharge in bankruptcy has been granted. In *re Kean*, 2 Hughes, 322, Fed. Cas. No. 7,630. In any event, an application to amend a claim for exemption should be made within a reasonable time after discovering the facts which will justify the amendment. The record of this case fails to show why the bankrupts, who discovered their additional assets in June, 1908, waited until the following December before applying for leave to amend their schedules. Our opinion is that the orders of the District Court, in so far as they increase the exemptions to the bankrupts, should be reversed.

The same orders also increased the fee allowed to the bankrupts' attorneys from \$37.50 in each of the two cases, fixed by the order of the referee, to the sum of \$100 in each case. These increases are also before us for review.

Section 64b provides that amongst the costs that may be paid out of a bankrupt's estate is one reasonable attorney's fee for the professional services actually rendered to the bankrupt in voluntary cases. In this case no other fee had been allowed to any attorney for either of the bankrupts. In considering the services performed, the District Court had power to review the facts on which the referee had fixed the fee in each case at \$37.50. It concluded that a reasonable fee in each case was \$100. On the petition to this court to revise, we can consider only questions of law. We are not at liberty to disturb the District Court's findings on the facts. The orders of the District Court, so far as they relate to attorney's fees, will therefore be affirmed.

Orders reversed as to bankrupts' exemptions, and affirmed as to attorney's fees.

GOODMAN v. CURTIS.

In re GOODMAN.

(Circuit Court of Appeals, Fifth Circuit. November 9, 1909.)

No. 1,889.

1. BANKRUPTCY (§ 399*)—RIGHT OF BANKRUPT TO EXEMPTIONS—WAIVER—AMENDMENT OF SCHEDULES.

A bankrupt does not lose his right to claim the exemptions allowed him by the laws of the state by his failure through the mistake of his attorney to specifically claim them in his schedule, and, on application at any seasonable time while the property remains in the hands of the trustee unaffected by adverse rights, should be permitted to amend his schedule in that respect as authorized by general orders No. 11 (89 Fed. vii, 32 C. C. A. xiv).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

2. BANKRUPTCY (§ 439*)—REVISION OF PROCEEDINGS—SCOPE OF REMEDY.

The right of a bankrupt to amend his schedule to supply an omission through mistake to claim his exemptions is a valuable legal right, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the action of the district court in refusing the amendment may be reviewed by the Circuit Court of Appeals on petition to revise under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 439.*]

3. BANKRUPTCY (§ 399*)—EXEMPTIONS—WAIVER OF RIGHT.

The fact that a bankrupt has given notes in which he waived his right to exemptions does not give the bankruptcy court jurisdiction to administer his exempt property, nor affect his right to have the same set apart to him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.*]

Petition to Superintend and Revise Proceedings of the District Court of the United States for the Northern District of Alabama, in Bankruptcy.

In the matter of J. Goodman, bankrupt. Petition of bankrupt to revise an order of the District Court refusing him leave to amend his schedules. Reversed.

The referee in bankruptcy in charge of the proceedings certified to the District Judge as follows:

That on May 25, 1908, said bankrupt filed his voluntary petition in bankruptcy containing schedules of assets and liabilities. No reference was made in the petition or schedules to a claim of exemptions by the bankrupt except in the petition, which was a printed one, and was in the approved form and contained the statement that the bankrupt "is willing to surrender all his property for the benefit of his creditors except such as is exempt by law." An adjudication of bankruptcy was regularly made on the date of the filing of the petition, and on June 24, 1909, a trustee was regularly appointed for said bankrupt's estate. On July 7, 1908, bankrupt filed a petition asking for leave to amend his petition and schedules by filing a claim of exemptions claiming as exempt \$1,000 worth of his assets, and this petition was duly heard, evidence was taken, and an order made denying the petition and refusing leave to amend.

On the hearing of the petition, bankrupt and J. D. Acuff, Esq., were each examined as witnesses, and testified, in substance, that a few days before the petition in bankruptcy was filed bankrupt employed Acuff, who was an attorney, to file a petition in bankruptcy for him, stating to Acuff at the time that he desired to claim \$1,000 worth of his property as exempt, and that Acuff advised bankrupt that it was not necessary that the claim of exemptions should be made or filed at the time the petition was filed, and that the proper practice was that the exemptions should be claimed after the appointment of a trustee; that the advice was given by Acuff in good faith and that bankrupt relied on same; that Acuff then prepared the petition in bankruptcy and schedules accompanying the same, and on his advice bankrupt signed them; that bankrupt had always since the filing of the petition expressed the intention of claiming his exemptions, and had always intended to claim them.

This was all the evidence offered on said hearing, except claims filed and allowed including notes for \$1,100, in which bankrupt had waived his exemptions and other nonwaiver claims.

The question presented on this review is whether a voluntary bankrupt by failing to file with his petition and schedules a claim to such exemptions as he may desire, as required by section 7 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), waived his right to exemptions, notwithstanding he may have intended to claim exemptions and his omission to file the claim was due to a mistake of his attorney.

The District Judge approved and confirmed the ruling of the referee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

George Huddleston, for petitioner.

J. J. Curtis, for respondent.

Before PARDEE, Circuit Judge, and JONES and FOSTER, District Judges.

PARDEE, Circuit Judge (after stating the facts as above). By the second section of the bankruptcy act of 1898, the bankruptcy court is given jurisdiction, among other things, (11) "to determine all claims of bankrupts to their exemptions," and by the sixth section it is provided:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

By the seventh section of the same act it is made the duty of the bankrupt, among other things, (8) to "prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition, if a voluntary bankrupt, a schedule of his property, showing * * * and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee."

By the forty-seventh section of the act it is made the duty of the trustee, among other things, to (11) "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."

By the seventieth section of the act the trustee takes title as of date of the adjudication in bankruptcy, "except in so far as it is to property which is exempt."

General order in bankruptcy No. 11 (89 Fed. vii, 32 C. C. A. xiv) is as follows:

"The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."

Applying these provisions of the law, which so fully and carefully protect the bankrupt's exemptions, to the facts as given by the referee, we think it is clear that the bankrupt did not waive his right by failure to set forth in his schedules a claim for such exemptions as he was entitled to.

This is the plain equity and we think also the clear law of the case. Certainly the bankrupt did not intend to waive his exemptions, nor did he at any time in terms waive them. The mere failure to claim them in the schedules, which are amendable by the equity practice in General Order No. 11, ought not to be treated either as a legal or equitable estoppel. See *Burke v. Title & Trust Co.*, 135 Fed. 562, 67 C. C. A. 486, and *Remington on Bankruptcy*, §§ 1063-1070, inclusive. In this particular case it seems that the failure to specifically claim the exemptions in the schedules arose from the fact that the attorney who

prepared the schedules for the bankrupt was ill informed as to the textual provisions of section 70 of the bankruptcy law, and advised his client that the claim for exemptions should be made later when the trustee should be appointed. And, on this aspect of the case, see *In re Fisher* (D. C.) 142 Fed. 205, and *In re Kaufmann* (D. C.) 142 Fed. 898. In *re Carley*, 117 Fed. 130, 55 C. C. A. 146, decided by the Circuit Court of Appeals in the Third Circuit, is authority for the proposition that, where the right to amend in bankruptcy proceedings is a valuable legal right, the action of the district judge in refusing the amendment may be revised in the Circuit Court of Appeals under section 24b of the bankruptcy act of 1898. This must be correct, because by said section 24b our jurisdiction to revise is in equity.

In this case the bankrupt did not waive his exemptions, and he had notwithstanding his omission to set forth his claim in the schedules a clear legal right to the exemptions allowed by the laws of the state of Alabama; and we think he had a legal right to prefer his claim in the bankruptcy proceedings at any seasonable time while the property remained in the hands of the trustee unaffected by adverse rights. Having this clear legal right, whether he asserted it by petition or by proposed amendment to defective schedules is immaterial. As appears by the law above quoted, the trustee took no title to the exempt property; and it was his duty to set the same apart as soon as practicable. There is no contention, aside from the omission in the schedules, that the claim was not asserted seasonably; in fact, reservation in the original petition suggested the right. As to the effect the alleged waiver notes may have to defeat or affect the bankrupt's rights, see *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

For these reasons, the judgment of the District Court and of the referee denying the bankrupt the right to so amend his schedules as to claim his exemptions under the laws of the state of Alabama are reversed, and the petitioner is allowed to file his amendment to the schedules within a reasonable delay fixed by the court, the proceedings thereon to be according to law and in accordance with the views herein expressed.

MENGEL BOX CO. v. DULIN.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1909.)

No. 2,993.

MASTER AND SERVANT (§ 218*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

Plaintiff, a boy 18 years old, while operating a grooving machine in defendant's box factory, slipped on the floor, and his hand was caught by the knives and injured. He had been working around the machine for a year, and operating it for two or three weeks. While of low mentality, he testified that he knew the floor was slippery, and that if he slipped his hand was likely to come in contact with the knives and be injured. *Held*,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the injury resulted from a risk which he appreciated and assumed, and that defendant was not liable therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 603, 604, 608; Dec. Dig. § 218.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Action by Will J. Dulin, by his next friend, against the Mengel Box Company. Judgment for plaintiff, and defendant brings error. Reversed.

Millard F. Watts, William M. Williams, Tyson S. Dines, and William R. Gentry, for plaintiff in error.

Albert C. Davis and Chester H. Krum, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. On the 26th day of August, 1907, Will J. Dulin was in the employ of the Box Company and engaged in operating a grooving machine in its factory at St. Louis, Mo. The machine was used to cut grooves in tobacco boxes for the internal revenue stamp. On the day mentioned Dulin, while pushing a box against the knives in the grooving machine, slipped on the floor where he was standing, and by reason of his slipping his hand was caught and injured by the machine. He brought suit against the Box Company, by his next friend, to recover damages for the injury thus received. The only ground of negligence specified in his petition was the putting of Dulin to the work of operating said machine without instructions or caution which would enable him to comprehend and appreciate the dangers of operating the same. It was also alleged that Dulin was of low mentality, of which the Box Company had been advised prior to the date of the injury. Dulin recovered a judgment in the court below.

At the close of all the evidence, counsel for the Box Company requested the court to direct a verdict in its favor, for the reason that Dulin's injuries were caused by the ordinary risks and hazards of his employment which he must be deemed to have assumed. The request was denied, and this action of the court is now assigned as error. We are of the opinion that the request of counsel for the Box Company ought to have been granted. The uncontradicted evidence shows that for a period of one year Dulin had been in the employ of the Box Company in dragging boxes along the floor to the machine in question; that he had worked upon this same machine off and on for two or three weeks prior to the accident. In regard to his knowledge of the danger attending the operation of the machine, Dulin himself testified as follows:

"Q. Then you knew, if you slipped, your hand would be liable to go into the machine? A. Yes, sir. Q. And you knew, if your hand went into those knives, you would be severely hurt? A. Yes, sir. Q. The foreman told you that? A. Yes, sir. Q. You saw the knives cut wood? A. Yes, sir. Q. So you knew

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

they would cut? A. Yes, sir. Q. And you knew the floor was slippery, because you sometimes put soapstone on there yourself? A. Yes, sir. Q. And you knew anything on it was liable to slip, because you saw the boxes slip on it? A. Yes, sir."

The evidence did show that Dulin was of low mentality; but notwithstanding this it did not appear anywhere in the evidence but that he knew and fully appreciated the dangers attending the operation of the machine. It appeared in the evidence, according to the testimony of Dulin's mother, that some time in April, 1907, she had a conversation with the superintendent of the Box Company, wherein she informed him that Dulin was weak-minded; but she also testified that she also said to the superintendent that she hated to have the boys tease Dulin, and hoped it would be stopped, because, if Dulin killed a boy down there, after she had told the superintendent, then Dulin would not be responsible for it. It thus clearly appears that the mother was warning the Box Company against Dulin as a dangerous person, and not that he was unfit to operate the machine in question. But, regardless of any warning, or of the low mentality of Dulin, it appears clearly that he fully knew and appreciated the dangers attending the operation of the machine. Dulin was 18 years of age, and under the rule established by this court in *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551, *Glenmont Lumber Co. v. Roy*, 126 Fed. 524, 61 C. C. A. 506, *Denver & R. G. R. R. v. Norgate*, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981, *Kirkpatrick v. Railroad*, 159 Fed. 855, 87 C. C. A. 35, and *Federal Lead Co. v. Swyers*, 161 Fed. 687, 88 C. C. A. 547, must be held to have assumed the risk attending the operation of the machine.

Judgment reversed, and new trial ordered

SOUTHERN PAC. CO. v. M'GINNIS.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1909.)

No. 1,960.

MASTER AND SERVANT (§ 86*)—FEDERAL EMPLOYER'S LIABILITY ACT—SUPERSEDING TERRITORIAL STATUTE.

The provisions of Act N. M. March 11, 1903 (Laws 1903, p. 51, c. 33), relating to suits for wrongful death and personal injuries, so far as they apply to suits by employes against a railroad company, were superseded by the federal employer's liability act (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. § 86.*]

What law governs master's liability for injuries to servant, see note to *Mexican Cent. Ry. Co. v. Jones*, 48 C. C. A. 232.]

In Error to the Circuit Court of the United States for the Western District of Texas.

Action by Maggie McGinnis, administratrix, against the Southern Pacific Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

T. J. Beall, for plaintiff in error.

Geo. E. Wallace, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This action was brought in the Circuit Court of the United States for the Western District of Texas by the defendant in error to recover of the plaintiff in error damages for causing the death of Neil B. McGinnis. Service was made on the plaintiff in error by delivering a copy of citation to A. W. Cheeseman, as local agent and representative of the Southern Pacific Company, in El Paso county, Tex., and also delivering a copy of the citation to A. W. Reeves, as local passenger and ticket agent in El Paso county, Tex., of the plaintiff in error. The plaintiff in error objected to the jurisdiction of the court, and moved to quash the service of citation on the ground alleged that it had no agent or representative in El Paso county, Tex., and none in the Western district of Texas, and that it does not own or operate any line of railroad within that district or within that state, and has not done so since the accrual of the plaintiff's cause of action; that it does not do any business, and has not done any, in the Western district of Texas, since the accrual of plaintiff's cause of action. The defendant in error (plaintiff below) answered this motion by proper pleading, and much testimony was offered on the issue joined, which issue appears to have been voluntarily submitted to the judge a quo without the intervention of a jury, and the order thereon recites that the court, having duly considered the same, and heard the evidence relating to the motion and the argument of counsel thereon, is of opinion that the motion should be overruled.

Whether in this case we must accept the judge's findings on this plea as conclusive (*So. Pac. Co. v. Melvin*, 157 Fed. 1005, 85 C. C. A. 679) it is not necessary for us to decide, because from a careful examination of all the proof the majority of the court is satisfied that the finding and order of the judge thereon was correct. The plaintiff in error sought, by exceptions to the pleadings of its adversary and by requested charges, to defeat or limit the right of a recovery in the case by seeking to have applied to it certain specified statutes of the territory of New Mexico. On May 11, 1907, the deceased was a locomotive engineer in the employment of the plaintiff in error, and was in charge of the engine pulling one of its passenger trains from El Paso, in the state of Texas, to Lordsburg, in the territory of New Mexico, which train, it is alleged and was shown, collided at a point near Lordsburg with certain cars then wrongfully on the main track, whereby Neil B. McGinnis received the injuries which caused his death. The assignment that the judge erred in refusing to apply to this case the specified statutes of the territory of New Mexico relating to the subject is, we think, concluded against the plaintiff in error by the case of *El Paso & Northeastern Ry. Co. v. Enedina Gutierrez*, Adm'r of the Estate of Antonio Gutierrez, Deceased, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. —, announced by the Supreme Court November 15, 1909.

The judgment of the Circuit Court is affirmed.

Affirmed.

WOODS v. UNITED STATES. †

(Circuit Court of Appeals, Fifth Circuit. December 7, 1909.)

No. 1,966.

1. CRIMINAL LAW (§ 1167*)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

A general verdict and judgment on an indictment containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3101; Dec. Dig. § 1167.*]

2. CRIMINAL LAW (§ 728*)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR—REMARKS OF COUNSEL.

A judgment in a criminal case will not be reversed by an appellate court because of improper remarks made by the district attorney, where a mistrial was not asked to be entered at the time, and the jury were instructed to disregard such remarks, and did so, as evidenced by their acquittal of the defendant on the count to which they particularly related.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.*]

In Error to the District Court of the United States for the Western District of Texas.

Will F. Woods was convicted of a criminal offense, and brings error. Affirmed.

William Aubrey and Henry Terrell, for plaintiff in error.

Chas. A. Boynton, for the United States.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In this case six counts of the indictment were submitted to the jury, and a verdict was rendered thereon finding the defendant guilty upon the second, third, fifth, sixth, and ninth, and the court assessed punishment upon this verdict under all said five counts by a general sentence of eight years.

Under the statute involved (section 5209, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3497]) this sentence is one that could have been imposed under each individual count.

We find that count 3, on which the defendant was found guilty, is good in form, sufficient in substance, and that the evidence warranted the jury in convicting thereon.

It is well settled that a general verdict and judgment on an indictment containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment. *Claasen v. United States*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; *Evans v. United States*, 153 U. S. 596, 14 Sup. Ct. 934, 38 L. Ed. 830; *Goode v. United States*, 159 U. S. 669, 16 Sup. Ct. 136, 40 L. Ed. 297.

In *Claasen v. United States*, supra, it is said:

"This count, by a verdict of guilty returned upon it, being sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 4, 1910.

In relation to such assignments of error as assert reversible error on account of the language of the district attorney in argument to the jury, which it is claimed commented upon the right of the defendant to testify in his own behalf, we are of opinion that as the defendant did not at the time ask to have a mistrial entered, and as at the time the trial judge directed the jury to disregard the statement of the district attorney, and as the jury acquitted the defendant upon the count to which the district attorney's remarks particularly related, showing that they were not prejudiced by said remarks, the said assignments of error are not well taken.

On the whole record, we find no reversible error, and the judgment of the District Court is affirmed.

UNITED STATES v. ROSENTHAL et al.

(Circuit Court of Appeals, Fifth Circuit. November 2, 1909.)

No. 1,838.

CUSTOMS DUTIES (§ 133*)—CUSTOMS LAWS—VIOLATION—FORFEITURES—PLEA IN BAR.

A verdict for defendants, indicted for smuggling certain diamond rings into the United States, was ground for a plea in bar to a libel by the United States for the forfeiture of the rings.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 133.*]

In Error to the District Court of the United States for the Western District of Texas.

Proceeding by the United States against eight solitaire diamond rings, and Max Rosenthal, claimant, for forfeiture under the United States customs laws. From a judgment dismissing the libel, the United States brings error. Affirmed.

The following is the opinion of Maxey, District Judge, on sustaining a plea in bar:

This is a libel of information filed by the government to forfeit eight diamond solitaire rings, and other items of jewelry mentioned in the information, because of their unlawful introduction into the United States, and Max Rosenthal and Abraham Rosenthal appear as claimants of the jewelry in the information described. The court finds that there was probable cause for the seizure of the diamonds and other jewelry mentioned in the information, and directs that a proper certificate thereof be entered of record. The plea avers, and it is admitted by counsel for the government, that Max Rosenthal and Abraham Rosenthal were indicted, tried, and acquitted of the offense of smuggling into the United States the articles in the information described. The court desires further to say that it differs with the jury in the conclusion reached by them in acquitting the defendants, Max and Abraham Rosenthal; but the question submitted to the jury was one of fact, which it was their duty to resolve as they deemed proper under the evidence and instructions of the court, and, the jury having seen fit to acquit the defendants, there is no appeal from such a verdict. The claimants in this case having been acquitted of the offense of smuggling in the criminal prosecution, the law declares that such verdict and judgment of acquittal may be interposed in bar of a libel of information based upon practically the same offense.

Counts 1 and 3 of the information charge that the articles of jewelry mentioned therein were smuggled by Max and Abraham Rosenthal into the United

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

States. The judgment of acquittal in the criminal case may clearly be interposed as a bar to these two counts. There may be some doubt as to whether such judgment of acquittal may be interposed as a bar to the remaining counts of the information; but the court is of the opinion that such judgment of acquittal is a bar to all the counts in the information contained, for the reason that all the counts of the information charge substantially the smuggling of the articles, that is to say, the clandestine introduction of the same into the United States without paying or accounting for the duties with intent to defraud the revenue, and the same proof substantially is necessary to sustain the counts as was required upon the trial of the criminal cause of smuggling.

The court, as stated, being of the opinion that the judgment of acquittal is a bar to all the charges contained in the information, directs that an order be entered sustaining the plea in bar filed by the claimants and dismissing the information.

Chas. A. Boynton, U. S. Atty.

W. B. Ware, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the District Court is affirmed. See opinion of Judge Maxey in this cause, and Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684; Stone v. United States, 167 U. S. 184, 17 Sup. Ct. 778, 42 L. Ed. 127.

NICHOLSON v. HAYES et al.

(Circuit Court of Appeals, Fifth Circuit. December, 14, 1909.)

No. 1,942.

1. MORTGAGES (§ 32*)—DEEDS POLL—POSSESSION—ESTOPPEL.

Where deeds poll were executed pendente lite, and in one of them the consideration was dependent on the result of litigation, no possession being shown in the mortgagee, he was not estopped by them.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 85; Dec. Dig. § 32.*]

2. MORTGAGES (§ 32*)—ABSOLUTE DEED AS MORTGAGE—ESTOPPEL.

Grantors in deeds poll executed pendente lite are not estopped in equity from showing that they were mortgages.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 85; Dec. Dig. § 32.*]

In Error to the Circuit Court of the United States for the Southern District of Texas.

Action by Milton L. Hayes and others against Charles A. Nicholson. Judgment for plaintiffs, and defendant brings error. Affirmed.

Henry F. Ring and Presley K. Ewing, for plaintiff in error.

H. Masterson, N. C. Abbott, and H. N. Atkinson, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. Although the clerk certifies "the foregoing to be a true and correct copy of the record, assignment of errors, and all proceedings in the cause numbered 67 C. L. on the law docket of said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court, entitled *Milton L. Hayes v. R. E. Dodson et al.*, as the same now appears on file of record in my office," it appears that only such parts of the record as the plaintiff in error directed are included in the transcript. The answer or other pleading putting the cause at issue as to the plaintiff in error, one of the defendants below, is omitted, leaving us to infer his defenses and claims.

Our conclusion, on the record as presented, is that no one of the assignments of error is well taken, and only one, the eighth, needs particular notice. The eighth reads:

"The court erred in denying the said defendant Nicholson's prayer for a direction to the jury to disregard all testimony tending to show that the three deeds in favor of Masterson from the defendants claiming to be the heirs of John W. Martin were mortgages and to consider them as absolute deeds."

The evidence of Masterson that "those deeds, while purporting to be deeds on their face, as a matter of fact were only security for small sums of money advanced during litigation," was admitted on the trial without objection. The deeds are deeds poll, and show on their face that they were made pendent lite, and in one of them the consideration is made dependent on the result of the litigation. No possession having been shown in Masterson, he is not estopped by said deeds. See *Bigelow on Estoppel*, 344. The grantors are not estopped in equity from showing the deeds to be mortgages.

The question as affecting the issues in this case is one of fact, and not of jurisdiction. The judge's charge to the jury, to the effect that if they believed that the three deeds to H. Masterson were not intended as mortgages, as testified to by said H. Masterson, then they should so state in their verdict, and find in favor of the plaintiff to the extent of the undivided interests of the parties making the conveyances, was not excepted to, and it sufficiently guarded the rights of the parties.

The judgment of the Circuit Court is affirmed.

SIMMONS v. GREER.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 847.

1. BANKRUPTCY (§ 188*)—MORTGAGES—CONSIDERATION—MONEY ADVANCED.

A mortgage on a bankrupt's stock of goods for money loaned at the time the mortgage was actually executed is not invalidated by the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 286; Dec. Dig. § 188.*]

2. BANKRUPTCY (§ 184*)—MORTGAGE LIENS—VALIDITY—"CREDITORS."

Civ. Code S. C. 1902, § 2456, provides that mortgages shall be valid, so as to affect subsequent lien or simple contract creditors, only when recorded within 40 days; but that the subsequent recording shall be notice to all creditors who become such after the date of the recording. *Held*, that the words "subsequent creditors" meant only those who became such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after the execution of the mortgage, not including the mortgagee, so that, where a mortgage on the bankrupt's stock was not recorded within 40 days, and before recording other claims arose, exceeding the amount of a fund realized from the sale of the property, the mortgagee was not only not entitled to a lien, but was not entitled to share with such "creditors."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. § 184.*

For other definitions, see Words and Phrases, vol. 7, pp. 6734, 6735.]

Pritchard, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of South Carolina, at Charleston, in Bankruptcy.

Proceedings for the distribution of a fund arising from the sale of the bankrupt's mortgaged stock of merchandise. From an order disallowing the claim of the mortgagee (164 Fed. 300), he appeals. Affirmed.

B. A. Hagood (T. Moultrie Mordecai, on the brief), for appellant.
E. Randolph Williams (Henry Buist, on the brief), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge. This is a controversy over the distribution of a fund arising from the sale of a stock of merchandise belonging to the bankrupts which, on February 20, 1906, was mortgaged to the appellant, B. I. Simmons. So far as affected by the bankrupt law, it is conceded that, as to the \$1,958.89 loaned at the time the mortgage was executed, the mortgage is not invalidated by the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The question in controversy arises from the fact that the mortgage was kept off the record until April 5, 1906, a period of over 40 days, and there are creditors of the bankrupt who became such in the interval between the execution of the mortgage and its recording whose claims exceed the amount of the fund.

The statute of South Carolina enacts that mortgages of real or personal property shall be valid, so as to affect subsequent creditors, whether lien creditors or simple contract creditors, only when recorded within 40 days; but the subsequent recording shall operate as notice to all creditors who become such after the date of the recording. Section 2456 of the Civil Code of South Carolina of 1902. This act, therefore, creates a class of creditors who are not affected by the mortgage, while all others take rights which are subordinate to it. That class is those who have become creditors between the date of the mortgage and the date of its record, and that without regard to whether they are "lien creditors or simple contract creditors." If there is a fund to be distributed among creditors, and some take subordinate to a lien, and there are others who are not affected by the lien, the result must be that those who are not affected by the lien are paid first, and the lien creditor is postponed to them. This was the ruling of the learned District Judge in *Re Cannon*, supported by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his careful opinion published in 121 Fed. 582, with full citation of authorities, and that was his ruling in the present case.

The assignments of error on this appeal are in effect that the judge below should have held that Simmons, the mortgagee, was entitled to share in the fund with the subsequent creditors. This contention must be upon the theory that he was as to his debt a subsequent creditor. This, we think, is an obviously strained and untenable construction. Simmons' debt and the mortgage to secure it were created simultaneously, and the debt cannot be said to have been subsequent to the mortgage. The only sensible meaning to be given to the words "subsequent creditors," used in the statute, is that they are creditors who became such subsequent to the execution of the mortgage. The South Carolina statute governs the rights of the respective parties. By that statute, and the construction placed upon it by the South Carolina courts, the mortgage is good without recording as to the bankrupt and as to all creditors whose rights accrued prior to its execution, and it is of no effect as to those creditors, whether simple contract or lien creditors, whose rights accrued between the execution of the mortgage and its recording. The ruling below gave effect to the statute.

In *Piester v. Piester*, 22 S. C. 139-143, 53 Am. Rep. 711, the question was whether the holders of the bonds secured by the mortgages should share ratably with the subsequent creditor because of the statute fixing the order in which a decedent's debts should be paid out by his estate; and the lower court so held, but the appellate court reversed the lower court on that point, and approved the ruling that, so far as the rights of creditors who come within the category of subsequent creditors were concerned, the unrecorded mortgage should be treated as nonexistent.

The sole error assigned upon this appeal, and which is properly before us to be considered, is that the District Court should have held that the mortgagee ought to have been allowed to share as a subsequent creditor ratably with the creditors to whom the bankrupt became indebted after the date of the mortgage. This we think would have been error, and the court was right in not so ruling.

Affirmed.

PRITCHARD, Circuit Judge, dissents.

THEODORE W. MORRIS & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 7, 1909.)

No. 98 (5,265).

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—ENGRAVED STEEL—"PLATES."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), for "plates" of steel, does not include an engraved piece of steel, 15 feet long, 4 feet 2 inches wide, 6.5 inches thick, and weighing over 6 tons, which is a completed article

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ready for use in glass manufacture, because it is not a "plate," and because said paragraph is limited to articles in an incomplete condition.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*

For other definitions, see Words and Phrases, vol. 6, p. 5403.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 169 Fed. 666.

Brooks & Brooks (Frederick W. Brooks, of counsel), for importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Martin T. Baldwin, Sp. Atty., of counsel), for the United States.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The merchandise in this case is a piece of steel 15 feet long, 4 feet 2 inches wide, 6½ inches thick, and weighing over 6 tons, with a geometrical design engraved on one side. It is a completed article ready for use in the manufacture of glass. The Circuit Court affirmed the decision of the Board of General Appraisers assessing it under paragraph 193 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]) which reads:

Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The importers, on the other hand, claim that it should have been assessed under paragraph 135, the relevant parts of which read as follows:

Steel ingots, cogged ingots, blooms, and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; mill shafting; pressed, sheared, or stamped shapes; saw plates, wholly or partially manufactured; hammer molds or swaged steel; gun-barrel molds not in bars; alloys used as substitutes for steel in the manufacture of tools; all descriptions and shapes of dry sand, loam, or iron-molded steel castings; sheets and plates and steel in all forms and shapes not specially provided for in this act. * * *

Schedule C of the act is entitled "Metals and Manufactures of," and from paragraphs 121 to 142 covers, generally speaking, iron and steel in forms upon which further work must be done before they are used. Paragraphs 142 to 172, on the other hand, cover completed articles made of iron or steel ready for use.

Judge Hazel in *Morris v. United States* (C. C.) 140 Fed. 774; T. D. 25,183, held without opinion a similar importation to be dutiable under paragraph 135, but his decision in the subsequent case of *United States v. Newman Wire Co.* (C. C.) 152 Fed. 488, T. D. 27,896, indicates a change of view. Our decision in the latter case (159 Fed. 123, 86 C. C. A. 511, T. D. 28,600) applies here no further than to indicate that the merchandise is a slab and cannot be regarded as a sheet or plate. The question whether it is dutiable under paragraph 135 or paragraph 193 was expressly reserved.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 174 F.—42

The uncontradicted testimony shows that further work must be done on all the articles specifically mentioned in paragraph 135 before they are ready for use, except perhaps in the case of hammer molds or gun-barrel molds, about which there is no proof at all. This being so, we think the intent of Congress will be best ascertained by construing the final catch-all clause of the paragraph, "steel in all forms and shapes not specially provided for in this act," as applying to other uncompleted forms and shapes than those previously enumerated. As the merchandise in question has been advanced actually and commercially beyond the articles covered by paragraph 135 so construed, is ready for use, and is not elsewhere specifically provided for, it falls within the general catch-all paragraph 193.

Judgment affirmed.

**SAFETY CAR HEATING & LIGHTING CO. v. CONSOLIDATED CAR
HEATING CO.**

(Circuit Court of Appeals, Second Circuit. November 17, 1909.)

No. 49.

1. PATENTS (§ 328*)—INVENTION—CAR HEATING APPARATUS.

The Searle patent, No. 707,361, for a railway car heating apparatus, which consists of a system of pipes for the circulation of hot water, the claimed novel feature being the combination of one transfer heater in the riser pipe and another at the lowest point of the circuit, is void for lack of invention in view of the prior art; no new result being accomplished by the use of the two heaters, conceding that they act in combination, and are not merely an aggregation.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 268*)—SUIT FOR INFRINGEMENT—LACHES.

An unexplained delay of 12 years after alleged infringement was commenced before bringing suit constitutes such laches as precludes the recovery of profits or damages.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 412; Dec. Dig. § 268.*]

Laches as a defense in suits for infringement, see notes to *Taylor v. Sawyer Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.*]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Suit in equity by the Safety Car Heating & Lighting Company against the Consolidated Car Heating Company. Decree for defendant (160 Fed. 476), and complainant appeals. Affirmed.

Duell, Warfield & Duell (Randolph Parmly, F. P. Warfield, and C. H. Duell, of counsel), for appellant.

W. K. Richardson, Charles Neave, J. Lewis Stockpole, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The patent to Searle relates to that class of circulatory heating systems in which a liquid, after being heated and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

freed of air and steam, may be employed for warming railway cars; the heat being derived from a main source, preferably a steam boiler.

He employs a circulatory system, which includes a heat-radiating portion with an ascending pipe on one side thereof and a descending pipe on the other, a heater located at substantially the lowest point of the circuit, and means for transferring heat derived from a main source into operative contact with the circulating liquid in the heater. In some instances he employs a circulatory system, including a heat-radiating portion with ascending and descending pipes, with a heater in the ascending pipe or upon one side thereof and a second heater located below the first at substantially the lowest point of the circuit. These heaters may be of any desired character. When used for car heating purposes, the patentee preferably derives heat for one or more of said heaters from a common source, such as the locomotive boiler. To this end he employs a main steam pipe or other suitable mechanism adapted to be connected to a main source of heat supply and also with a plurality of heaters. In practice, one or more heaters may impart heat to the said liquid by being in operative connection with the main source of heat supply. This connection may be effected in various ways; for instance, by letting the heat derived from the main source be carried through a pipe or passage containing the circulating liquid, or by letting the steam derived from the main source be carried into a pipe or passage which incloses a portion of the system containing the circulating liquid. Searle also provides for an emergency heater in case of a temporary failure of the heat derived from the main source. The claims are as follows:

"1. The combination of a circulatory system that includes a heat-radiating portion and has an ascending pipe on one side thereof and a descending pipe on the other side thereof, a heater in the ascending pipe or upon one side thereof, and a second heater located below the first-named heater and at substantially the lowest point of the circuit.

"2. The combination of a circulatory system that includes a heat-radiating portion and has an ascending pipe on one side thereof, a descending pipe on the other side thereof, and an expansion chamber located above said pipes and having communication therewith, an emergency heater having a combustion chamber inclosing a portion of the ascending pipe of said system, a primary heater located at substantially the lowest point of the circuit, and means for transferring heat derived from a main source of heat supply into operative contact with the circulating liquid in said last-named heater.

"3. In combination, a water-circulating system having a radiating portion in the descending pipe or upon one side thereof, a heater in the ascending pipe or upon the other side thereof, and a second heater located below the first-named heater and at substantially the lowest point of the circuit."

All the claims are for combinations. The first claim is for a combination which contains the following elements: (1) Circulatory system, including a heat-radiating portion, with an ascending pipe on one side and a descending pipe on the other; (2) a heater in the ascending pipe or upon one side thereof; (3) a second heater below the first and at substantially the lowest point of the circuit. The second claim is for a system similar to that of the first claim; but it adds an "expansion chamber" to the combination, and substitutes for the heater of the first claim on the riser "an emergency heater having a com-

bustion chamber." The third claim differs from the first claim only in requiring "a radiating portion in the descending pipe."

It will be observed that none of the claims specifies steam heaters, or a combination of steam heaters. The specification expressly states that the heat may be derived from any prime source, preferably a steam boiler; but any suitable heat generator will suffice. The upper and lower heaters, or either of them, may receive their heat from any suitable source. When, however, the invention is employed in warming railway cars—and not the "other structures" for which it may also be used—it is preferable that one or more of the heaters derive the heat from a common source; for instance, the engine boiler. It is as plain as language can state it that the patentee intended to claim a system where the heat was derived from the boiler, or any other heat generator, adapted to heat the circulating liquid. A steam pipe is preferably employed, which may be connected with one or a plurality of heaters. One or more of such heaters may be used. If, however, the specification be construed, as it may well be, to require at least one steam heater, the specification makes it plain that the water in the pipes may be properly and sufficiently heated by contact with the steam in the lower heater. In other words, one steam heater will do the work. The heater on the riser pipe is mentioned as one which may be used separately, or simultaneously with the lower heater, to form part of a single flow system. The patentee says that:

"The location of the various parts within the limitations specified in the appended claims as to the location of the heaters, one below another and at substantially the lowest point of the circuit, may also to a considerable extent be varied without departing from the principle of my invention."

He also says that the expression used to designate the heaters—

"is to be understood as a term employed in the art to embrace a heater of any suitable description adapted to impart its heat to the liquid in the pipes or passages of the system."

Infringement, except upon a theory of construction which it is unnecessary to consider, is admitted. It is conceded by the complainant that all of the elements of the combination, when segregated, are old; but it is argued that the combination produces a novel result, not known before March 23, 1888, the date of Searle's application. The combination of one transfer heater in the riser pipe and another at the lowest point of the circuit is the novel feature of the claims which the complainant contends supports invention. Unless this combined action produces a new result the patent is invalid for lack of patentability.

The Circuit Court held that the sole function of the upper heater is to heat the water in the pipe, taking it as it finds it when it arrives. "If this were so," says complainant's brief, "there could be no possible claim of novelty in the combination, but the decision overlooks or fails to appreciate the facts, which show that there is co-operation between the two heaters which produces a result which could not be otherwise obtained. The fact is that the upper heater aids the lower heater in transferring heat to the water, since it aids it in starting and continuing a circulation, so that the heat can be transferred from the

steam to the water." So that the question can be still further narrowed: Do the heaters act independently or jointly? If they act independently, it is an aggregation; if they act jointly, and a new and useful result is produced, it is a combination.

The prior art, as stated in the opinion below, need not be repeated here, and in view of the express declaration of the patentee that his system may be used in railway cars and other structures we do not see why "other structures" may not be examined in considering the prior art. Baker, in 1868, obtained a patent for a successful circulating hot-water system for heating cars; but he employed a combustion heater, which was dangerous in case of accidents. It was found necessary, therefore, to substitute some other heater for the stove, and a steam drum with steam supplied from the locomotive immediately suggested itself to a number of inventors. The interference which was declared between 13 of these applicants, among them Searle and Towne, was declared in favor of Towne and against Searle. Towne shows that the steam heater and combustion chamber may be in two separate structures, and he says:

"If separated, the combustion chamber and its coil of water pipes might be in one position, and the steam heater or transfer chamber and its coil be in another position, either in or under the car, the pipes of both and of the circulatory system all being connected together, substantially as indicated in Fig. 7 at T, T."

Having in mind the statement of Searle that one steam heater is sufficient and the language of the second claim, where one steam heater and one combustion heater are employed, it would seem that this statement in the Towne patent comes very near being an anticipation, and, in any view, leaves no room for invention. A mechanic, following the direction of the Towne patent, who left the stove in its usual place and located the steam drum under the car, would infringe the second claim of Searle's patent; and, if the other claims, in view of the statements of the specification, are construed as covering a stove in the riser pipe—and we see no escape from the conclusion that they may be so construed—it would infringe these claims also. Being before, it anticipates. The article in the *Railway Age* of May 13, 1887, is, in part, as follows:

"The device consists of a drum, in which is placed a bench radiator, through which the steam is forced. The cold-water pipe of the Baker or other water-circulating heater is tapped near the furnace, and the pipe is brought down and connected with the bottom of the drum. The hot pipe of the system is tapped at a point where it leaves the furnace and brought down to the top of the drum, which is placed horizontally under the cars just back of the trucks, and as near to the truck as possible. The drum is also placed, when possible, up between the sills, on the same side as the heater. By these connections the drum becomes a part of the regular circulating system of the car, the water in the drum being around the steam pipes of the coil or radiator, the condensed steam being carried off by a trap. It is claimed that under the system about to be introduced by the Safety Car Heating & Lighting Company the now existing devices are kept intact for use as emergency heaters, and there are no complicated changes to be made, in order to change from steam heat to fire, or from fire heat to steam; in fact, with the water-circulating system, both could be used at once."

This article is criticised as describing an inoperative system; but we are unable to see why it should not operate, and especially so when it appears that it actually worked satisfactorily. The record contains many other patents and publications relied on as anticipating or limiting the field of invention; but in the light of the full discussion by Judge Ray we deem it unnecessary to refer to them in detail.

Even if it be conceded that claims 1 and 3 require two steam heaters, we are not persuaded that a new result is produced by their use. If they act independently, it is admitted that the claims are for an aggregation. The patent says nothing about a new result. If such existed, it is remarkable that Searle should have failed to state it, but should, on the contrary, have stated that one steam heater would do the work. We cannot resist the conclusion that as the cars grew larger and the radiating surface greater a second heater was introduced to aid the circulation and maintain uniform radiation. That the additional heater does this there is no doubt, but it does it in the old way. There is nothing magical about it. The water had far to go, the single heater needed help in propelling it, and another heater was introduced to furnish this help. Its introduction did not produce a revolution in hydrostatics. It did its assisting work, but it did it in the old way. It gave an auxiliary push to the circulation. The Dixon patent was for a minor improvement, and expired over a year ago. No injunction can, of course, be issued. The proof shows that the complainant waited for 12 years before bringing this action, and is guilty of such laches as will preclude a recovery for profits and damages. Nothing need be added to the opinion of the Circuit Court on this subject.

The decree is affirmed, with costs.

INGERSOLL v. CORAM et al.

(Circuit Court, D. Massachusetts. March 15, 1909.)

No. 552.

APPEAL AND ERROR (§ 1207*) — MANDATE TO LOWER COURT — DECREE—SETTLEMENT.

Decree in equity settled as modified to conform to a mandate of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4696-4699; Dec. Dig. § 1207.*]

In Equity. Suit by Eva A. Ingersoll, administratrix, against Joseph A. Coram and others. Settlement of decree after mandate.

E. N. Harwood and Hollis R. Bailey, for complainant.

Brandeis, Dunbar & Nutter and Horace G. Allen, for defendant Leyson.

PUTNAM, Circuit Judge. The present matter concerns judgment to be entered in accordance with the opinion in *Ingersoll v. Coram*, found in 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208. In accordance with the judgment of the Supreme Court, the opinion comes

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

down as a part of the mandate. The judgment is to be modified in accordance with that part of the opinion shown at 211 U. S. 369, 370, 29 Sup. Ct. 101 (53 L. Ed. 208), and in no other particular.

In accordance with an order of this court, the complainant filed a draft merely incorporating in the original final decree of this court the single modification required by the Supreme Court.

The respondents were invited to file corrections to the draft decree, according to rule 21 of this court. They filed proposed corrections, apparently based on their own interpretation of sundry expressions in the opinion passed down in the Supreme Court which have no relation to the single particular in which our decree was modified. In order to protect all rights, we leave on file both the complainant's draft decree and the respondent's proposed amendments.

It will be very regretful if, after so long litigation, involving such complicated and difficult matters as we are involved in here, there should be any error of this court in attempting to proceed according to the mandate of the Supreme Court. We think that what the complainant has proposed is correct, with some minor modifications which we will suggest. If we should attempt to go through the opinion and incorporate the amendments required, we might err. We deem it proper and just to throw the responsibility on the complainant at this stage of the case, except so far as we make suggestions otherwise.

The complainant will pass to the clerk a new, clean decree with the following modifications: The Supreme Court has not used the word "supplemented," but the word "modified." The word "supplemented" will be omitted. There will also be stricken out the first paragraph of the draft decree submitted by the complainant, and the following will be inserted:

"Whereas," it is to be here stated that a final decree was entered in the Circuit Court; also that an appeal to the Circuit Court of Appeals had been taken, and that the decree of the Circuit Court was there reversed; that thereupon the case went on certiorari to the Supreme Court, where judgment was entered, and mandate pursuant thereto sent down to this court, bearing date of the 22d day of January, 1909, "wherein, it was declared on December 7, 1908, as follows: 'It is now hereby adjudged and decreed,'" running through to and including the words "remanded to the said Circuit Court." Then proceed as follows: "Whereupon it is now adjudged and decreed that the final decree of this court, duly made and entered on the 3d day of May, 1905, be, and the same is hereby, modified;" then follow along the draft decree as proposed by the complainant to and including the words, "It is further ordered, adjudged, and decreed," at bottom of page 11, striking out everything there now about costs and interest, and inserting nothing additional about costs except what is found in the mandate.

Apparently there was no provision in the judgment of the Supreme Court for any additional costs, except those of that court, \$658.95; also there was no special provision for interest, and therefore nothing can be added in regard to interest, although probably the original decree is so drawn that it carries interest on the original judgment.

Perhaps it would have been better to have had the matter of interest expressly covered by the judgment of the Supreme Court as is the usual practice.

The complainant, if she desires, may add at the close that the decree as modified takes effect as of the date of the original final decree, namely, the 3d day of May, 1905.

As soon as the complainant passes in a clean draft of decree which she claims corresponds hereto, the court will direct it to be entered, leaving all further responsibility for correctness thereof on the complainant.

CORAM v. DAVIS et al.

(Circuit Court, L. Massachusetts. May 26, 1909.)

No. 562.

1. EVIDENCE (§ 43*)—JUDICIAL NOTICE—JUDICIAL RECORDS OF SAME COURT.

A Circuit Court may take judicial notice of a mandate of the Supreme Court filed in such Circuit Court in another case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

2. EQUITY (§ 362*)—DISMISSAL OF BILL.

It is the duty of the Circuit Court to dismiss, with costs, an original bill between the same parties, the effect of which would be to obstruct, delay, or embarrass it in the execution of a final decree already entered in another suit.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 362.*]

In Equity. Suit by Joseph A. Coram against Andrew J. Davis and others. On motion to dismiss bill. Motion granted.

Adler & Wood, for complainant.

E. N. Harwood, Hollis R. Bailey, Brandeis, Dunbar & Nutter, Edward F. McClellan, William L. Snyder, Horace G. Allen, William T. Read, Jesse B. Roote, D. E. Webster, and Morse & Friedman, for defendants.

PUTNAM, Circuit Judge. On hearing the motion to dismiss this bill the conclusion the court arrives at is inevitable, as the result of the practice established by the Supreme Court. It is thoroughly settled by several decisions of that court that we can take notice of the mandate of the Supreme Court in *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208, which is already on file in this court, and has been incorporated in the decree in that case, and not only that we may take notice of it, but that under the present circumstances we should do so.

From the time that mandate was received this court was powerless to proceed in any way which would in any manner qualify or obstruct the judgment entered in accordance with that mandate. This is now thoroughly settled law.

The mandate grew out of a bill in equity to which the *Ingersoll* estate and Mr. Coram were parties. It involved all the equitable re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lations between them involved in the bill now before us. The present bill, whatever else may be the facts in reference to it, undertakes to qualify those relations, and, in a certain sense, asks the court to establish a lien in favor of Mr. Coram superior to the lien in favor of the estate of Mr. Ingersoll. It also asks us to enjoin and delay proceedings under the mandate. All those things are absolutely and utterly beyond the power of this court to do.

Counsel for the complainant offers to amend by striking out everything relating to the Ingersoll estate; but that topic is so far interlaced into the bill that, in the judgment of the court, such an amendment, cannot be satisfactorily accomplished. If the complainant has any equities which can be litigated between him and the parties to this bill aside from the Ingersoll estate, he must file a clean new bill in reference thereto; but in that bill he must be careful not to ask any remedy which will obstruct, delay, or even embarrass this court in proceeding under the mandate of the Supreme Court.

This bill, having been first filed in this court, is not on its face a contempt of the jurisdiction of this court, as it might have been if filed elsewhere; but it may easily ripen into such a contempt if proceedings on this bill, or on any other bill, wherever filed, satisfy the court that the real purpose is to delay the execution of the decree in favor of the Ingersoll estate, and it might then be regarded as the subject-matter for an attachment.

The complainant maintains that, if he pays the judgment in favor of the Ingersoll estate, he will be entitled to be subrogated to that estate. According to the rules of subrogation in proceedings in equity in the federal courts, he must first pay the judgment before he can in any way have an order of subrogation. When that judgment is paid, or the money brought into this court to pay the judgment, so the court can apply it to the payment of the judgment, the court then will protect any rights to subrogation, so far as it can.

The judgment at present will dismiss the bill with costs; but if within a short time Coram pays the judgment according to the mandate, or brings into court the amount required to pay it, the bill may be restored for whatever it is worth to Mr. Coram, if anything. The decree dismissing will be on the merits; but, of course, it would not bar another suit which did not seek to make the Ingersoll estate a party, and was not subject to the objections which this opinion covers.

Let the respondents file a draft decree dismissing the bill, with costs; and the complainant may have to and including Tuesday, June 1, 1909, to file corrections thereof under the rule.

CORNUE v. INGERSOLL et al.

CUMMINGS v. SAME.

(Circuit Court, D. Massachusetts. November 17, 1909.)

Nos. 582, 583.

1. REMOVAL OF CAUSES (§ 23*)—FEDERAL QUESTION.

Suits in equity in a state court, the effect of which, as disclosed on the face of the bills, are to delay and obstruct, and perhaps defeat, the enforcement of a judgment of a federal court, are removable, as involving a federal question.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 23.*]

2. REMOVAL OF CAUSES (§ 108*)—DISMISSAL OF CAUSE.

A Circuit Court of the United States, after refusing to remand a suit brought in the state court, the effect of which would be to delay and obstruct, and perhaps defeat, the enforcement of a judgment already rendered in the Circuit Court, may summarily dismiss the same, with costs, as frivolous and vexatious. *O'Connell v. Mason*, 132 Fed. 245, 247, 65 C. C. A. 541, applied.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 108.*]

In Equity. Suits by Ellen S. Cornue and by Herbert P. Cummings, executor, respectively, against Eva A. Ingersoll, executrix, and others. On motions to remand to state court. Motions denied, and bills dismissed.

Brandeis, Dunbar & Nutter, for complainants.

E. N. Harwood, Hollis R. Bailey, and Horace G. Allen, for defendants.

PUTNAM, Circuit Judge. The above cases came before us on motions to remand to the state court. On hearing the motions we denied them. We also entered summary decrees dismissing each bill with costs, but without prejudice to any questions arising between the parties interested in the estate of Andrew J. Davis, deceased, after the decree in *Ingersoll v. Coram*, entered by this court, has been fully performed. These orders and decrees were entered with an oral expression of our views in reference to them; but, inasmuch as the complainants in each of those cases have signified to us an intention to take an appeal to the Circuit Court of Appeals, we now deem it proper to file this brief statement of the oral views thus expressed.

We sufficiently identified the proceedings in *Ingersoll v. Coram* by a reference to the mandate from the Supreme Court in that case, which was filed in this court on January 25, 1909, pursuant to which mandate final disposition of *Ingersoll v. Coram* was made by this court. That mandate established the judgment of this court in favor of *Ingersoll*, administratrix, with a modification which appears therein, and which need not be stated particularly in this rescript. See *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208.

The bill in equity in the foregoing cases described quite fully the proceedings in *Ingersoll v. Coram* and the result in this court as we have stated it. The view we took of each of those bills was that on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

their face they not only set out the proceedings in *Ingersoll v. Coram* and the final judgment therein, but also on their face operated to delay, embarrass, and, perhaps, to some extent defeat, the appropriate execution of our judgment in accordance with the mandate to which we have referred; and we were of the opinion that it appeared on the face of each of those bills that such was the purpose of each of them. At any rate, we were of the opinion that they did so operate as a matter of fact, and that on their face they set out sufficient to establish that they operated in the manner we have said, and that, therefore, on their face each raises such a federal question as justified removal to this court. We were also of the opinion that, as they were at least by implication of law contemptuous in their nature, we were justified in taking and maintaining jurisdiction over the same even in a summary manner. Therefore we refused each motion to remand.

Also we were of the opinion, by reason of the operation of each with reference to the judgment of this court, especially with reference to the mandate from the Supreme Court, and from their contemptuous nature in implication of law, that the court in which the bill was originally filed had no jurisdiction over the subject-matter of either of them, and that, therefore, each bill should be dismissed. Moreover, in order to prevent their practical operation in delaying and embarrassing the execution of the judgment and mandate aforesaid, which would result if we permitted the litigation to be continued even in this court, we were of the opinion that the only remedy suitable under the circumstances was summary dismissal.

We were strengthened in our conclusions by the expressions found in the opinion of Judge Aldrich, passed down in behalf of the Circuit Court of Appeals in *O'Connell v. Mason*, on August 25, 1904, reported in 132 Fed. 245, 247, 65 C. C. A. 541, 543, where the following is found:

"We have no doubt of the inherent and necessary power of courts of general jurisdiction to protect members of the public from vexatious suits through an exercise of the right to dismiss frivolous proceedings, which, upon the face of the pleadings, present no cause of action recognized by the law. Unquestionably the power to dismiss exists quite independent of express statutory authority, and may be exercised in a proper case by the court of its own motion."

The clerk is directed to file this rescript in each of the above cases the day it is dated, adding also "nunc pro tunc as of the day when the motion to remand was denied and the bill was dismissed."

H. L. BRUETT & CO. v. F. C. AUSTIN DRAINAGE EXCAVATOR CO.

(Circuit Court, N. D. Iowa, Central Division. December 7, 1909.)

No. 315.

1. COURTS (§ 315*)—FEDERAL COURTS—JURISDICTION DEPENDENT ON CITIZENSHIP—PARTNERSHIP.

Citizenship, for the purpose of determining federal jurisdiction, cannot be rightfully predicated of a copartnership as such.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

2. COURTS (§ 322*)—FEDERAL COURT—ACTIONS BY OR AGAINST PARTNERSHIP.

A partnership cannot sue or be sued in its partnership name in a Circuit Court of the United States without alleging the citizenship of its individual members.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 322.*]

3. REMOVAL OF CAUSES (§ 26*)—ACTION BY PARTNERSHIP—DIVERSE CITIZENSHIP.

A partnership suing as such in a state court cannot prevent a nonresident defendant from removing the cause to the proper Circuit Court of the United States on the ground of diverse citizenship, if its individual members are shown in the petition for removal to be each and all citizens and residents of a state other than that of the plaintiffs, in which they reside and the suit is brought.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 26.*]

4. PARTNERSHIP (§ 197*)—ACTIONS AGAINST—PARTNERSHIP NAME.

The common-law rule that an action by or against a partnership as such could not be maintained in the partnership name, but must be brought by or against the individual members of the firm, was changed by Iowa Code 1897, § 3468, providing that actions may be brought by or against a partnership as such, or against all or either of the individual members, or against it and all or any of its members.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360; Dec. Dig. § 197.*]

5. ACTION (§ 64*)—COMMENCEMENT—ORIGINAL NOTICE.

Under Iowa Code 1897, § 3514, providing that an action in a court of record shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorney, informing him of the name of the plaintiff, that a petition is, or on or before a specified date will be, filed in the office of the clerk, and stating generally the cause of action, etc., personal actions are commenced in the state court by serving the defendant with a notice as specified; the action being regarded as begun from the time of the service of the notice.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 725-734; Dec. Dig. § 64.*]

6. REMOVAL OF CAUSES (§ 26*)—COMMENCEMENT OF ACTION—CHARACTER OF PARTIES.

Where plaintiffs, not designating themselves as a copartnership, served an original notice on defendant, constituting the commencement of an action in the state court, and the requisite diversity of citizenship between plaintiffs as individuals, and defendant existed, plaintiffs could not deprive defendant of its right to remove the cause to the federal court by filing a petition in support of the notice purporting to sue only in a partnership name.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 26.*]

7. COURTS (§ 323*)—FEDERAL COURT—JURISDICTION—CITIZENSHIP—CORPORATIONS—PRESUMPTIONS.

Citizenship of the individual members of a corporation for the purpose of federal jurisdiction is conclusively presumed to be that of the state in which the corporation is organized.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 885, 886; Dec. Dig. § 323.*]

8. COURTS (§ 315*)—FEDERAL COURTS—JURISDICTION—PARTIES—CITIZENSHIP—PARTNERSHIP.

Where the members of a firm sue or are sued in the name of the firm, the citizenship of the individual members of the firm may be looked to to ascertain whether there is requisite diversity of citizenship between the members of the firm and the opposite party in order to determine federal jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.*]

Action by H. L. Bruett & Co. against the F. C. Austin Drainage Excavator Company. On motion to remand to the state court. Denied.

F. C. Gilchrist, for plaintiffs.

Healy & Healy, for defendant.

REED, District Judge. This action was commenced in the district court of Iowa in and for Pocahontas county to recover of the defendant damages in excess of \$2,000 for its alleged fraud in the leasing of a certain drainage machine to the plaintiffs. The defendant, appearing specially for that purpose, removed the cause to this court upon the ground of the diverse citizenship of the parties, and the plaintiffs move to remand because upon the face of the record it appears, as they contend, that such diversity does not exist. The particular ground relied upon by the plaintiffs is that they are a copartnership and sue as such, that a partnership is not a citizen of any state, and that this cause is not therefore one that is within the jurisdiction of this court. That the individual members of the copartnership, who are named in the original notice and in the petition filed by the plaintiffs in the state court, are, and were at the time the action was commenced and the petition for removal filed, citizens of Iowa, residing in the Northern district thereof, and that the defendant at such times was a corporation of Illinois, and not of Iowa, is not disputed. That citizenship cannot rightly be predicated of a copartnership as such (or of a corporation for that matter) and that a partnership cannot sue or be sued in its partnership name in a Circuit Court of the United States without alleging the citizenship of its individual members is well settled. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Great Southern Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 482; *Carnegie Phipps Co. v. Hulbert*, 53 Fed. 10, 3 C. C. A. 391. And that a partnership sued as such in a state court cannot remove the cause to the proper Circuit Court of the United States on the ground of diverse citizenship, even though its individual members are shown in the petition for removal to be each and all citizens and residents of a state other than that of the plaintiffs, in which they reside and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suit is brought, was held in *Ralya Market Co. v. Armour & Co.* (C. C.) 102 Fed. 530. At common law a suit by or against a partnership as such could not be maintained in the partnership name; but it must be brought by or against the individual members of the copartnership. *Covington Drawbridge Co. v. Shepherd*, 20 How. 227-232, 15 L. Ed. 896.

This rule is changed by the Iowa statute, which provides as follows (Code 1897, § 3468):

"Actions may be brought by or against a partnership, as such, or against all or either of the individual members thereof, or against it and all or any of the members thereof. * * *"

An action may be brought, therefore, in the state courts of Iowa as at common law in the names of the individual members of the partnership, or under this statute in the name of the copartnership as such, or it may be brought against the partnership as such, or against it, and all or any of its individual members. It is urged by the defendant that the suit in question was originally commenced in the state court in the name of the individual members of the partnership, and that for this reason alone it was rightly removed by the defendant. The Iowa statute which provides for the commencement of actions in the courts of record in that state is as follows (Code 1897, § 3514):

"Action in a court of record shall be commenced by serving the defendant with a notice, signed by the plaintiff or his attorney, informing him of the name of the plaintiff, that a petition is, or on or before the date named therein will be, filed in the office of the clerk of the court wherein action is brought, naming it, and stating in general terms the cause or causes thereof, and if it is for money, the amount thereof, * * * and that unless he appears thereto and defends before noon of the second day of the term at which defendant is required to appear, naming it, his default will be entered and judgment or decree rendered against him thereon. * * *"

Under this section it is held that personal actions are commenced in the state court by serving the defendant with a notice thereof signed by the plaintiff or his attorney, informing him of the name of the plaintiff or plaintiffs, and that a petition is or on or before a date named will be on file in the office of the clerk of the court where the action is brought, and from the time of the service of such notice on the defendant the action is pending in the court named therein. *Par-kyn v. Travis*, 50 Iowa, 436; *Proska v. McCormick*, 56 Iowa, 318, 9 N. W. 289.

The original notice in this case is as follows:

"In the District Court of Iowa in and for Pocahontas County.

"H. L. Bruett & Co., H. L. Bruett and J. H. Allen, Plaintiffs, v. E. C. Austin Drainage Excavator Co., Defendant.

"October Term, 1909. Original Notice.

"To Said F. C. Austin Drainage Excavator Company, Defendant:

"You are hereby notified that on or before the first day of October, 1909, there will be on file in the office of the clerk of the district court of Iowa in and for Pocahontas County, a petition of the plaintiffs claiming of you the sum of \$10,000, for and on account of (stating the grounds relied upon).

"And that unless you appear thereto and defend on or before noon of the second day of the regular October term, 1909, of said court, which will com-

mence and be held in the court house in Pocahontas, Iowa, on the 12th day of October, 1909, default will be entered against you and judgment entered thereon as prayed. [Signed] Allen & Atkinson, Attys. for Plaintiff."

The return of the sheriff of Pocahontas county indorsed upon this notice shows that it was served personally by him on the vice president and general agent of the F. C. Austin Drainage Excavator Company in said county on June 2, 1909. October 1, 1909, there was filed in the office of the clerk of said court a petition as follows:

"In the District Court of Iowa in and for Pocahontas County.

"H. L. Bruett & Co., Plaintiff, v. The Austin Drainage Excavator Co.,
Defendant.

"October Term, 1909. Petition at Law.

"The plaintiff states:

"Count One.

"That it is a partnership composed of H. L. Bruett and J. H. Allen, and that defendant is a corporation engaged in manufacturing selling and leasing machinery for the excavation of large drains, ditches, etc. [stating the cause of action relied upon]."

The contention of the plaintiffs is that this petition is one in the name of the copartnership only, and not in the names of the individual members thereof. But under the Iowa statute the action was commenced in the state court when the original notice was served upon the defendant, and that notice makes no mention of a copartnership, but describes H. L. Bruett and J. H. Allen as the plaintiffs, and that they as plaintiffs claim of the defendant \$10,000, etc. It is true that H. L. Bruett & Co. is named in the caption also as plaintiffs, but whether as a copartnership, a corporation, a joint-stock company, or as an association of some other kind is not stated, and the only reasonable inference to be drawn from the notice is that H. L. Bruett and J. H. Allen are doing business under the name of H. L. Bruett & Co., and that they as individuals bring the action against the defendant. The right of removal when based upon the ground of diverse citizenship depends upon the citizenship of the parties at the time the action is commenced; and a subsequent change of citizenship, if any should take place, would not defeat the right. The petition for removal is entitled the same as the original notice, and it is alleged therein that the defendant is, and was when the action was commenced, a corporation organized and existing under the laws of Illinois, and that the plaintiffs H. L. Bruett and J. H. Allen alone compose the said copartnership of H. L. Bruett & Co., and that said plaintiffs at the time of the commencement of the suit were, and still are, each and all citizens of the state of Iowa residing in Pocahontas county. Unless then two or more individuals can after commencing an action in the state court in their own names by serving a notice upon the defendant as required by the state statute file a petition in such court in which they describe themselves as copartners, and thus defeat the defendant, who otherwise would be entitled to remove the cause to the proper Circuit Court of the United States, from doing so, this cause is clearly removable, and has been properly removed from the state court.

But if it should be admitted that the petition filed in the state court

is controlling, and shows that the suit is brought only in the name of the copartnership as such, then the question remains: May the defendant remove the cause from the state court by showing in the petition for removal that the requisite diversity of citizenship exists between it and each of the plaintiffs, and did so exist when the suit was commenced? It must be admitted that it was held in the case of *Ralya Market Co. v. Armour & Co.* (C. C.) 102 Fed. 530, above, that defendants sued as a copartnership only cannot so remove the cause. This court with much hesitancy followed that decision in *Hallowell v. McLaughlin Brothers* (no opinion filed); but further examination and consideration of the question has convinced that it should not have done so. The authorities cited and relied upon for the ruling in *Ralya Market Co. v. Armour & Co.*, are *Carnegie Phipps & Co. v. Hulbert*, 53 Fed. 10, 3 C. C. A. 391; *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Great Southern Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 482. Each of these cases was originally commenced in a Circuit Court of the United States in the name of a copartnership, but without any averment or showing of the citizenship of the individual members thereof, and it was held that the requisite jurisdictional facts to authorize the maintenance of the suit in the Circuit Court of the United States did not affirmatively appear of record, and for that reason the judgment in each was reversed. In *Great Southern Hotel Co. v. Jones* the cause was remanded with leave to the complainants to amend the bill, if they could do so, to show that the citizenship of the individual members of the different partnerships who were parties to the suit was such as to enable the Circuit Court to take cognizance of the controversy. The bill was so amended in the Circuit Court and the suit proceeded to final judgment against the hotel company, and that judgment was affirmed by the Supreme Court in *Great Southern Hotel Co. v. Jones*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778. In *Carnegie Phipps & Co. v. Hulbert* the Circuit Court of Appeals this circuit says:

"When a partnership sues, the citizenship of the parties composing it must be averred, and must be such as to confer the jurisdiction. For aught that appears in the record, the members of the copartnership and the defendants may be citizens of the same state. The judgment of the Circuit Court is reversed for want of jurisdiction, * * * and the cause remanded with directions to dismiss the bill, unless the plaintiff shall amend its complaint to show jurisdiction."

In *Adams & Co. v. May* (C. C.) 27 Fed. 907, Judge Love said:

"The petition (for removal) in this case states, in substance, that *Adams & Co.*, the plaintiffs, are citizens of Pennsylvania. But who are *Adams & Co.*? Citizenship cannot be predicated of a firm *eo nomine*. The individual names of the partners must be set out, and citizenship alleged of each and every of them. The state statute authorizing suits to be brought in the partnership name is inapplicable here. No doubt a cause commenced in a state court in the firm name, without giving the individual names, may be removed to this court; but the petition for removal should state the individual names and citizenship of the members of the firm, and show that no one of them is a citizen of the same state with an adversary party in the controversy. At all events, this diversity of citizenship should appear in some part of the record, when the case comes here from the state court. This nowhere appears in the present record."

The cause was therefore remanded for this reason alone.

From these authorities it is entirely clear that there is no obstacle in the way of a partnership either suing, or being sued, in the proper Circuit Court of the United States if the citizenship of its individual members is shown to be such as to confer jurisdiction of the controversy upon such court. It was early held by the Supreme Court that a corporation might sue or be sued in its corporate name in the courts of the United States, provided it was alleged and made to appear of record that the individual members of the corporation were all citizens of states other than that of which the opposite parties to the suit were citizens. *Bank of the United States v. Deveaux*, 5 Cranch, 61-87, 88, 3 L. Ed. 38; *Marshall v. Baltimore & O. R. R.*, 16 How. 314, 14 L. Ed. 953; *Covington Bridge Co. v. Shepherd*, 20 How. 227-233, 15 L. Ed. 896.

In *Bank of the United States v. Deveaux*, above, Mr. Chief Justice Marshall said:

"It is unimportant by what name citizens are by the laws of their own state permitted to sue. They are still citizens, and entitled to that substantial justice, and the benefit of those independent tribunals, which were intended to be secured by the federal Constitution. The Constitution does not speak of the name on record—of the nominal party. It speaks of controversies 'between citizens of different states.' The question is not what names appear upon the record, but between whom is the controversy. Who are the real litigants? In conformity with the spirit of the Constitution, the federal courts have always inquired after the real parties. Although the nominal parties are really persons competent to sue in those courts, yet they will inquire into the character of the real litigants, and, if they find them unable to sue there, they will dismiss the suit. * * * They will allow no fiction to give jurisdiction to the court where the substance is wanting. Can it be admitted, then, that they will allow the jurisdiction to be excluded by a name, if the substance exists which gives jurisdiction?"

And in *Covington Drawbridge Co. v. Shepherd*, 20 How. 227-233, 15 L. Ed. 896, Chief Justice Taney said:

"The question as to the jurisdiction of the courts of the United States in cases where a corporation is a party was argued and considered in this court for the first time in the cases of the *Hope Insurance Company v. Boardman*, and of the *Bank of the United States v. Deveaux*, 5 Cranch, 57, 61, 3 L. Ed. 36. These two cases were argued at the same time and were, as appears by the report, decided at the same time. And in the last mentioned case the court held that in a suit by or against a corporation in its corporate name this court might look beyond the mere legal being which the charter created, and regard it as a suit by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular state (if such was the fact) would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators not named in the suit or the averment."

By later decisions it is, of course, now settled that the citizenship of the individual members of a corporation, for the purpose of federal jurisdiction, is conclusively presumed to be that of the state in which the corporation is organized.

But, if it is permissible to go back of the corporate name to show the citizenship of the individual members of the corporation for the purpose of showing federal jurisdiction, why is it not also permissible for the same purpose to go back of the partnership name and show the

citizenship of the individual members of the copartnership who sue or are sued in the name of the copartnership? It is not uncommon for one or more individuals to carry on business under some arbitrary or purely fanciful name which of itself signifies neither corporate nor copartnership existence, and, under statutes like that of Iowa, they may sue or be sued in such name by simply alleging that they are a copartnership. Can it be that, if two or more citizens of a state who reside in and are doing business therein under such a name, may in such name sue a citizen of another state in a state court under a statute like that of Iowa, and thus prevent the latter from alleging in a proper petition for removal the fact, if it be such, that the requisite diversity of citizenship exists between the real parties to the controversy, to warrant the removal of the cause from the state court to the proper Circuit Court of the United States, the requisite amount being involved? If they can, then mere matter of form must control in determining the right of removal of a cause from a state to a federal court, and the substance of things must give way to their mere shadow. The state statute authorizing a suit to be brought in the state court by or against a copartnership as such cannot, of course, restrict the jurisdiction of the federal courts, nor the right to remove the cause to one of those courts, if it is one that otherwise would be removable.

The conclusion therefore is that the motion to remand should be denied; and it is accordingly so ordered.

Ex parte LI DICK.

(District Court, N. D. New York. December 6, 1909.)

1. ALIENS (§ 31*)—GENERAL IMMIGRATION ACT—APPLICABILITY TO CHINESE ALIENS.

The Chinese exclusion acts do not exclude the application of General Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447), to Chinese aliens seeking to enter the United States, and rules 3 and 49 of the regulations, governing the admission of Chinese aliens adopted pursuant to such act, which provide for the examination of such aliens under that act as well as the exclusion acts, and that they shall be subject to arrest and deportation thereunder for entry in violation of its terms, are valid.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 31.*]

2. ALIENS (§ 31*)—SURREPTITIOUS ENTRY OF CHINESE ALIEN—DEPORTATION UNDER GENERAL IMMIGRATION ACT.

A Chinese alien entering the United States from Canada surreptitiously in the night, avoiding inspection and examination at a designated place of entry, enters in violation of Immigration Act Feb. 20, 1907, c. 1134, § 36, 34 Stat. 908 (U. S. Comp. St. Supp. 1909, p. 466), and, like any other alien so entering, is subject to arrest on a warrant issued by the Commissioner of Commerce and Labor and to be deported to Canada, or to China, the "country whence he came," under the provisions of sections 20 and 21 of the act, without regard to the provisions of the Chinese exclusion acts. And it is no defense that he is a domiciled merchant in the United States entitled to enter under such acts; the deportation in such case being with-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

out prejudice to his right to subsequently apply for admission in a lawful way.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92; Dec. Dig. § 31.*

Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

In the Matter of Li Dick. On writ of habeas corpus and return. Writ dismissed, and petitioner remanded.

Wilson W. Hoover, for petitioner.

H. E. Owen, Asst. U. S. Atty.

RAY, District Judge. The petitioner, Li Dick, was apprehended and taken into custody at the city of Utica, near the central part of the state of New York, in the Northern district of New York, on the 22d day of October, 1909, on the charge that he was then and there a Chinese alien, and that he had surreptitiously entered the United States at or near the town of North Burke, in the county of Franklin, in said district, from the Dominion of Canada, without having produced a certificate of admission or having been examined or inspected as required by the immigration laws and regulations of the United States, and that therefor he had surreptitiously entered the United States in violation of law, especially section 20 of the Act of February 20, 1907 (34 Stat. 904, c. 1134 [U. S. Comp. St. Supp. 1909, p. 459]), entitled "An act to regulate the immigration of aliens into the United States," and also in violation of rules 3 and 49 of the regulations governing the admission of Chinese, approved February 26, 1907, as amended October 2, 1909, and adopted and issued by the Department of Commerce and Labor, Bureau of Immigration and Naturalization.

On the 25th day of October, 1909, the acting Secretary of Commerce and Labor issued his warrant under the provisions of sections 20 and 21 of said immigration act and the rules referred to, and same was placed in the hands of E. G. Sperry, Chinese inspector and inspector of immigration of the United States in the Northern district of New York for execution. Said warrant reads as follows:

United States of America.

Department of Commerce and Labor.

No. 52399/9.

Washington.

To John H. Clark, Commissioner of Immigration, Montreal, Canada, or to Any Immigrant Inspector in the Service of the United States:

Whereas, from evidence submitted to me, it appears that Wong You, Li Dick, Wong Chun and Hom Chee, aliens, who landed at some unknown port on or about the 23d day of October, 1909, have been found in the United States in violation of the act of Congress approved February 20, 1907, to wit, that the said aliens are unlawfully in the United States in that they entered without inspection: I, Ormsby McHarg, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said aliens and grant them a hearing to enable them to show cause why they should not be deported in conformity with law. The expenses of execution and detention are authorized, payable from the appropriation "Expenses of Regulating Immigration 1910." Pending disposition of their cases the aliens may be re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

leased from custody upon furnishing a satisfactory bond in the sum of five hundred dollars each. For so doing, this shall be your sufficient warrant.

* Witness my hand and seal this 25th day of October, 1909.

J.S.B. [Seal.]

11-1120a

Ormsby McHarg,

Acting Secretary of Commerce and Labor.

Thereupon, and on the 27th day of October, 1909, said inspector, under and by virtue of said warrant, took the said Li Dick into custody, and has held him in custody under and by virtue of said warrant ever since. He was so held in custody by said inspector when this writ of habeas corpus was applied for and allowed.

On the 27th day of October, 1909, and upon his arrest under such warrant, Li Dick was taken before H. Edsell, an inspector duly authorized to conduct the hearing and before the officers named in such warrant and then and there given full opportunity to show cause why he should not be deported. Li Dick was then and there informed of his right to be represented by counsel and to inspect all the evidence upon which the Secretary of Commerce and Labor had acted in directing the arrest, and he was also then and there given an opportunity to offer evidence in his behalf. An examination was then and there had, and said Li Dick was duly sworn. He then stated that he did not wish to be represented by counsel at that hearing, but might decide to do so later on.

On the 22d day of October, 1909, Li Dick had been questioned after his arrest near Utica by inspector Edsell and his examination reduced to writing. He then gave a statement as to the time, place, and method of his entering the United States and as to his life, family, occupation, and various residences. On the 27th of October, his attention was called to that statement, and he said that the statement made on the 22d was the truth, and that his answers to the same questions would be the same, and that the record of such examination might be incorporated as a part of the record of the hearing on the 27th, and it was incorporated accordingly.

From that statement, which is made a part of the return, it appeared and appears that Li Dick is married, and that his wife resides in China, and that he has no children. He is 35 years of age and first came to the United States in 1894. He belonged to a firm dealing in laundry supplies until seven or eight years ago, when it closed, and he then purchased an interest in the store of Sooyeh Weh Lung, Newark, N. J. He entered on a paper sent to him in China the contents of which he did not or could not state. He admits that he was born in China. He remained in the United States four years and then went to China and returned to the United States in 1899. He stated that he had remained a member of the firm last mentioned, and that "for the last year or so I have been traveling from place to place selling Chinese groceries for this concern." Li Dick then denied that he had been in Montreal, Canada, recently, but stated that he came to the place where arrested on the 22d from Albany. He then left the stand, but later returned and stated that he left Montreal, Canada, on the Monday evening preceding his arrest and came by automobile; that he came to Montreal from China, where he had been some eight or nine months, and that he had been in Montreal only a few days. He also stated that he had no

property in the United States and only small amounts of money due him, but also said that he had an interest of \$500 in the store of Sooeey Weh Lung, 28 Lafayette street, Newark, N. J. He was asked why he smuggled into the United States, and stated: That he had lived here before and wanted to come back again; that he did not make preparations to return at the time he left, as several of his friends had been turned down, and he thought he should meet their fate too so did not apply; that since he left the United States last he had not applied for readmission at a port of entry for Chinese; that he was to pay the man who brought him into the United States from Montreal in the automobile \$170; that they remained in a barn after leaving the automobile until they started for the train and took a rig and drove several hours; that the same party who brought them from Montreal to the barn brought them to the train; that he left for China through Malone.

It thus appears from his own statement that he left the United States something like 9 to 12 months ago and returned to China. It might be inferred he had no intention of returning to the United States at that time and that his return was an afterthought. It does appear from his own statement and is not denied that he returned surreptitiously in the manner described without inspection or examination and without producing a certificate of any description. His return, if the immigration laws have any application to alien Chinese persons, was in violation of the laws of the United States, which require aliens to present themselves at a port of entry and submit to an examination, etc., and also in violation of the rules and regulations referred to.

The return of the inspector states: That Inspector Edsell, after due consideration, did find upon the evidence and testimony produced before him that Li Dick is an alien, a subject of China, and that he has entered the United States surreptitiously and without examination under the immigration laws at the place designated as a port of entry, and that Li Dick was on the 27th day of October, 1909, within the United States in violation of law. Also, that a report of the hearing before the immigration officer, together with the evidence given by Li Dick, was immediately forwarded to the Secretary of Commerce and Labor as provided by law, and that the said report, evidence, and findings thereon were being considered by the said Secretary of Commerce and Labor at the time the writ of habeas corpus was issued. Also, that at the time the writ was issued Li Dick was in the custody of said Sperry as such officer of the United States under said warrant of arrest issued by the Secretary of Commerce and Labor awaiting the determination and decision of such secretary upon the said report, evidence, and findings, and that the holding and detention of Li Dick was under and by virtue of the laws and authority of the United States of America. The return was not traversed; but on the hearing Li Dick, by his counsel, asked permission to introduce evidence showing that prior to his last departure for China he was a Chinese merchant, member of the firm aforesaid, at Newark, N. J., engaged in no other work or business and is now such merchant. The United States objected to the introduction of such testimony; but the court permitted

it, not for the purpose of entering on a trial of that question, but for the purpose of showing that Li Dick makes a bona fide claim that he is a Chinese merchant domiciled in the United States, having no other business, and that he is not a laborer, and that he has the right to come and go freely and is not subject to the provisions of the immigration laws.

On the hearing Li Dick, by his attorney, Mr. Hoover, entered the following objections to the return and the sufficiency thereof, viz.:

"First. That he was under unlawful duress and restraint at the time said examination was had, and that his signature thereto was not on its face his voluntary act, in that he had not been arrested under a warrant issued by a judge, justice, or commissioner, as provided by section 13 of the act of Congress of May 5, 1892, and it is affirmatively shown that he was arrested within the borders of the United States, to wit, not at Malone, but at or near Utica, N. Y. The applicant objects to the admission in evidence of the finding of the Chinese inspector thereto annexed on the ground that the proceeding was without warrant of law and in contravention of the express provision of the act of 1892, above cited, and that Li Dick was not lawfully before the Chinese inspector for examination.

"Second. That the examination showed that Li Dick was a resident domiciled merchant in the United States having a right under the treaty 'to come and go freely,' and that he entered the United States, as appears by the statement on which the inspector based his finding, in the exercise of his lawful right.

"Third. That there cannot be a surreptitious exercise of such lawful right.

"Fourth. That there is no provision of law requiring applicant to appear before any officer or produce any official document to entitle him to enter into the United States; he being a domiciled resident merchant, as appears from said examination.

"Fifth. That there is no authority for declaring applicant's right of domicile forfeited by reason of his not appearing before the Chinese inspector at the port of Malone.

"Sixth. That the judicial tribunal named in section 13 of the act of 1888 is the only one to say and determine the rights of applicant on the facts shown on the return.

"Applicant further objects to the admission of the document purporting to be a warrant of arrest issued by the acting Secretary of Commerce and Labor on the 25th day of October, 1909, upon the ground that it appears from the return of said Chinese inspector and from the recitals in the body of the warrant that the applicant had entered the United States on the 23d day of October, 1909, and that the applicant was seized and put under bodily restraint without any warrant by the Chinese inspector and was detained by him without any authority of law, and that said warrant above recited does not justify either the original arrest or further detention."

By the act of February 20, 1907, "An act to regulate the immigration of aliens into the United States," it is provided, in section 2:

"That the following classes of aliens shall be excluded from admission into the United States."

Then follows a description of such excluded classes, and these include idiots, imbeciles, feeble-minded persons, epileptics, insane persons, persons who have been insane within five years, paupers, persons likely to become a public charge, persons afflicted with tuberculosis or with a loathsome or dangerous disease, persons not above included who are found and certified to be mentally or physically defective so as to affect the ability of such alien to earn a living, persons convicted of or who admit having committed a felony or other

crime or misdemeanor involving moral turpitude, polygamists or persons who admit their belief in the practice of polygamy, anarchists or persons who believe in or advocate the overthrow by force or violence of the government of the United States, or of all government, or of all forms of law, etc.

That this provision is constitutional and proper cannot be questioned. That Congress may devolve the determination of the question whether an alien seeking admission into the United States for the purpose of residence here comes within the excluded class on an executive or administrative branch of the government is too well settled to be doubted or questioned. That Congress may establish ports of entry and provide for inspection and examination thereat, and that all aliens shall enter through such ports, if at all, and that entry at any other place shall be unlawful, cannot be doubted, and that it has done so is plain. The language of the immigration act in its terms applies to all aliens. It makes no exception in favor of alien Chinese persons. Section 36 of the act provides:

"That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act, provided that nothing contained in this section shall affect the power conferred by section thirty-two of this act upon the Commissioner General of Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico."

Section 32 provides as follows:

"That the Commissioner General of Immigration, under the direction or with the approval of the Secretary of Commerce and Labor, shall prescribe rules for entry and inspection of aliens along the borders of Canada and Mexico, so as not to unnecessarily delay, impede, or annoy passengers in ordinary travel between the United States and said countries, and shall have power to enter into contracts with transportation lines for the said purpose."

Ports of entry on the Canada border have been duly designated; Malone in the Northern district of New York being one. Li Dick did not enter at one of these or at any other port of entry. He came in surreptitiously in the nighttime avoiding inspection and examination.

Rules 3 and 49 of the regulations governing the admission of Chinese aliens as amended, approved by the Secretary of Commerce and Labor, and promulgated by the Commissioner General, read as follows:

"Rule 3. Chinese aliens shall be examined as to their right to admission to the United States under the provisions of the law regulating immigration as well as under the laws relating to the exclusion of Chinese (24 Op. Atty. Gen. 706; 164 Fed. 506; 170 Fed. 566). As the immigration act relates to aliens in general, the status of Chinese applying for admission must first be determined in accordance with the terms of that law and of the regulations drawn in pursuance thereof; then, if found admissible under such law and regulations, their status under the Chinese exclusion laws and regulations shall be determined. In order to avoid inconvenience, delay, or annoyance to Chinese applicants arising through misunderstanding, and in the interest of good administration, examination under both sets of laws and regulations shall be made, in the order stated, only at the ports named in rule 4 hereof."

"Rule 49. Orders for the deportation of Chinese arrested and tried in accordance with the Chinese exclusion laws can be issued only by a justice, judge, or commissioner of the United States court upon his decision that such Chinese have been found to be unlawfully in the United States, and the cost of making any such deportation is payable from the appropriation 'Expenses of regulating immigration' (Chinese). Aliens, including Chinese (170 Fed. 566), who enter the United States surreptitiously 'shall be adjudged to have entered the country unlawfully and shall be deported as provided in sections 20 and 21' of the immigration act (section 36). Therefore, in arresting aliens, including Chinese, who have entered the United States in violation of the immigration law and regulations, immigration officials shall follow the procedure prescribed in the 'Rules relating to deportation' of the Immigration Regulations of July 1, 1907 (rules 31-39), so far as said regulations are practically applicable to such cases."

Section 22 of the act provides for and authorizes the making of rules and regulations by the Commissioner General of Immigration. Section 20 provides:

"That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States."

Section 21 says:

"That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came as provided by section 20 of this act," etc.

Section 23 provides:

"That the duties of the Commissioner of Immigration shall be of an administrative character, to be prescribed in detail by regulations prepared under the direction or with the approval of the Secretary of Commerce and Labor."

Suitable rules and regulations and modes of procedure have been adopted and promulgated and have all the force of law so far as authorized and not inconsistent with the express provisions of law or of treaties or the Constitution.

Section 43 of the act refers to the Chinese exclusion acts, and provides:

"That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent," etc.

It does not state that Chinese aliens of any class shall not come within its provisions.

If Chinese aliens seeking to come into the United States, to immigrate thereto, or to come therein and reside therein, are subject to any of the provisions of the immigration act, it is clear that Li Dick, concededly a Chinese alien, entered the United States unlawfully and is subject to deportation. See section 36 quoted. In such case he is subject to the provisions of sections 20 and 21, unless the Chinese exclusion acts provide some other course of action or remedy in such a case. If the immigration act of 1907, as to remedies and proce-

dure, has no application to Chinese aliens, then, of course, the arrest and detention of Li Dick under the warrant of the Secretary of Commerce and Labor quoted is unlawful, unless such warrant is authorized by the Chinese exclusion acts themselves, and, if not so authorized, there is no jurisdiction to hold him or subject him to examination by virtue of that warrant. The force and validity of rules 3 and 49 are also involved.

If a domiciled alien Chinese merchant leaves the United States and goes to China, intending his visit to be temporary only, and there becomes an imbecile, an epileptic, insane, afflicted with tuberculosis or some loathsome or dangerous contagious disease, or is there convicted of a felony or crime involving moral turpitude, or becomes a polygamist or an anarchist, and then returns to the borders of the United States seeking to enter this country, is he entitled to enter freely, unquestioned, and without examination or inspection? I think not. The fact that he was a merchant and was domiciled in the United States when he left does not entitle him to return, if during his absence he has voluntarily or involuntarily become one of the class of aliens our laws exclude. If he does succeed in smuggling himself into the United States surreptitiously, is the inquiry when he is apprehended confined to the question whether or not he is a domiciled alien Chinese merchant having no other business? I think not. If he may be rejected, denied admission, or, in case he enters surreptitiously, deported, for the reasons mentioned, do the Chinese exclusion acts apply and afford the remedy, and must the methods of arrest, examination, and deportation there provided be followed? If those methods there pointed out and prescribed, and the tribunals there, in those exclusion acts named, are exclusive as to Chinese aliens, then the Secretary of Commerce and Labor is without jurisdiction to arrest and hold an alien Chinese person who surreptitiously enters the United States in violation of the immigration laws, and, while we have a violation of those laws and remedies for their violation pointed out therein, such remedies do not apply to alien Chinese, and the authorities must resort to the procedure and remedies pointed out in the Chinese exclusion laws.

So the contention is that, Li Dick having evaded the authorities at the Canada border, having evaded examination and inspection in violation of law, and having been found unlawfully in the United States because of such unlawful entry and apprehended in the United States, he must be brought before some justice, judge, or commissioner of a court of the United States, and that he cannot be deported unless by such officer "found to be one (that is, an alien Chinese person) not lawfully entitled to be or remain in the United States." This would place the trial, examination, and inspection of every Chinese person "found unlawfully" within the United States, no matter how he got here, in the courts of the United States; that is, before a justice, judge, or commissioner, as provided by section 12 of the Act of May 6, 1882 (22 Stat. 61, c. 126), as amended July 5, 1884 (23 Stat. 117, c. 220 [U. S. Comp. St. 1901, p. 1310]), or section 13 of the Act of September 13, 1888 (25 Stat. 479, c. 1015 [U. S. Comp. St. 1901, p. 1317]). The contention is that, once across the Canadian or Mexican border, the

Chinese alien is no longer subject to inspection and examination by the immigration officers at the designated ports of entry for disease, etc., which, if found to exist, would have precluded his entrance into the United States, but a justice, judge, or commissioner of the courts of the United States must make all that examination or investigation, if made at all. The immigration act provides for boards of special inquiry at ports of entry, and section 10 of the act provides:

"That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this act."

If the contention of the petitioner be correct, this section has no application to alien Chinese persons found unlawfully in the United States who have entered surreptitiously.

In *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082, cited and approved *United States v. Wong Kim Ark*, 169 U. S. 699, 18 Sup. Ct. 456, 42 L. Ed. 890, it was settled that statutes excluding or regulating the entry of alien Chinese apply to those who, having acquired a commercial domicile within the United States, leave for a temporary purpose and then claim the right under some law or treaty to re-enter. In other words, all aliens of whatever nationality may be excluded altogether, or their return regulated and conditions of return imposed in case they were here lawfully and departed for a temporary purpose only. I find nothing in the laws of the United States, or in the treaty with China, that grants any special privilege to Chinese aliens who have gained a commercial domicile as to their coming and going between the United States and China or any foreign country. Persons belonging to that class of Chinese aliens are neither exempted from inspection or examination on seeking to re-enter the United States, nor permitted by any provision of law to re-enter at any point they select. Being aliens, they must come in at the ports of entry designated and under the conditions imposed as to disease, conviction of crime, etc. If the law is in such shape that alien Chinese persons, who surreptitiously enter the United States in violation of law and in defiance thereof and are then apprehended as having violated the law as to entry so as to be then found unlawfully in the United States, are entitled to be arrested and held by a justice, judge, or commissioner of the United States courts only, such persons have greater rights and privileges than aliens of any other class, rights and privileges not granted to aliens of any other nationality, and, instead of being on a par with those of the most favored nations, they have superior rights, and our laws offer a premium on the surreptitious entry of Chinese aliens. No one contends that, where a Chinese alien duly applies for admission at a port of entry, or is stopped at the border before entry, he is not subject to inspection, examination, and rejection without being taken before a justice, judge, or commissioner. I do not think the law is in the condition suggested as to Chinese aliens who surreptitiously gain entrance into the United States. I do not think the law

offers a premium, or special privileges, to those Chinese aliens who enter surreptitiously and in violation of law. The proposition, in principle at least, is covered by the decision in *Looe Shee v. North* (C. C. A., Ninth Circuit) 170 Fed. 566, 571, 572. There a Chinese alien, prostitute, who had entered or was here in violation of the provisions of the immigration laws referred to, was held subject to deportation under those laws and by the procedure there prescribed.

In so far as the status of Li Dick is concerned in his relation to the Department of Commerce and Labor and Bureau of Immigration, I am of the opinion that while he was, in a sense, "found unlawfully within the United States," he was when found and apprehended in precisely the same condition as to his right to be and remain in the United States, as though he had then presented himself at a port of entry for admission, or had been apprehended by the immigration officers in the very act of crossing the border into the United States in violation of law at some point remote from a port of entry, and there stopped by them. Can there be any question that the immigration officers may prevent such an entry by a Chinese alien even though he had a mercantile domicile in this country prior to his departure, even though such departure and absence was intended to be temporary only? In this case Li Dick had just entered or crossed the border secretly and in the nighttime. He had not reached his destination in the United States. He had not settled down and become a part of the resident population. He was still engaged in the act of surreptitiously entering the United States as much as though he had been on foot running to gain entrance and had reached a point 10 or 20 rods this side the boundary line when actually overtaken and apprehended. In such a case as that, must the alien Chinese person be taken before a justice, judge, or a commissioner as one found unlawfully within the United States? Clearly not. *Ex parte Chow Chok et al.* (C. C.) 161 Fed. 627, affirmed by Circuit Court of Appeals, 163 Fed. 1021, 90 C. C. A. 230; *United States v. Ju Toy*, 198 U. S. 263, 25 Sup. Ct. 644, 49 L. Ed. 1040.

In my opinion he is lawfully in the custody of the Chinese inspector, and inspector of immigration and the immigration officers may examine into his case and return him to Canada if he is denied admission. In my opinion for purposes of disposition by the immigration officers under the immigration law he is deemed to be in Canada seeking admission into the United States. I know of no right he has gained by surreptitiously entering in defiance and violation of law. When returned to Canada, whence he came, he may present himself at a port of entry, submit to examination and inspection, present his case as an alleged domiciled Chinese merchant entitled to return to and remain in the United States, and if he sustains his claim no doubt the immigration officers will admit him. If he is denied a fair and full hearing, or an arbitrary or unlawful decision is made, habeas corpus will afford a full remedy. There is no law by which such officers or the department can impose upon him any judgment of forfeiture of that right, if it exists, because of his surreptitious entry. The penalty is a return to the "country whence he came." Sections 20 and 21 both

provide for a deportation or return "to the country whence he came." This may not mean China in this case, but the Dominion of Canada. Section 36 says:

"That all aliens who shall enter the United States, except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act."

But it is said that difficulties arise; that, having left the Dominion of Canada, the alien Chinese person has lost his right to be there; that the authorities of that Dominion will not receive him; that the United States will have Li Dick on its hands; and that he is doomed to perpetual confinement unless this government permits him to go at large, as it has no right to deport him to China. All this, if true, does not deprive the immigration officers of jurisdiction. However, no such consequences follow. If the Dominion of Canada refuses to permit the return of such person to its territory, assuming he must be sent there and that he cannot be returned directly to China, a question I do not now decide, he is not as a consequence lawfully in the United States or entitled to be or remain here. By his own wrongful act, violation, and defiance of law, he finds himself in a place where he has no right to be; that is, he is "found unlawfully in the United States," within the intent and meaning of the Chinese exclusion laws. He has entered in violation of law and is deemed unlawfully here. In such case he may be turned over to the Chinese inspectors as such, arrested, and held under the provisions of the Chinese exclusion laws by the warrant of any justice, judge, or commissioner of the courts of the United States, and it would be the duty of such officer to find that, having surreptitiously entered the United States in defiance and violation of law, he is here illegally and "found unlawfully in the United States," and deportation to China would follow as matter of course. Act May 5, 1892, c. 60, § 2, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1319), which reads as follows:

"That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country; provided, that in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China."

The illegal conduct of such alien Chinese person would not operate to shield him from such consequences.

I am of the opinion that the United States has two remedies in this case and may pursue them in the order it has prescribed: That Li Dick is lawfully held and detained under the warrant quoted. That being so lawfully detained and held, and his case not having passed to judgment or a determination by the Secretary of Commerce and Labor, the judicial department of the government has no right

to interfere or take such Chinese person from its custody or possession. "It is settled doctrine that a court of competent jurisdiction having possession of a person cannot be deprived of the right to deal with such person by habeas corpus until its jurisdiction is exhausted, and that no court of another and independent sovereignty has the right to interfere with such custody." In *re Johnson*, 167 U. S. 120, 125, 17 Sup. Ct. 735, 42 L. Ed. 103; *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; and many other cases. True, the Department of Commerce and Labor and its officers, even when a board is formed as prescribed, for the examination of certain cases, is not a court. But it is given jurisdiction by law to hear certain cases and decide certain questions and enforce its judgments. As has been held in administering the Chinese exclusion acts, the courts have a certain limited supervisory power; but the power to take a Chinese alien from the Department of Commerce and Labor while it is engaged in examining into the case and before its decision is made is impliedly denied. *Chin Yow v. United States*, 208 U. S. 8, 11, 28 Sup. Ct. 201, 52 L. Ed. 369; *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

But whether denied or not, the principle enunciated in *Re Johnson*, *supra*, should apply and govern the courts of the United States in dealing with the executive and administrative departments of the government up to the time they have pronounced judgment. If that judgment is arbitrary, if no opportunity to be heard or give evidence was afforded, or if it be clearly in excess of jurisdiction, the courts may interfere. *Chin Tow v. United States* and *United States v. Ju Toy*, *supra*. It is no new doctrine that the sovereign power may provide two tribunals with concurrent jurisdiction. Here we have the Chinese exclusion laws and also the general immigration laws. The exclusion laws were not enacted for the enforcement of the immigration laws as to Chinese aliens, although they are applicable and may be used for that purpose in some cases. There are cases where they would be inadequate and inefficient, as is pointed out in 24 Op. Atty. Gen. 706, and *Looe Shee v. North* (C. C. A.) 170 Fed. 572.

The fact, if it be a fact, that Li Dick, prior to his last departure for China, had gained a domicile in the United States as a Chinese merchant (Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320]), is no defense to the pending proceeding in the Department of Commerce and Labor. As stated, by entering surreptitiously, he has not forfeited his right to return to a port of entry, after deportation, and apply for admission on the ground that he is a domiciled merchant, submit to an examination and an inspection, prove if he can, as required by law, that he had such a domicile and has not abandoned it and has his commercial interests here. Should he do that, and no lawful reason for his exclusion appear, it would be the duty of the immigration officers to admit him, and it is presumed they would do their duty. However, when he avoided compliance with the law relating to his entry into the United States, defied and violated it, and by violating law surreptitiously entered, he placed himself unlawfully in the United States, and he gained no right by doing so, and by the ex-

press terms of the immigration laws he is to be sent back to the place whence he came. The law is express and explicit. There is no doubt, if Canada refuses to receive him, that he can be taken before a justice, judge, or commissioner and deported, for physically he is within the United States and cannot be heard to say that he is not. Legally he is here by violation of law, and, so far as he is concerned or can be heard to say, is found unlawfully here. He has no right to be here, as he did not comply with the statutes and rules governing the entry of domiciled Chinese merchants, and until he has done that at the proper time and place his right to be here as such merchant is suspended. He cannot now be allowed to plead or assert that right as a bar to deportation, even if he might assert it at the proper time and place and in the proper manner. In no other way can there be an efficient and effective enforcement of our laws.

The United States has the right to say where and when and how all aliens shall apply for admission and be heard on the question of their right, and a compliance with those requirements is a condition of their being heard at all on the question of their right to enter or reside here. Li Dick by his own wrong and violation of law placed himself in the United States, and thereby incurred the penalty of expulsion. He cannot avoid the penalty of that illegal act by showing he had a prior right to come into the United States at the designated place on complying with the law he has violated. He did not have the right to come and go freely, and his case is not like that of a citizen of the United States arrested for having come in illegally on the supposition he was an alien. In such case citizenship is an absolute defense to the proceeding, as there is no law regulating the entry of our citizens on returning from abroad. This principle does not necessarily apply to one claiming to have been born here, to be a citizen of the United States. The immigration laws and Chinese exclusion acts by their terms apply to aliens only. They have no application to citizens of the United States, except in so far as the mode of procedure, subject to review by the courts, is applicable for the determination of the question of fact whether or not the applicant is a citizen of the United States. When that question of fact is determined in his favor, he is entitled to come and go at will so far as those laws are concerned. But Li Dick concedes that he is a Chinese person, an alien, that he departed to China some eight or nine months ago, without making any preparation or arrangements for his return, and that when he did return he purposely failed to comply with the law and entered surreptitiously. I think the law clear that he must be returned to Canada, or deported to China if Canada will not receive him, and that his rights as a domiciled merchant cannot be brought in question in these proceedings or the proceedings pending before the Department of Commerce and Labor, Bureau of Immigration. The warrant is not void, the Department has jurisdiction and possession of his person, and, at this stage of the case, at least, the courts should not and will not interfere.

The writ must be dismissed, and Li Dick remanded.

PHILADELPHIA & R. RY. CO. et al. v. INTERSTATE COMMERCE COMMISSION.

(Circuit Court, E. D. Pennsylvania. November 20, 1909.)

1. COMMERCE (§ 98*)—ORDERS OF INTERSTATE COMMERCE COMMISSION FIXING RATES—REVIEW BY COURTS.

A court having no constitutional power to regulate commerce or to fix rates to be charged by a carrier cannot suspend or vacate an order of the Interstate Commerce Commission prescribing rates under the power conferred by section 15 of the interstate commerce act as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), except on the ground that in making such order the commission transcended its power or exercised such power without due regard to law and in violation of some legal, constitutional or natural right of the carriers affected.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 98.*]

2. CARRIERS (§ 32*)—PREFERENCES IN INTERSTATE RATES—JUSTIFICATION.

The similarity of circumstances and conditions under which a service of carriage is rendered, which, under the interstate commerce act, requires an equality of rate, relates to the circumstances and conditions which affect the service only, and, where different coal mining localities are grouped into a district for rate-making purposes, a carrier is not justified in making a different rate for the same or substantially similar service from a particular locality in such district, or on the product of a particular mine or vein, from that charged others because the difference in the product from such locality mine or vein and that from other mines in the district is such that it can pay a higher rate and still compete in the market.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. § 32.*]

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

In Equity. Suit by the Philadelphia & Reading Railway Company, the Baltimore & Ohio Railroad Company, Benjamin F. Bush, receiver of the Western Maryland Railroad Company, the Pennsylvania Railroad Company, the Cumberland Valley Railroad Company, and the Lehigh & New England Railroad Company, against the Interstate Commerce Commission. On demurrer to bill. Demurrer sustained.

Charles Heebner and Hugh L. Bond, Jr. (George Stuart Patterson, of counsel, for Pennsylvania R. Co.), for complainants.

J. Whitaker Thompson, U. S. Atty., and Luther M. Walter, Sp. Asst. U. S. Atty., for Interstate Commerce Commission.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a bill brought by the Baltimore & Ohio Railroad Company and a number of other railroad companies against the Interstate Commerce Commission, to enjoin the latter from enforcing its order of June 7, 1909, whereby it established a tariff rate on Big Vein coal carried from the George's Creek and Elk River regions in Maryland to coast points in other states. To this bill the Commission demurred. The questions pertinent to our disposi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of the case may be considered under the first and fifth grounds of demurrer, which are:

"(1) That it appears from the face of said bill: That all of the proceedings required by statute to be taken were duly taken and had; that after a formal complaint and answer a full hearing was had; that the Commission arrived at its conclusion after being fully advised; that the order complained of was duly given, made, rendered, and served; and that the conclusion of said Commission was not arbitrary or reached through fraud; and therefore the act of the defendant is final and conclusive and not reviewable by the courts."

"(5) That it appears from the face of the bill of complaint that the order of the Commission is lawfully issuable under the act to regulate commerce."

By section 15 of the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), Congress empowered the Commission, if it "shall be of the opinion that any of the rates or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, * * * are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, * * * to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged."

The jurisdiction of the court in this case is invoked under section 15, which provides that the Commission's order may "be suspended or set aside by a court of competent jurisdiction," and section 16, which designates the particular court to exercise jurisdiction and provides that "jurisdiction to hear and determine such suits is hereby vested." Now the power conferred being to suspend or set aside the Commission's order, the question arises in what way and to what extent will this court exercise its powers in order "to hear and determine such suits"? Without referring to that general jurisdiction which federal courts, within constitutional limits, necessarily have to prevent infractions of the law, we note that the jurisdiction here invoked is conferred by the statute above quoted, and its purpose is to submit the action of an executive branch of the government to the judgment of the court that it may hear and determine such suit with a view to suspending or setting aside that action. On the argument counsel did not question the right of the Commission under the act to fix maximum rates, provided they were not confiscatory.

Now manifestly courts have no power to fix rates. Maximum Rate Cases, 167 U. S. 499, 17 Sup. Ct. 896, 42 L. Ed. 243; *Gordon v. United States*, 117 U. S. 697, 20 Sup. Ct. 1020, 44 L. Ed. 1219; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014. No such authority is conferred on federal courts by the Constitution, and by its grant to Congress of the power "to regulate commerce * * * among the several states," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," the exercise of power to regulate commerce is restricted to that agency. The fixing of rates as an incident to the regulation of commerce, being a nonjudicial function, it follows that when

the legislative branch has itself acted therein, or by proper delegation of its powers has acted through the executive branch, such action, provided no legal, constitutional, or natural right has been violated, is not to be suspended or vacated by a court.

In pursuance of the powers above referred to, the Commission has made such an order in the premises, and that order is now in force unless it "be suspended or set aside by a court of competent jurisdiction." Now on what principles should this court proceed in suspending or setting aside an act of an independent branch of the government? Manifestly, the act is one of those administrative acts of the executive branch of the government, duly empowered thereto by the legislative branch, that falls within that category of which Mr. Justice Harlan spoke in the *Union Bridge Case*, 204 U. S. 386, 27 Sup. Ct. 374 (51 L. Ed. 523):

"If the principle for which the defendant contends received our approval, the conclusion could not be avoided that executive officers, in all departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the foundation of the national government, exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature. This will be apparent from an examination of the various statutes that confer authority upon executive departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business."

It is therefore apparent that, when the question of suspending or setting aside an executive act comes before a court under such statute, the question is one of law, namely, whether the executive transcended its power or exercised such power without due regard to law. If, for example, there was a failure to comply with statutory requisites of notice, or to afford a statutory hearing, or the action taken was confiscatory—these are all elements a court might consider and in exercising such jurisdiction inquire into the facts to ascertain the real subject involved as throwing light upon the lawful or unlawful character of the order under review. The principles affecting this exercise of jurisdiction are clearly set forth by Judge Lanning in *Appleby v. Cluss* (C. C.) 160 Fed. 984, where, on a bill to enjoin execution of a fraud order made by the Postmaster General, he said:

"A due regard for an order of an executive department of the government demands that the judicial department shall not require the head of that executive department, or any of his subordinate officials, to answer a bill in equity, the purpose of which is to secure a decree which in effect annuls the order, unless the bill makes a clear *prima facie* case that the facts adduced before the executive department could not possibly support the order, or that the complainant's legal or constitutional rights have been violated."

This view is in accord with the principles set forth in *San Diego v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154, and cases cited, viz.: *Spring Valley v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; *Chicago v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176; *Reagan v. Farmers' Loan*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1031; *Smyth v.*

Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Henderson v. Henderson, 173 U. S. 592, 19 Sup. Ct. 553, 43 L. Ed. 823; Missouri Co. v. Interstate Commerce Commission (C. C.) 164 Fed. 645; Knoxville Water Case, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; Consolidated Gas Case, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

In the present case all the provisions of the statute were observed, and the parties concerned were duly notified and fully heard. It is, however, averred in the bill that the Commission "based its finding that the rates on the Big Vein coal, when consigned over the lines of your orators to Baltimore, Wilmington, and Philadelphia for transshipment by vessel, were unreasonable and unjustly discriminatory, wholly upon the ground that by reason of the higher cost of production of the said Big Vein coal it could not, when so consigned, successfully compete with the coals of the Pocahontas and New River districts."

Assuming, for present purposes, that, if this conclusion were correct, the Commission could not legally base an order on that ground, analysis discloses not only that the pleadings have not brought before us all the facts and proofs on which the Commission acted, but that those which are before us show that the conclusion stated above is not warranted, and that the Commission based its action on other and different grounds. To that end we address ourselves to the facts. The rate here in question applies to the transportation of coal mined from the Big Vein in the George's Creek and Elk Garden region, which we will hereafter refer to as the "George's Creek basin." For the purpose of rating, these two fields and the Somerset (which the Commission refers to as the Pennsylvania) field to the north and west, and the Austen-Newburg (which the Commission refers to as the West Virginia) field, to the west, were included in one group and had been so grouped for ten years. Thus, in their report in the present case and annexed to the bill, the Commission says:

"Rates from George's Creek basin and from the Pennsylvania and West Virginia fields are the same when the coal is destined for track delivery on the lines of the principal defendants; that is to say, coal from mines in the Pennsylvania and West Virginia fields takes the same rate as coal from the George's Creek basin when it is destined for local consumption even at tide water points. This is still the relation of the rates on coal from the three fields when destined to local points on the Baltimore & Ohio and Western Maryland. The three fields have been thus grouped for ten years or more. Moreover, Philadelphia, Wilmington, and Baltimore and intermediate points, at the other end of the haul, have for a like period of time also been grouped together under one rate for track delivery."

On all the coal carried from the mines in this group for track delivery to Philadelphia, Wilmington, and Baltimore the rate was \$1.60 per ton, and for overpier delivery for shipment inside the Chesapeake and Delaware Capes the rate was \$1.35 per ton. When it came, however, to overpier deliveries for shipment beyond the Capes, the George's Creek basin coals were charged a materially higher rate than the West Virginia and Pennsylvania fields, although all were in the same group, and the George's Creek had a shorter and downgrade haul as compared with the longer and upmountain grade to Cumberland in the case of the West Virginia and Pennsylvania fields. Now the effect

of the present order is to put all the coal from the group on an exact equality of \$1.60 per ton for track deliveries, \$1.35 for overpier deliveries for shipment inside the Capes, and \$1.18 for overpier deliveries at Baltimore, and \$1.25 at Philadelphia, for shipment outside the Capes.

The reason why shippers submitted to these varying prior rates in the same grouping is quite plain. The coal in the Pennsylvania and West Virginia fields of the group was ordinary bituminous coal and was found in small veins, while that in the George's Creek basin came from the "Big Vein," a stratum of such unusual thickness that it was mined at far less cost than the thinner veins, while its high grade and peculiar characteristics gave it a market of its own in which no other coal competed. Of this condition the Commission say in their report:

"The defendants the Baltimore & Ohio and the Western Maryland reach three coal districts, which for convenience are referred to in the report as the Pennsylvania, West Virginia, and George's Creek fields. Under an adjustment made in 1900, which was then entirely satisfactory to all concerned, these three fields were grouped together and took the same rate on coal destined for track delivery at points on the lines of those two roads. At that time the output of George's Creek basin consisted of Big Vein coal only, and it was concededly superior in quality to the coals mined in the other two districts. * * * The record showed that there was no competition from outside coal fields at local points on those lines; but when the coal went over the piers at Philadelphia, Baltimore, and Curtis Bay, for destination inside and outside the two Capes, it met the more or less severe competition of water-borne coal from mines on the Chesapeake & Ohio, Norfolk & Western, Pennsylvania, and the New York Central railroads. It was necessary therefore to shrink the rates in order to enable the coal from these three fields to enter those markets. Because, however, of the superior quality of George's Creek coal, and of its ability more easily to meet such competition, the rates on that coal were shrunk less than the rates on the coals from the Pennsylvania and West Virginia fields. The result of the adjustment was that, as compared with the rates from these fields, there was a differential of ten cents a ton against George's Creek coal when water-borne to competitive points inside the Capes, and of 15 cents a ton when destined to points outside the Capes."

Now to us it is clear that while a reduction by the railroad of their rates to the Pennsylvania and West Virginia fields was a proper business step, since otherwise the carrier would have had no traffic from those fields, yet it is equally clear that in the face of such reduction of rates to a part of the group the railroad had no legal right to retain the higher rate on the remainder of the group. The fact that the latter did not need the reduction to meet competition was no legal justification to warrant its retention. Speaking, in the recent case of Pennsylvania Railroad Company v. International Coal Mining Company (C. C. A.) 173 Fed. 3, of an attempt to justify different rates on coal hauled from the same grouping because one was "contract coal" and the other "free coal," we said:

"We are thus brought face to face with the question whether the existence of these contracts created a dissimilarity of circumstance and condition under which the service of carriage was rendered. To us the reading of the act is clear. The act contemplates 'compensation for any service rendered.' Now it is manifest that 'service rendered' is the physical service of carriage. Elsewhere it is spoken of as 'a like and contemporaneous service.' Such service is a 'service in the transportation'; it is a 'service in the transportation

of a like kind of traffic'; and it is a service in transportation 'under substantially similar circumstances and conditions.' The law having in view the carriage of freight and equal rates to all, it is clear to us that the words, 'substantially similar circumstances and conditions,' as used in this subsection, are those which affect transportation, and not those which involve personal conditions or contractual relations between one particular shipper and the carrier, but are such things only as are circumstances of carriage generally. In *Wight v. United States*, 167 U. S. 513, 17 Sup. Ct. 822, 42 L. Ed. 258, it was sought to differentiate the service performed by the different terminal facilities of the two shippers at their respective warehouses; but the court held these were not the circumstances and conditions of the act, but that the circumstances and conditions the act contemplated were those which affected the actual carriage of the freight, using this language: 'It was the purpose of this act to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.' And that this phrase, 'circumstances of carriage,' was a carefully chosen one limiting the circumstances to such as affected haulage of freight is shown in *Interstate Com. Com. v. Alabama*, 168 U. S. 166, 18 Sup. Ct. 49 (42 L. Ed. 414), where, referring to *Wight v. United States*, supra, the court say: 'We there held that the phrase, "under substantially similar circumstances and conditions," as used in the second section (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155]), refers to the matter of carriage, and does not include competition between rival routes.' It follows therefore that, if these circumstances and conditions of section 2 are those which affect haulage and do not include competition between rival routes, they do not include individual elements affecting individual shippers. The purpose of the section is to afford identity of rate for substantial identity of transportation service, and anything that does not aid in determining what is such substantial identity of haulage does not aid in the application of the section."

It will thus be seen that, while the nonuniform rate was continued as against George's Creek basin, there was no legal justification for such continuance. Later this matter came before the Commission in *George's Creek Basin Coal Company v. B. & O. R. R. Co.*, 14 Interst. Com. R. 127, and of that case the present report says:

"In 1902, after this relation of rates as between the three fields had been in existence for about two years, the operators in George's Creek basin commenced for the first time to mine Small Vein coal, which as stated, is inferior in quality to the Big Vein coal, and is substantially the same as the coals mined in the Pennsylvania and West Virginia fields. But as the defendants in that proceeding made no distinction in their rates between Big Vein and Small Vein coal the latter, with differentials of 10 and 15 cents a ton against it, could not move by water in competition with coal of the same quality from the other two fields. The record in fact showed that, from the time the Small Vein mines were opened in 1902, to the time when the hearing of that complaint was had, not a single cargo of Small Vein coal was shipped to competitive points either inside or outside the Capes, although coal in large volume had reached those destinations from the other two fields. It was under these circumstances that the original complaint was filed asking for relief on behalf of the Small Vein operators. The complainants contended that the Small Vein coal, with differentials against it, could not successfully enter the markets for water-borne coal. No attack was made in the complaint on the inherent reasonableness of the rates from George's Creek basin to tide water points but only upon the reasonableness of those rates as applied to Small Vein coal when compared with the rates accorded to operators in the Pennsylvania and West Virginia fields. No complaint was made at that time either by or on behalf of the producers of Big Vein coal in George's Creek basin. On the contrary, the witnesses who testified gave us to understand that the Big Vein coal, because of its superior quality, had been able to hold its own under the existing rates in competition with the coals from the other

fields, and therefore required no reduction in order to retain its markets. We were, in fact, advised that the Big Vein coal had been so well and favorably known that it practically met with no competition at all from other bituminous coals except possibly from the New River coal on the Chesapeake & Ohio and the Pocahontas coal on the Norfolk & Western. Although it was quite unusual, as we then explained, to have two rates on coal from one mining district, nevertheless as the Big Vein coal was not shown to require any reduction in rates, but was said to be moving freely in competition with the other coals, and as the issue made on the complaint was directed against the rates on Small Vein coal only, we concluded, without committing ourselves to the general propriety of two rates from one district and basing our action strictly on the record before us, to order a reduction in rates on Small Vein coal to tide water points, so as to permit that coal to meet the competition of coals of like quality from the Pennsylvania and West Virginia fields. We thereupon entered such an order without disturbing the rates on Big Vein coal and the lower rates on Small Vein coal were subsequently published by the defendants in that complaint. But we said in explanation of our exact attitude toward the whole situation that: 'If the results are such as to demonstrate that the two rates cannot be successfully maintained without giving rise to discriminations and unlawful practices, the question will then arise whether the lower rate should not be made effective from all mines in the basin, whether producing Big Vein or Small Vein coal.' And it may be well also now to emphasize the fact that this disposition of the matter is not to be understood as an approval of such a rate adjustment either for general application or as controlling our action in the future in case complaint should be made of the rate on water-borne coal from the Big Vein mines. We are to be understood only as giving recognition, on the record before us, to the right of the Small Vein operators to have a rate that will enable them to move their output to the consuming markets and give them a reasonable opportunity to compete with similar coal from adjacent fields moving through Cumberland to tide water for destinations inside and outside the Capes."

Accordingly, the rate on Small Vein coal from George's Creek basin was made uniform with that from the Pennsylvania and West Virginia fields. Subsequently the proceeding in the present case was brought on behalf of companies in the George's Creek basin engaged in the mining of both Big Vein and Small Vein coal, and two forms of relief were sought, viz.: In the case of the Big Vein coal:

"That the differentials of 10 and 15 cents a ton against the Big Vein coal constitute an undue discrimination that ought to be removed, and that the Big Vein coal ought to be placed on a parity with the Small Vein coal and with the coals from the Pennsylvania and West Virginia fields."

And in the case of both the Big Vein and the Small Vein coals of George's Creek basin, that they be removed from their grouping with the Pennsylvania and West Virginia fields, viz.:

"(2) That, as the George's Creek basin is nearer to tide water than the Pennsylvania and West Virginia fields, and the haul less expensive both on account of the shorter mileage and on account of the more favorable character of the grades, the rates from these mines to all points on the lines of the defendants should be less than the rates from the more distant western mines with which the mines of the George's Creek basin are now grouped for rate-making railroads."

The relief by way of regrouping was denied, and, while that question is not before us, it is helpful to an understanding of the present case to note that the Commission say:

"While we are not disposed to criticise the desire on the part of the operators at George's Creek to secure better rates than their competitors in the other two fields enjoy, we are not inclined, on the other hand, to yield to

their demand. There are many coal groups that are much more extensive than this group. Moreover, it has been our understanding that group rates, particularly on such a commodity as coal, are advantageous to the public, the carriers, and the mineowners alike. The disrupting of this group of coal-producing districts and coal-consuming destinations after it has been in effect for so many years could not fail to lead to a widespread confusion in coal rates, and we see nothing in the record to justify such an order."

As to the other relief sought, viz., putting Big Vein coal on an equality with all the other coals in this group, the report shows not only that there was the all-sufficient ground we have noted above, viz.; that there was a dissimilarity of charge for similarity of service, but that, wholly apart from the legal ground, there was a practical commercial reason for relief in the increased cost of mining due to drawing pillars, greater water troubles, longer haulage, lumbering, etc., incident to the exhaustion of a very thick vein. The report then states:

"The report of the Commission in the previous proceeding indicates the action that might fairly be anticipated whenever the question of the reasonableness of the rates on Big Vein coal, when water-borne to points inside or outside the Capes, was properly presented to us accompanied by adequate proof that the differentials against it operated to its disadvantage. Such a complaint is now before us, and the testimony makes it quite clear that the reduction in the rates on Small Vein coal required under our order in the previous case ought now to be extended to the rates on Big Vein coal."

Indeed, an examination of this case in all its bearings satisfies us not only that the Commission did not act unlawfully, but was constrained to order the enforcement of a uniform rate in the whole group in accordance with the provisions above quoted from section 15 of the act.

We are therefore of opinion the demurrer should be sustained and the bill dismissed.

It remains to consider an argument peculiar to the Pennsylvania Railroad advanced at the hearing. It was, in effect, said that as the lines of that railroad enter the George's Creek basin only, and do not enter the West Virginia and Pennsylvania fields, the order will subject it to pains and penalties should the Baltimore & Ohio hereafter change its rates from the West Virginia and Pennsylvania fields. It suffices to say that such danger is too remote to invoke injunctive relief, and that, if any such construction is placed upon the order as is now suggested, there will be opportunity to that road to apply to the Commission for modification of the order, or to this court for injunctive relief.

THE COMMONWEALTH.

(District Court, S. D. New York. January 15, 1910.)

COLLISION (§ 39*)—CAUSE—EVIDENCE.

Collision at the eastern entrance to Long Island Sound between the steamer Volund proceeding eastward through the sound and the steamer Commonwealth proceeding toward New York. The Volund was going at a moderate rate of speed and while her navigation was in some respects

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

subject to criticism, *held* that the Commonwealth was solely in fault because of her excessive speed of about 18 knots.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 39.*]

(Syllabus by the Judge.)

Action by Ole Irgins and others against the steamer Commonwealth. Decree for libellants.

Wallace, Butler & Brown, for libellants.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This action was brought by Ole Irgens and Axel Irgens, owners of the steamer Volund, and several members of her crew, against the steamer Commonwealth to recover their losses for the value of the steamer, loss of personal effects, and personal injuries, said to aggregate \$76,000, suffered by reason of a collision between the said steamer and the steamer Commonwealth in the Race, the easterly entrance to Long Island Sound, on the 26th of September, 1908. The Commonwealth was also damaged to the extent, it is said, of \$40,000.

The libel alleges that the Volund was proceeding, about 1 a. m., with all her regulation lights set and brightly burning, on a course of E. $\frac{1}{4}$ S. by compass and had reached a point in the vicinity of and to the northward of Little Gull Island, when a thick fog shut in, whereupon her engines were slowed; that a few minutes after 1 o'clock, the engines were stopped for a minute or thereabouts to ascertain as accurately as possible, the bearing of the siren of Little Gull Island; that the steamer then proceeded at slow speed as before until she brought the siren to a safe bearing well abaft her starboard beam and the Race Rock trumpet to a bearing of about a point on her starboard bow; that her engines were again stopped for a minute to determine these bearings as accurately as possible; that again proceeding at slow speed her course was changed to south-east for a few minutes, then to south $\frac{1}{2}$ east; that under a slow speed she proceeded on this course making only about $2\frac{1}{2}$ miles an hour through the water, carefully sounding her regulation fog signals as required by the rules of navigation; that the master and chief officer were on the bridge, a competent lookout was stationed forward on the forecastle head and a competent man at the wheel and they and the rest of the crew were properly stationed and vigilantly attending to their respective duties; that while proceeding in this manner, and at about 1:38 a. m., the whistle of a steamer, which afterwards proved to be the Commonwealth, was heard by the officers of the Volund and reported by the lookout bearing nearly abeam on the port side and apparently a considerable distance away; that the engines of the Volund were at once stopped in order to locate the whistle; that a repetition of the whistle was heard bearing apparently right abeam, whereupon the Volund again started her engines under a slow speed order, sounding her fog signal at short intervals; that after 3 or 4 repetitions of single whistle fog signals from the other steamer, a double whistle signal was heard from her, which was afterwards repeated; that this signal consisted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of two prolonged blasts resembling the signal prescribed by the International Rules for a vessel stopped and without way; that shortly afterwards the general lights and the green side light of the Commonwealth were seen, already at close quarters somewhat forward of the Volund's port beam and the Commonwealth loomed up out of the fog approaching at a high rate of speed, sounding at the same time a signal of 3 blasts; that as soon as the lights of the Commonwealth could be seen, the engines of the Volund were at once stopped and reversed full speed astern and every effort made to back clear; that nevertheless the Commonwealth kept on and struck the Volund a terrific blow on her port side about 30 feet from the stem, tearing a great hole in her side, puncturing the collision bulkhead and causing the Volund to fill and rapidly settle by the head, sinking a short time later with the property and personal effects of those on board, becoming a total loss; that the crew escaped with their lives, being picked up by the Commonwealth, although one of the libellants, who was acting as lookout, was thrown to the deck by the force of the collision and sustained severe personal injuries and another libellant, the helmsman, was struck by the wheel and severely injured. It is further alleged that the collision was not due to any fault or error on the part of those navigating the Volund, but was due solely to the negligence of those on the Commonwealth in that: (1) she was proceeding at an immoderate and excessive speed in a dense fog, (2) she did not maintain a vigilant or proper lookout, (3) she did not stop her engines upon first hearing the fog signal of the Volund, (4) she did not seasonably slow, stop and reverse, (5) she attempted to cross the bow of the Volund instead of going under her stern and (6) she did not give proper fog signals.

In her answer, after some admissions and denials, the Commonwealth alleged:

"Eighth: Further answering, this claimant alleges that it is a corporation of Connecticut, and is the owner of the steamer Commonwealth, which is a new sidewheel passenger boat, built by William Cramp & Sons Ship and Engine Building Company, and by the Quintard Iron Works Company. She measures 445 feet 2 inches in length, with a beam over guards of 94 feet 7 inches. She is designed for speed of 23 statute miles per hour, and since June 23d last has been in the service on the Fall River Line, between Fall River via Newport and New York.

Ninth: On the night of September 25th, the Commonwealth had left Newport bound for New York. Fog was encountered for more than two hours before the collision and the Commonwealth had sounded regular prolonged fog blasts at one minute intervals. Her whistle is clear and powerful. The fog was not of a uniform density being less at the height of the pilot-house than below, but the steamer's speed was reduced to from 13 to 14 miles an hour. Her bright electric regulation lights were set and brightly burning. Her master, pilot and quarter-master were in the pilot house, keeping careful watch, which was also maintained by her watchman forward. The wind was light, tide ebb, and the Commonwealth's course was about W. $\frac{1}{4}$ S. She had heard the fog signals of and met three Eastbound steamers which were passed in safety.

Tenth: When the Commonwealth had entered the narrow neck or passage known as the Race, and had made the fog whistles of Race Rock, and was upon the course aforesaid, her lookout and officers who had been attentively listening for signals, suddenly saw a white masthead light bearing between one and two points on the steamer's starboard bow. No colored lights were

then shown, and the vessel was not giving any sound signals. Those on the Commonwealth could not tell whether this was a meeting vessel, or if she was being overtaken, but they instantly rang for full speed astern and placed the helm hard a starboard, followed by two short blasts as required to indicate her starboard helm. Just after that one faint whistle from the other steamer, which the Commonwealth followed by sounding several alarm blasts. The other steamer approached athwart the Commonwealth's course showing a red light just before she was struck. The stem of the Commonwealth struck a square blow upon the port bow of the steamer (which proved to be the Volund), so that the Volund soon went down by the head. The Commonwealth lowered four of her boats, and rescued all the Volund's officers and crew, as the Commonwealth anchored until all had been picked up.

The collision was at 1:19 A. M. and occurred near the middle line of the Race Channel, with Race Rock fog signal sounding about abeam of the Commonwealth.

Eleventh: By said collision the Commonwealth had both hawse-pipes driven in and sustained other damages, the cost to repair which, with the delay incident thereto, amounts to about forty thousand dollars.

Twelfth: Said collision was not due to any neglect on the part of the Commonwealth, but was solely due to the faults of the libellant's steamer Volund, in not keeping a proper course, but in steaming athwart the passage of the Race, also that no proper or licensed officer was in charge; had no sufficient lookout; had no efficient whistle; failed to give proper whistle signals, and kept on after hearing repeated whistles of the Commonwealth, in not stopping as required by Article 16, and especially that when heading square across the passage of the Race and warned by repeated whistles that a steamer was coming through to the westward, the Volund nevertheless kept on a dangerous course tending to intercept and collide with such inbound steamer, which course was unchecked even after the two starboard helm signals of the Commonwealth had been sounded; and in other faults which will be shown upon the trial."

It appears that the Volund was a small Norwegian steamer, measuring 1087 tons gross, 670 tons net. Her length was about 230 feet and her ordinary full speed about 8 knots. She was drawing 11 feet aft, 5 feet 3 inches forward. She was on a voyage from Newburg, New York, to Windsor, Nova Scotia, in ballast and had left New York the afternoon of September 25th. She passed Hell Gate between 2 and 3 p. m. and Cornfield Lightship at 11.40 p. m.

The Commonwealth left Newport for New York as stated in her answer. It says that her speed was reduced to 13 or 14 miles an hour. It is denied, however, that she was actually making 16 statute miles an hour. It is claimed by the libellant that her speed was not less than 18 knots through the water. There was a tidal current from $1\frac{1}{2}$ to 4 knots at various stages of her journey, running in an easterly or south-easterly direction. Eldridge's chart, admittedly correct, shows 4 knots at the place of collision. I think there can be little doubt that the Commonwealth's speed through the water was fully 18 knots, making a speed of 20.7 statute miles. She stopped and reversed just before the contact, obtaining a few revolutions of the engines astern but without materially affecting her speed. It appears that she, with other vessels of the line, habitually navigated in fogs at nearly or quite full speed in order to arrive at various points on schedule time but it is needless to say that this affords no justification for the excessive speed of this occasion. She must therefore be condemned for this fault and it is unnecessary to consider the minor ones claimed against her.

During the trial I expressed the opinion that the Commonwealth was in fault but reserved decision to ascertain whether or not the Volund was also in fault. At that time I had not read the depositions of the Volund's witnesses, taken before the trial, but have since done so.

The Commonwealth contends that the Volund was also going at an excessive rate of speed, that is, at her ordinary full speed of $8\frac{1}{2}$ miles an hour.

All of the logs of the Volund were lost in the collision, therefore her side of the account is dependent upon oral statements of her crew. It is conceded that she was kept at full speed until she came to Little Gull. Up to that time, a part of the testimony shows that she had met with some fog but did not reduce her speed on account of it. The lookout said that at 12 o'clock it was foggy but no signals were given. At 1 o'clock, she stopped to listen for Little Gull, which was heard off her starboard bow and judged to be abeam at 1:05 and about 2 miles distant. The fog whistles were commenced about 10 minutes before 1 o'clock and they were sounded 6 or 7 times when Little Gull was heard. The master had thought of anchoring if he could not make the Race Rock signals but he did hear them and kept on. A couple of days after the collision the captain made a precise diagram on a Government chart, of the steamer's movements from off Little Gull to the point of collision. It shows the steamer about $2\frac{3}{4}$ nautical miles north of Little Gull at a point marked "A" at 1 o'clock, thence proceeding east $\frac{1}{4}$ south to a point marked "B," about 2 miles, reached at 1:25 o'clock, thence proceeding south-east to a point marked "C," less than $\frac{1}{4}$ of a mile, reached at 1:27 o'clock, thence proceeding south $\frac{1}{4}$ east to a point marked "D," where the captain heard the Commonwealth's whistle at 1:38 o'clock, and then to a point marked "E" where the collision happened at 1:39. The distance from "C" to "E" was about $1\frac{1}{4}$ miles. The whole distance from "A" to "E" was $3\frac{1}{2}$ miles which the Volund made between 1 o'clock and 1:39 o'clock, at the rate of about a mile in 11 minutes, or about $5\frac{1}{2}$ miles an hour over the ground.

All the testimony shows very careful navigation with respect to speed after entering upon a course to pass through this dangerous place and nothing appears against the Volund with respect thereto except what may be gathered from the chart alluded to here and even assuming its correctness, it does not seem that the Volund should be condemned for excessive speed.

It is also contended by the Commonwealth that the collision happened not at 1:42 o'clock, as claimed by the Volund, but 23 minutes earlier, that is, at 1:19 o'clock and that therefore the speed of the Volund was greater than she claimed. There was doubtless considerable variation between the times indicated by the clocks of the respective steamers but what this amounted to is in too much doubt to permit the difference to be of any value in reaching a determination in this connection, especially as the Volund's time pieces were all lost and little is known about them.

The next important question is whether the Volund was in fault for adopting the course of south $\frac{1}{4}$ east, which caused her to expose her broadside to any vessel intending to pass through the channel to the westward. The captain's theory was that a prudent course required him to locate his position by means of Race Rock before undertaking to continue on a course through the Race. This could not be done if she kept over to the southerly or starboard side of the passage between Little Gull and Race Rock. The danger was that if she pursued a course on the southerly side of the passage she would be apt to be put ashore by the tidal current on that side and if she passed Great Gull and Little Gull successfully, but without hearing Race Rock, her subsequent course, founded on no certain point of departure, would be dangerous. Doubtless a vessel making considerable speed as compared with the tidal velocity could pass through the Race on the southerly side by dead reckoning from her last point of departure, with some assistance from the fog signals on Little Gull. But for a vessel going $2\frac{1}{2}$ or 3 miles an hour to attempt the same thing in a 4 knot current would require an accurate knowledge of the strength and direction of the current, which no one can be expected to have, or to assume any such risk. It was therefore prudent on the part of the master of the Volund to adopt a course that brought him within the sound of the signals even though it compelled the adoption of a crooked course. Although undoubtedly there was great danger in exposing the broadside of the Volund to any vessel navigating on the usual course through the Race, the master of the Volund was not bound to anticipate that any vessel which he would meet would be transgressing the law as to speed. I find nothing to indicate that if the Commonwealth had been proceeding at that moderate speed which the law demands, the course of the Volund would have interposed any obstacle to the Commonwealth's progress which would not or could not have been avoided by ordinary care and good seamanship. The Volund was endeavoring to reach the southerly side of the channel from the beginning of her change to the southward and when the Commonwealth came on the scene, the Volund was already somewhat to the south of the center line. The space that she was required to traverse across the channel after making Race Rock was not more than about 2 miles and the time required to cross it was inconsiderable. If the Volund had been somewhere else this collision would not have occurred but that she happened to be in the dangerous spot when the Commonwealth came along can scarcely I think be deemed negligent on her part.

In *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053, a case of collision between that steamer and the *Iberia* in a dense fog off the coast of Long Island, the *Iberia* was undoubtedly an obstacle to the progress of the *Umbria*, yet she was not found in fault, the court holding that the *Umbria* was gravely in fault for excessive speed and solely liable. In *The Kentucky* (D. C.) 148 Fed. 500, a case in this court not appealed, the other vessel in the collision, the *Exeter City*, was at the time of collision lying at the mouth of Gedney Channel, across the track of incoming vessels and was collided with by

the Kentucky, which was about entering the channel. It was held that the Kentucky was solely in fault for excessive speed. I have not been referred to and am not aware of any authorities which hold a vessel in the Volund's position in fault for being in the Commonwealth's track.

The Commonwealth contends that the Volund after hearing the former's whistle should have changed her heading so as to assume a position parallel with the former's course but it obviously would have been dangerous to make such an attempt and incur the risk of turning toward and confusing the other vessel.

The following part of Article 16 is relied upon by the Commonwealth:

"A steam-vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." Act Aug. 19, 1890, c. 802, 26 Stat. 326 (U. S. Comp. St. 1901, p. 2869).

In order to arrive at a conclusion with respect to this point, it is necessary to determine what were the whistles given by the Commonwealth and heard on the Volund. The former was blowing her regular fog signals at intervals of something less than a minute and blew a signal of two whistles when the vessels were near together to indicate a change of course to the left. The witnesses on the latter heard some of these signals but uniformly stated that they were about or nearly "abreast" of the Volund, except in the case of the wheelsman, who said he heard a whistle "on the port beam, a little forward of the beam." This man said he heard the whistle "several times." The lookout said he reported the whistle and the steamer stopped; that he heard 6 or 7 altogether to which he paid attention; that the first four whistles were "one at a time"; that they then came "two at a time" and after the two, another single whistle, which was the last he could remember; that the Commonwealth was in sight at the time of the last signal. The chief officer said he heard a whistle from the Commonwealth "about abreast," "right abreast * * * pretty far away" and they stopped the steamer. They then heard another on the same bearing and they started ahead again at slow speed; that he heard the signal "four times I guess; I didn't count them" and each time blew the Volund's whistle; that he next heard 2 blasts for a couple of times. "I could hear she was closer than when we heard her first whistle, but I couldn't see her. * * * Q. What did you think those signals of two blasts were? A. Well, I thought they were some kind of a tramp steamer, or something like that that was blowing 2 whistles for making no headway." Shortly after this the lights of the Commonwealth appeared, showing a "bunch of white lights. * * * And about the same time we could see a green light. Q. What did you do then? A. We stopped and reversed full speed astern. * * * Right away." He said that the lights were 4 or 5 points on the port bow and that she was "heading for right down on us nearly" and that the steamer was 500 or 600 feet away. Just before the ship struck, the Commonwealth blew a danger signal of 3 blasts. The captain also

heard the single blasts 4 or 5 times, bearing about the same. His statement more in detail was:

"Q. How many times did you hear these successive single blasts of this approaching vessel? A. About four or five times.

Q. About a minute apart? A. Not quite a minute.

Q. Pretty near a minute? A. Yes.

Q. They were all that you call fog whistles? A. Yes, sir.

Q. Long blasts? A. Yes.

Q. And they kept getting louder all the time? A. Yes.

Q. And they were bearing about the same? A. Yes sir, about the same as near as I can tell.

Q. A little forward of abeam? A. I don't think that they were any forward of abeam.

Q. Don't you as a navigator know that there was great danger when the bearing of an approaching vessel remains the same? A. Yes sir.

Q. And was there any change of the apparent bearing of these whistles? A. Well, I think it was coming more forward, yes.

Q. That is more forward on your port side? A. Yes, when I heard the two signal blasts—

Q. I have not got to that yet; but wasn't it true that the other whistles, the four or five single whistles were bearing more forward— A. No sir, more abaft.

Q. You mean to say any of those whistles were ever taken as bearing abaft your beam? A. Yes, I think so, more abaft the beam than forward.

Q. I am not asking with reference to the exact bearing, but was there any change; that is the first whistle you said was about abeam; were the second, third, fourth and fifth whistles about the same? A. Yes, I think they were about the same; I think it was getting a little more abaft.

Q. You think the whistles were sounding a little abaft the beam? A. Yes.

Q. How much? A. I said pretty near abeam; I don't know how much.

Q. Then as near as you are able to state they were nearly abeam? A. Yes.

Q. When you heard the signal of two blasts, that sounded very much forward of abeam? A. Yes.

Q. How many points? A. Four or five points, only she was pretty close then.

Q. When you say four or five points which way do you mean? A. From the stem.

Q. From your stem? A. Yes.

Q. Three or four points forward of the beam? A. Yes.

Q. Wasn't it true that the last whistle before the two blasts was one or two points forward of your beam? A. I couldn't say exactly; not as much as that; probably one point, half a point, something like that."

The foregoing statements with respect to "abreast" are rather suspiciously alike and I think affect somewhat the credit to be given to the witnesses. Nevertheless, even if the Volund was not following strictly the provisions of Article 16, I do not think that her remissness was such as to condemn her under the circumstances. It might reasonably have been concluded, up to the hearing of the signal of 2 blasts, that the vessel if navigating westward would go astern of the Volund and on that theory, her proceeding to the southward was in aid of such navigation. Even, however, if her navigation was faulty, she should be exonerated under the authority of the *Umbria*, supra, in view of the grave fault of the Commonwealth.

It is also urged by the Commonwealth that the Volund was not justified in keeping on after hearing the 2 blast starboard helm signal of the Commonwealth.

There is no doubt that these signals could not properly be regarded

as fog signals because this accident happened in inland waters, nor should they have been considered as deep sea signals under the International Rules. But I cannot hold the officers of the Volund obligated to treat them as passing or helm whistles because they were of too long duration and especially because passing whistles are prohibited by the Rules except as between vessels that are able to see each other. Even did the Commonwealth sight the Volund's masthead light when she gave the double blast signal, this did not justify her in giving such signal and in navigating accordingly. The Rules prohibit passing signals under these circumstances until the signal lights of the other vessel, from which the direction of her course can be inferred, come into view.

But even if the Commonwealth's criticism in this respect was well founded, it would not alter the result because any error on the part of the Volund at this time was in extremis, and in any event would have in all probability made no difference.

There is considerable legitimate criticism of the Volund's navigation but in view of the gross fault of the Commonwealth in proceeding at such a rate of speed, I do not think, under the authorities, that the Volund's minor faults are clearly enough established to entitle the Commonwealth to an apportionment of the damages. *The Victory*, 168 U. S. 410, 423, 18 Sup. Ct. 149, 42 L. Ed. 519, *The Transfer* No. 14, 127 Fed. 305, 306, 62 C. C. A. 223.

There will be a decree for the libellants, with an order of reference.

In re PHILADELPHIA FREEZING CO.

(District Court, E. D. Pennsylvania. November 24, 1909.)

No. 3,434.

BANKRUPTCY (§ 72*)—PERSONS WHO MAY BE ADJUDGED BANKRUPT—CORPORATIONS—NATURE OF BUSINESS—"ENGAGED PRINCIPALLY IN MANUFACTURING, TRADING, AND MERCANTILE PURSUITS."

A corporation was chartered "for the purpose of conducting the business of a cold storage warehouse, * * * furnishing cold storage for meats, produce, fruits, and other perishable merchandise." The business actually done by it was the conducting of a cold storage warehouse in which produce, etc., was preserved for others for hire, by means of brine circulated through pipes; and it also operated a pipe line running through the street and connected with storage rooms of others, which it refrigerated by means of the brine pumped through the pipes and circulated in such rooms, returning to the tank in its own plant. For this service it charged in proportion to the size of the rooms cooled, and it constituted the larger part of its business. The brine was made in its plant by mixing calcium chloride in water at a certain temperature to a certain consistency. The calcium chloride was a manufactured product sold in the market, which it purchased in cases, and the brine was made by ordinary workmen under direction of a superintendent. *Held*, that such corporation was not "engaged principally in manufacturing, trading, or mercantile pursuits," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Comp. St. 1901, p. 3423), and was not subject to be adjudged an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 8, pp. 7650-7651; vol. 5, pp. 4346-4358; vol. 8, pp. 7053, 7054; vol. 5, pp. 4477, 4478.

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank of Mattoon, Ill., v. First Nat. Bank, 42 C. C. A. 4.]

In the matter of the Philadelphia Freezing Company, bankrupt. On report of Alfred Driver, special referee, on petition for involuntary adjudication, and answers of the Hub Machine & Tool Company and Armstrong & Latta Company, creditors. Report confirmed and approved.

The following is the report of Special Referee Alfred Driver:

The Philadelphia Freezing Company is a corporation under the laws of Pennsylvania, and was formed, as is shown by the application for a charter, approved by the Governor on March 5th, 1903, "for the purpose of conducting the business of a cold storage warehouse, * * * furnishing cold storage for meats, produce, fruits, and other perishable merchandise."

Afterwards, on June 29, 1908, the real, personal, and mixed property of the corporation and the franchises and rights of the said Freezing Company were sold at judicial sale by George D. Woodside, receiver, appointed by the court of common pleas No. 5 of Philadelphia county, and conveyed to certain persons by said receiver. Afterwards the said purchasers met, and under the provisions of the act of assembly approved May 25, 1878 (P. L. 145), as amended by the act of assembly approved May 31, 1887 (P. L. 278; 1 Pepper & Lewis' Dig. p. 979, par. 100), organized a new corporation. The name adopted by the new corporation is the Philadelphia Freezing Company. Under the proceedings for reorganization there is no statement of the purposes for which the corporation was formed, and under said act of May 31, 1887, said new corporation was vested with all the rights, powers, immunities, privileges, and franchises of the corporation as whose the same may have been so sold, and which may have been granted to or conferred thereupon.

By the answer of the said Hub Company it is alleged that it does not appear by the petition or by the record that this court has jurisdiction to adjudge said Freezing Company a bankrupt, in that "it does not appear that said company is a corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, and that it is engaged in the business of conducting a general cold storage plant and warehouse; that it operates and conducts a line of pipe lines underneath the surface, which extends to neighboring buildings and plants and returns to the plant of said Freezing Company; that through these lines of pipe a substance known as brine is conducted to the neighboring buildings and plants, whereby the air in the refrigerating plants of said neighboring buildings and plants is cooled, and said brine or substance by continuing on through the pipes is returned to the plant of the Freezing Company."

It is alleged in the petition for adjudication that said Freezing Company "is principally engaged in a general cold storage business at 48 North Delaware avenue, Philadelphia."

On the 1st day of October, 1909, the evidence of the president of the said Freezing Company was taken by the petitioning creditors and said witness testified that the business of the corporation has been refrigerating by means of brine, which is manufactured on the premises and circulated through pipes for preserving produce; that the company sells the brine to people who require it for freezing purposes at so much per year; that in addition the company does a storage business, and preserves goods in storage by the circulation of brine which is manufactured there; that the business is a commercial necessity for the preservation of perishable products, and that it is recognized as a mercantile business all over the United States; that to carry out the purposes of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the corporation it employs a manufacturing plant, which plant is located on the real estate of the company at 48-54 North Delaware avenue, and occupies the ground floor of the entire building, with boilers, refrigerating machines, and the necessary pumps and appliances for the purposes of manufacturing brine and cooling it, and that the brine is circulated through pipes in this building, and there is also a line running through the street, which connects with about 40 properties in that street which are refrigerated from this central plant; that the brine is circulated through these pipes from pumps in the central plant, and that the properties which are served by the company are piped by the owners. These rooms are cooled by means of the circulation of the brine for a price per cubic foot of the space to be cooled. This witness says that the brine is prepared on the premises of the Freezing Company, and that the basis is calcium; that the calcium is bought in drums, and that the preparation which he calls brine is made from calcium, and water and ammonia is used to make it cool. This witness also says that the business of the Freezing Company has largely been a business of supplying brine to others from which the receipts have been about three times as much as from the storage business which they conduct. He stated that it requires an expert laborer to produce this brine. After it is made it is taken by pumps and circulated through the coolers and pipes, and it is cooling while it goes through a certain portion of the pipes which are surrounded by ammonia.

No other evidence was taken by the petitioning creditors, and no cross-examination was made by counsel for the Hub Company of said witness. No evidence on behalf of the Hub Company was taken.

Afterwards, on October 15, 1909, the petition of Armstrong & Latta Company, Incorporated, a creditor, was filed for leave to intervene. It was ordered by the court that said Armstrong & Latta Company be allowed to intervene as an answering creditor, and have leave to prosecute the answer of the Hub Company filed April 12, 1909, with the same force and effect as if the said answer had been filed by them. On October 18, 1909, the petition of said intervening creditor was referred to the undersigned, and, after notice to the said Freezing Company, to counsel for the petitioning creditors, and to counsel for said Hub Company, the evidence of John P. Maher, a witness called by said Armstrong & Latta Company, was taken on October 21, 1909, on behalf of said intervening creditor. Counsel for the petitioning creditors and counsel for said Hub Company did not attend the examination of said John P. Maher, nor did any one attend on behalf of the Freezing Company.

Said witness John P. Maher testified that he has been connected with the business of refrigerating and cold storage about 25 years; that he is familiar with the character of the business conducted by the said Freezing Company and with the building in which the business is conducted; that it had been a cold storage plant for about 12 years; that the building was used for cold storage several years previous to the installation of the pipe line. He said that brine consists of water and coarse rock salt dissolved in water, so as to make a solution of a certain consistency, and that this is the ordinary method. He says, also, that the latest practice is to dissolve chloride of calcium in water, which makes brine without salt. Chloride of calcium comes in cases. It is a manufactured product, which can be bought on the market as any other material can be bought, and is bought and sold in quantities for use in refrigerating purposes. Brine produced by this method is not a thick liquid. It is simply the consistency of brine water. In answer to the question, "Does it require any skill or particular knowledge in order to dissolve this chloride of calcium?" he said: "It is generally dissolved by ordinary help under the direction of the engineer of the plant; that it is put into a tank or barrels, and turned into the general brine tank, the calcium being dissolved in water until the brine reaches a certain temperature, say about 105 degrees Centigrade; that it is then considered proof against freezing in the ordinary term; that it then passes from this tank into the main brine storage tank, and is stored there until it is used as of this degree of temperature. He says that if anybody wanted brine it could be sold, and people could refrigerate with it by the application of ice; that after it is cooled it is usually used in connection with pipe lines; that he has never known brine to be bought or sold as a marketable commodity; that if it was purchased as it stood in the tank, and

taken away, before it could be used for refrigerating it would be necessary to make it cool by the application of ice or otherwise, and that after that had been done it could then be made to circulate through pipes and complete the refrigeration. After the brine has been produced, he says it is cooled with ice or by a coil of pipes submerged in the brine tank, and in these pipes ammonia gas is expanded, which reduces the temperature of the brine to the desired degree; that the brine then is pumped through coils of pipes into the cold storage rooms, and returns back to the tank, to be recooled and pumped over again.

This witness states that this process is not ordinarily considered manufacturing, for the reason that all the ingredients used in making brine are already manufactured; that he had never heard the making of brine called a manufacturing business; that he never knew of brine being bought and sold as a commodity. He says this mixture, which is called brine, is produced by taking so much calcium and so much water and stirring them together with a stick by hand; that as much water is used as is necessary to dissolve the calcium into a liquid of a certain thickness; that ordinarily the brine is a little thicker than water; that it does not require skilled labor to stir the calcium with the water; that the brine originally has a temperature, before it is cooled by the use of the ammonia, of about the same degree as tepid water, and of course the heat must be taken from it before it can be used and circulated for refrigerating purposes.

The petitioning creditors contend that the Freezing Company is engaged principally in manufacturing. On the other hand, the Hub Company by its answer and the Armstrong & Latta Company by evidence contend that the business conducted by the Freezing Company is not manufacturing.

The charter of this company does not state that it is chartered for the purpose of manufacturing.

In *Re H. J. Quimby Freight Forwarding Company* (D. C.) 121 Fed. 139, the court said:

"The susceptibility of a corporation to bankruptcy does not depend wholly upon its charter. This is clear, both from the language of the act, which speaks, not of the corporation's charter powers, but of the business in which it is principally engaged, and also from the decided cases. A corporation may have charter powers to do that which is not its principal business; but a corporation can hardly be brought within the scope of the bankrupt act [Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418)] by a principal business which is beyond the authority given by its charter."

In *Re Kingston Realty Company*, 160 Fed. 445, 87 C. C. A. 406, the Circuit Court of Appeals for the Second Circuit says:

"It is true that the susceptibility to bankruptcy of a corporation does not depend upon its charter. *Matter of Quimby*, 121 Fed. 139, quoted with approval by this court in *Re Construction & Dry Dock Company*, 130 Fed. 447 [64 C. C. A. 648]. Whether it can be adjudged a bankrupt depends upon what it actually does, not what it is empowered to do."

Is the business in which the Freezing Company is engaged principally manufacturing? The president of the company testifies that the company manufactures brine. There is no evidence to show that it is engaged in manufacturing any other commodity. The brine is composed of water and calcium mixed together. Is the production of brine manufacturing?

In the case of *Hall & Kaul Co. v. Friday*, 158 Fed. 593, 87 C. C. A. 23, it appears that the Monongahela Construction Company in carrying on its business, combined together raw materials such as cement, gravel, and sand in the making of concrete, and supplied labor, machinery, and appliances necessary for the proper carrying on of said business of constructing and erecting concrete arches, piers, buildings, and structures, and excavating therefor at such times and places as its contracts call for; that it carried on no other manufacturing business except the above. The District Court for the Western District of Pennsylvania adjudicated said company a bankrupt, as being a corporation engaged principally in manufacturing. Appeal was taken to the Circuit Court of Appeals for the Third Circuit, and Judge Gray in his opinion says:

"The words 'manufacture' and 'manufacturing' seem to us to have a well ascertained and defined meaning. There is no confusion in the general concept conveyed by these words, as referring to the making of raw materials or natural substances by hand, art or machinery, with more or less skill, into commodities for use. The leading lexicographers all agree as to this general signification. No special, technical, or legislative use of them, different from their general or popular use, has been suggested. It appears from the agreed statement of facts that the Monongahela Construction Company carried on no manufacturing business unless the business of 'making, constructing and erecting concrete arches, bridges, buildings, walls and other structures, also excavating, grading and ballasting of roadbeds and laying tracks for rail roads' be such a business. The alleged bankrupt therefore in this case was a builder or constructor of concrete arches, bridges, buildings, walls and other structures. These were erected in situ, and when erected were attached to and became part of the real estate. No one in ordinary parlance would ever think of saying that such a builder was a manufacturer of bridges, houses, etc. It is only by a forced construction founded on verbal refinements that such a conclusion can be arrived at. It is true that such a builder assembles and combines the raw materials of cement, sand and water, which are mixed with more or less skill with tools and appliances adapted for such purpose, and the composite thus formed, being poured into molds, gradually and by successive repetitions of the process forms the arch, building, or wall intended to be erected. We cannot see upon what possible grounds a person or corporation engaged in this work is to be distinguished from one engaged in the erection of an arch, building, or walls with other materials such as stone, bricks, and mortar, or how, except arbitrarily, the one can be called a manufacturer and the other not."

The decree of the court below was reversed, with directions to dismiss the petition of the petitioning creditors.

In the case of *Hall & Kaul Co. v. Friday* it is decided that the combining of cement, gravel, and sand, mixed with more or less skill, in the making of concrete, is not manufacturing. Following that decision, which is controlling, the combination or mixing of water and calcium, resulting in what is called brine, cannot be called manufacturing.

It seems to be contended by the petitioning creditors that the Freezing Company is engaged in mercantile pursuits, as well as in the manufacturing business. The evidence shows that the Freezing Company does not buy or sell any commodity and is not engaged in trading or mercantile pursuits.

The evidence shows that the brine is not sold. After it is cooled it is transmitted through pipes to customers who conduct a cold storage business in the neighborhood, and returns to the receiving tanks of the company. The brine does not remain in the buildings of the customers, and is not purchased by them in quantity. These customers pay by the cubic foot for the reduction of the temperature in the rooms they use for cold storage purposes, by the circulation of the brine through pipes which belong to the customers. The Freezing Company does not own the pipes in the buildings of the customers, whose rooms are cooled by the brine passing through the pipes. There is little, if any, leakage, and the brine remains substantially the same in quantity after returning to the tanks of the Freezing Company as it was when the circulation through the pipes began.

In *Re Kingston Realty Co.*, 160 Fed. 447, 87 C. C. A. 408, the Circuit Court of Appeals for the Second Circuit, citing the decision of Judge Brown, in *Re N. Y. & W. Water Co.* (D. C.) 98 Fed. 711, at page 713 says:

"In *Bouv. Law Dict.* a trader is defined as 'one who makes it his business to buy merchandise or goods or chattels, and to sell the same for the purpose of making a profit.' *Black, Law Dict.* says: 'One whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings.' And the weight of authority seems to be that the proper description of the business of a trader includes both buying and selling either goods or merchandise, or other goods ordinarily the subject of traffic. * * * The words 'mercantile pursuits' may have a little broader signification than 'trading.' 'Mercantile' is defined by the *Century Dictionary* as having to do with trade or commerce; of or pertaining to merchants, or the traffic carried on by mer-

chants; trading; commercial. It signified for the most part the same thing as the word 'trading'; and by 'mercantile pursuits' is meant the buying and selling of goods or merchandise, or dealing in the purchase and sale of commodities, and that, too, not occasionally or incidentally, but habitually as a business. * * * These terms are restricted also to dealings in merchandise, goods, or chattels, the ordinary subjects of commerce."

And that court says further on page 448, of 160 Fed., page 409, of 87 C. C. A.: "Dealing in articles of commerce—goods and merchandise—alone constitutes trading or a mercantile pursuit as those terms are used in the statute."

If it be contended that the Freezing Company is conducting a warehouse in which it receives perishable products and preserves them in cold storage, it is not subject to adjudication as an involuntary bankrupt. "A corporation conducting a public warehouse, in which it receives and stores grain and other merchandise for hire, issuing receipts therefor, is not engaged in trading or mercantile pursuits, and is not subject to be adjudged an involuntary bankrupt." In re Pacific Coast Warehouse Co. (D. C.) 123 Fed. 749.

The referee finds that the said Freezing Company is not a corporation engaged principally in manufacturing, or in trading, or in mercantile pursuits, and is not subject to be adjudged an involuntary bankrupt. The referee recommends that the petition for adjudication should be dismissed for want of jurisdiction.

Julius C. Levi, for petitioner.

William B. Davis, T. Henry Walnut, and Henry M. Du Bois, for creditors.

J. B. McPHERSON, District Judge. Report of the special referee confirmed.

REINARTSON v. CHICAGO GREAT WESTERN RY. CO. et al.

(Circuit Court, N. D. Iowa, C. D. December 7, 1900.)

No. 317.

1. PLEADING (§ 62*)—SEVERAL DEFENDANTS—JOINT CAUSE OF ACTION.

Where plaintiff has a joint cause of action against several defendants, he should state with reasonable particularity the facts relied on against each to sustain a joint recovery against all, so that the court and each of the defendants may be apprised of the facts relied on to create a joint liability.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 132; Dec. Dig. § 62.*]

2. REMOVAL OF CAUSES (§ 61*)—JOINT CAUSE OF ACTION—PLEADING.

Where plaintiff, suing several defendants, does not allege with reasonable particularity the facts relied on to sustain a joint cause of action, but charges negligence generally against all, such allegation is indicative of an attempt to so frame a petition that will prevent a defendant entitled to do so from removing the cause to a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 61.*]

3. REMOVAL OF CAUSES (§ 61*)—JOINT OR SEVERAL CAUSES OF ACTION—PETITION.

Whether a cause presents a separable controversy which authorizes its removal to the federal Circuit Court is to be determined from plaintiff's own statement, made in good faith, in the petition filed by him in the state court of his right of action against the defendants, and, if a joint cause of action is stated, it is not open to either or both of the defendants

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by answering separately or pleading separate defenses to make that a several suit or action which plaintiff has elected to make joint.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.*]

4. REMOVAL OF CAUSES (§ 36*)—ACTION FOR INJURIES—JOINT CAUSE OF ACTION.

In an action for injuries to plaintiff while crossing a railroad track, the petition alleged that the injuries resulted because of the negligent acts of the defendants, in that defendants constructed the tracks so close to each other and so near to a mill in which plaintiff was employed that persons crossing upon the public passageway were not able to see the movement of the cars, engine, or trains on the track, and in not constructing the tracks so as to leave the view open, and in failing to provide any gates, guards, or barriers to protect persons so crossing. Other acts of negligence were charged against both defendants, relating solely to the movement and operation of trains, and a failure to warn plaintiff of the approach of the train by which he was injured. It was stipulated on a motion to remand that defendant M. Company alone constructed the tracks and leased them to the defendant C. Company, and that the latter or its receivers were exclusively engaged in operating the road thereafter, and at the time plaintiff was injured; that the injury was immediately caused by the negligent movement of the cars by the C. Company or its receivers. *Held*, that it appeared that the M. Company did not participate in the negligent acts alleged, and was joined to prevent the C. Company from removing the cause to the federal court, and that it was therefore entitled to remove, notwithstanding such joinder.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 36.*]

Action by Leonard M. Reinartson, by Oscar Reinartson, his next friend, against the Chicago, Great Western Railway Company and another. The action having been removed to the federal court, plaintiff moves to remand. Denied.

Kenyon, Kelleher & O'Connor, for plaintiff.

Carr, Carr & Evans, and Healy & Healy, for defendants.

REED, District Judge. This suit was commenced in the District Court of Iowa in and for Webster county by the plaintiff, a citizen of Iowa residing in that county, to recover damages from the two railway companies for a personal injury alleged to have been caused him by their joint negligence while he was attempting to cross the tracks of the railroad at Lehigh, in Webster county, near a mill in and about which he was employed. The Chicago Great Western Railway Company, a corporation of Illinois, in due time filed a sufficient petition and bond in the state court to remove the cause to this court upon the alleged ground that a separable controversy existed between it and the plaintiff; that the Mason City & Ft. Dodge Railroad Company, an Iowa corporation, was not engaged in the operation of the road, had nothing to do with the movement of the trains or cars thereon which caused the alleged injury to plaintiff, is a mere sham defendant, and was fraudulently joined with the Great Western Company to prevent its removal of the cause to this court. The state court ordered the removal, and plaintiff moves to remand upon the ground that there is no separable controversy between him and the Chicago Great Western Railway Company, and denies the alleged fraudulent joinder of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

Mason City & Ft. Dodge Company as one of the defendants to prevent the removal.

The Great Western Company has filed in support of its alleged fraudulent joinder of the Mason City Company a stipulation signed by it and the plaintiff's attorneys, in which it is admitted:

"That the Mason City & Ft. Dodge Company is an Iowa corporation, and in about 1887 built and constructed a line of railroad, including side tracks, spurs, and switches, from the city of Ft. Dodge, Iowa, to Lehigh, and operated the same until some time in the year 1902, when it leased the same to the Chicago Great Western Company, and that that company alone operated said road and the trains and engines thereon thereafter, and until about January, 1908, when its property including its lease of this line of road went into the possession of receivers appointed by the Circuit Court of the United States for the District of Minnesota, who thereafter operated the road as such receivers until about September 1, 1909, when the property, including the lease of the road in question, was sold to another company, and that the Mason City Company did not operate said road or any part thereof after 1902, and was not connected with the movement of engines or trains thereon after it leased the road to the Great Western Company."

The injury of which the plaintiff complains is alleged to have occurred in December, 1908, while the road, according to this stipulation, was being operated by such receivers, and the contention of the Great Western Company is that, inasmuch as the Mason City Company was not engaged in the operation of the road, or with the movement of the trains or cars thereon which caused the alleged injury to the plaintiff, that company is not responsible for such injury, and that it thus conclusively appears that it is a mere nominal defendant only, joined with the Great Western Company to prevent it from removing the cause to this court. The question at once suggests itself if the property of the Chicago Great Western Company, including its lease of the road in question, was in the hands of receivers appointed by the United States Circuit Court, and was being operated by them at the time of the injury of which plaintiff complains, how can either company be held responsible for the acts of the receivers, if the injury arose solely from the alleged negligent operation of the road? This, however, is a question that goes to the merits of the controversy between the plaintiff and the defendants, and need be considered only in determining whether or not the two companies were fraudulently joined to evade federal jurisdiction.

Many authorities are cited by the Great Western Company in support of its right of removal, but all of them were decided prior to the decision of the Supreme Court in *Alabama Great Southern Railway Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441. By that decision it is settled that whether or not a cause presents a separable controversy which authorizes its removal from a state court to a Circuit Court of the United States is to be determined from the plaintiff's own statement, made in good faith in the petition filed by him in the state court, of his cause of action against the defendants; that the plaintiff has the right to prosecute his action to final determination in his own way, and, if in his petition he states in good faith a joint cause of action against two or more defendants, it is not open to either or both or all of them by answering separately or pleading separate

defenses to make that a several suit or action which the plaintiff has elected to make joint. But, if the plaintiff fails to state any cause of action against one of the defendants, the presence of that defendant as a party to the suit may be disregarded in determining the right of removal. What then, does the plaintiff allege as his cause of action against these defendants in the petition filed by him in the state court? That petition alleges, in substance, that both defendants are corporations and own and operate certain lines of railroad in Iowa, including one from Ft. Dodge to Lehigh, in Webster county, with branches, spurs, side tracks, and switches connecting said line of railway with mills and manufactories adjacent thereto; that during the month of December, 1908, said companies were in the ownership and operation of a certain railroad track and cars and engines thereon, and had constructed, owned, maintained, and operated several parallel tracks immediately adjacent to a mill known as the "Mineral City Stucco Mill" in said Webster county; that one of said tracks was constructed along the side of said mill and within a few feet thereof, and a second parallel with the first and within a few feet thereof, both of which were constructed to be used, and were in fact used, for the purpose of storing cars thereon and switching them to and from said tracks; that at the time of the injury to the plaintiff there was a well-defined and much used walk or passageway across said railroad tracks extending to and from a door in said mill which was much used by the public and persons employed in and about the mill in entering and leaving the same, which was well known to the defendants; that on December 23, 1908, the plaintiff was employed in and about said mill, and in the performance of his duties as such employé undertook to enter said mill by way of such passageway or walk across said railroad tracks, and in crossing the same in a careful manner was caught between cars moving thereon and injured. After stating his injuries and the particular manner in which he received the same, the petition continues:

"That said injuries resulted because of the negligent and wrongful acts of said defendants in the following particulars, viz.: That said defendants were negligent in constructing said tracks so close to each other and so near to said mill that persons crossing upon said public passageway aforesaid were not able to see the movement of cars, engines, or trains on said tracks; in not so constructing said tracks as to leave said view open; and in failing to provide * * * any gates, guards or barriers of any kind for the protection of persons about to cross said tracks upon said walk aforesaid."

Other acts of negligence are charged against both companies which relate solely to the movement and operation of engines and cars on the tracks, such as the failure to sound the whistle, ring the bell, or in some other manner give notice to the plaintiff of the movement of the cars, which alone may have caused the injury of which he complains.

The practice of charging different defendants in this class of cases with negligence generally, without alleging the specific acts of each that are relied upon for recovery against all, is not to be commended. If the plaintiff has a joint cause of action against several defendants, he should state with reasonable particularity the facts relied upon against each to sustain a joint recovery against all, so that the court may know, and each of the defendants be apprised of, the facts relied

upon to create the joint liability. The fact that this is not done, but that it is alleged generally that several defendants are guilty of the same acts of negligence which caused the injury complained of when it is reasonably apparent from the petition, or it is admitted, or otherwise made to appear, that all are not so guilty, is strongly indicative of an attempt to frame a petition that will prevent a defendant, who may have the right to do so from removing the cause from the state to the federal court, and when this appears it should be held, where a resident defendant is joined with a nonresident citizen, that he is fraudulently so joined for the purpose of preventing the latter from removing the cause from the state court. *Wecker v. National Enameling Co.*, 204 U. S. 176-185, 27 Sup. Ct. 184, 51 L. Ed. 430; *McGuire v. Great Northern Ry. Co.* (C. C.) 153 Fed. 434-439.

In *Wecker v. National Enameling Co.*, above, it is said:

"While the plaintiff in good faith may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."

Can it rightly be said then that the allegations of this petition charge the Mason City Company with any neglect that directly contributed to the plaintiff's injury? The petition alleges that "defendants were negligent" in constructing the tracks so close together as to prevent persons about to cross the same from observing trains or cars thereon, and in failing to guard the same by gates, bars, or other means so as to prevent the injury to such persons. But the immediate cause of the plaintiff's injury is alleged to be that "defendants were negligent" in handling and moving the cars without giving any signals or warning to plaintiff who was about to cross the tracks.

These allegations charge both defendants with the alleged negligent acts, and the petition seeks to hold both jointly liable therefor. The facts stipulated, however, show that the Mason City Company alone constructed the tracks in 1887, and leased them to the Great Western Company in 1902, and that that company was, or that its receivers were, exclusively engaged in operating the road thereafter and at the time the plaintiff was injured, and that such injury was immediately caused by the negligent movement of the cars by the Great Western Company or its receivers. This clearly negatives the fact of joint negligence on the part of the two companies that caused the injury of which plaintiff complains. A careful consideration of the plaintiff's petition in connection with the admitted facts leads unavoidably to the conclusion that the Mason City Company did not participate in the alleged negligent acts which caused the injury of which plaintiff complains, and that it was not made a party to the suit with any expectation of proving such acts against it, or hope of recovery from it therefor, but that it was joined as a party defendant with the Great Western Company for the sole purpose of preventing that company from removing the cause to this court. The plaintiff relies mainly upon the case of *Person v. Illinois Central Railway Company et al.* (C. C.) 118 Fed. 342, to defeat the right of removal. In that case it was stated by the plaintiff in his petition filed in the state court that the injury

complained of was caused alone by the negligence of the Illinois Central Company, which company was the lessee of the Dubuque & Sioux City Company, and recovery was sought against the Illinois Central Company for its alleged negligence and against the Sioux City Company upon the ground that it was legally liable for the negligence of its lessee in operating the road. The authorities upon this question may not be in harmony, and it was held by Judge Shiras that, when a plaintiff thus correctly states the facts in his petition, bad faith will not be imputed to him simply because he thus states them and presents for determination the question of the liability of the lessor company for the negligence of its lessee in operating the road. But no such case is stated by the plaintiff in this case, nor does he seek to recover against the Mason City Company upon the ground that it is legally liable for the negligence of its lessee in operating the road. In his petition he charges that both companies were negligent in the construction and operation of the road which directly caused the injury of which he complains, and seeks to recover of both because of their active participation in such alleged negligence; but it is admitted by the stipulation signed by his attorneys, who also signed the original petition, that this is not the fact, but that the Mason City Company had nothing to do with the alleged negligent operation of the road, which was the immediate cause of the injury of which plaintiff complains. There is no pretense that this incorrect statement of the facts was inadvertently made in the original petition, and the counsel preparing it must be held to have known the facts admitted in the stipulation signed by them when they prepared the petition; and the conclusion, as before stated, is that such statements were made in the original petition for the sole purpose of stating upon the face of the record a cause of action that was not removable from the state court. Inasmuch as the right of removal depends upon the cause of action stated in good faith by the plaintiff in his petition filed in the state court, he will not be permitted to prevent a defendant, who has the right to do so, from removing a cause from a state court by purposely stating in such petition a joint cause of action against both defendants, which he subsequently admits, or it is otherwise made to appear, is incorrect. *Wecker v. National Enameling Co.*, 204 U. S. 176-185, 27 Sup. Ct. 184, 51 L. Ed. 430; *McGuire v. Great Northern Ry. Co.* (C. C.) 153 Fed. 434-439. On the other hand, a defendant will not be permitted to incorrectly state in a petition for removal the ground relied upon for the removal of the cause from the state court. *Harrington v. Great Northern Ry. Co.* (C. C.) 169 Fed. 714. But both will be held to a fairly correct statement in their respective petitions of the cause of action, and of the grounds relied upon for the removal; and the right of removal will be granted or denied upon the facts thus truly stated.

The conclusion therefore is that the motion to remand should be denied, and it is so ordered.

NOTE.—Since the foregoing opinion was filed, that of the Supreme Court in *Illinois Central R. Co. v. Sheegog* has been announced, and published in 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. —.

In re FRAZIN & OPPENHEIM.

(District Court, S. D. New York. November 18, 1909.)

No. 11,997.

1. LANDLORD AND TENANT (§ 76*)—LEASE—COVENANT NOT TO ASSIGN—VIOLATION.

A lessee's covenant not to assign, mortgage, or pledge the lease, or underlet the property, without the lessor's consent, is not violated by the lessee's bankruptcy.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 228; Dec. Dig. § 76.*]

2. LANDLORD AND TENANT (§ 103*)—LEASE—COVENANTS—BREACH—INSOLVENCY.

A covenant that in case of the lessee's insolvency, or the institution of bankruptcy proceedings by or against him, or the appointment of a receiver or trustee of the lessee's property, or the devolution upon any person by operation of law of the lessee's occupancy, shall authorize the lessor to re-enter, is violated by the occurrence of any of the acts specified.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 103.*]

3. LANDLORD AND TENANT (§ 112*)—LEASE—BREACH OF COVENANT—WAIVER.

Acceptance of rent by a landlord, after a breach of covenant authorizing re-entry, waives the right forever.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 345; Dec. Dig. § 112.*]

4. BANKRUPTCY (§ 152*)—EFFECT—TITLE TO PROPERTY—RELATION.

Bankruptcy divests the owner of property of the title, which thereupon becomes in custodia legis, and on the appointment of a trustee his title relates back to the date of the adjudication.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 194; Dec. Dig. § 152.*]

5. BANKRUPTCY (§ 139*)—ASSETS—LEASE.

On the bankruptcy of a tenant, his trustee, on his appointment, was vested with title to the lease, subject to acceptance within a reasonable time, if his acceptance would be advantageous to the estate; and hence the lessor, having accepted rent from the trustee, waived all provisions authorizing re-entry in case of the bankruptcy of the lessor, authorizing the trustee to sell the lease and convey title to the purchaser, without being subject to re-entry on the part of the landlord, so long as the purchaser complied with the provisions of the lease.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 218; Dec. Dig. § 139.*]

In the matter of Frazin & Oppenheim, bankrupts. Petition by trustee for a sale of a lease and the property on the leased premises previously occupied by the bankrupt as a going concern, and to determine asserted adverse claims by the United Cigar Stores Company, the lessor. From an order of the referee sustaining the landlord's claim in part, the trustee files a petition for review. Modified.

Stroock & Stroock, for United Cigar Stores Co.

Guthrie B. Plante, for trustee.

HOLT, District Judge. This is a petition to review an order of the referee, made in a proceeding instituted by petition of the trustee

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for authority to sell a lease. On April 2, 1907, the United Cigar Stores Company made a lease, demising to the bankrupts, Frazin & Oppenheim, certain premises at 258 West 125th street, New York, for a term expiring April 1, 1913, at an annual rent of \$10,000. The lease, among other provisions, contained the following:

"Not to assign, mortgage, or pledge this lease, nor underlet the whole or any part of the premises, without the lessor's written consent. If the lessee shall at any time during the term hereby demised become insolvent, or if proceedings in bankruptcy shall be instituted by or against said lessee, * * * or if a receiver or trustee shall be appointed of the lessee's property, or if this lease shall, by operation of law, devolve upon or pass to any person or persons other than said lessee, then and in each of said cases it shall and may be lawful for the lessor, at the lessor's election, into and upon said demised premises or property or any part thereof, in the name of the whole, to enter," etc.

The bankrupts, upon the execution of the lease, went into occupation of the premises, occupied them as a shoe store, and paid rent regularly therefor until their bankruptcy. On February 3, 1909, a petition in bankruptcy was filed against them, and receivers were appointed. The receivers were authorized, by the order appointing them and subsequent orders, to continue the business. They continued in possession of the store, continuing the business there, until August, 1909. While in possession, the landlord sent to the receivers monthly bills for the rent, which the receivers paid. In August, a trustee was elected and qualified, who went into possession of the premises and continued the business there. The landlord sent the trustee bills for rent for August and September, and the trustee paid the bills. The trustee, on September 27, 1909, filed a petition, praying for an order authorizing the sale of the lease and the property situated in the premises as a going concern. It is alleged in the petition that the landlord asserted claims adverse to the interest of the trustee herein, and threatened to re-enter upon the premises, and the trustee asked for authority to sell, and that the landlord be compelled to set up its interest in the leasehold, or be thereafter debarred from asserting any interest. A hearing was had before the referee, on which the landlord appeared and asserted that, under the covenants of the lease, it had the right to re-enter the premises, and would have such right in case of their sale by the trustee. The referee, by his decision, held, in substance, that the acceptance of rent by the landlord from the trustee, under the provisions of the lease, was a waiver of the right to re-enter as to all grounds of re-entry which had occurred before the acceptance of the rent, but that as, at the time the proceeding was begun, the trustee had not exercised any election to accept the lease as a part of the bankrupts' estate, nothing had then occurred to bring into operation the clause in the lease authorizing a re-entry if the lease should "by operation of law devolve upon or pass to any person or persons other than said lessee," but that, whenever the trustee should accept such lease, or should sell it, and it should pass to a purchaser, the landlord would have the right thereupon to re-enter the premises for a violation of said provision in the lease, and an order to that effect was entered. The question involved in this proceeding is whether that order should be affirmed.

There can be no doubt, under the authorities, that a covenant by the lessee, in a lease, not to assign, mortgage, or pledge the lease, or underlet, without the lessor's consent, is not violated by the lessee's bankruptcy. *Gazlay v. Williams*, 147 Fed. 678, 77 C. C. A. 662, 14 L. R. A. (N. S.) 1199; affirmed 210 U. S. 41, 28 Sup. Ct. 687, 52 L. Ed. 950; *Re Pennewell*, 119 Fed. 139, 55 C. C. A. 571. The covenant, however, providing that, in the case of the lessee's insolvency, or the institution of bankruptcy proceedings by or against him, or the appointment of a receiver or trustee of the lessee's property, or the devolution upon any person, by operation of law, of the lessee's occupancy, the lessor may re-enter, is violated by the occurrence of any of the acts specified. The rule is well stated in *Jones on Landlord and Tenant*, § 466, cited with approval in *Gazlay v. Williams*, 210 U. S. 41, 28 Sup. Ct. 687, 52 L. Ed. 950, where it is said that an ordinary covenant against subletting and assigning is not broken by a transfer of the leased premises by operation of law, but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment in operation of law. It is equally well settled that the acceptance of rent by a landlord, after a breach of a covenant in a lease authorizing re-entry, waives the right of re-entry, and the right thus waived is dispensed with forever. *Re Montello Brick Works* (D. C.) 163 Fed. 624; *Murray v. Harway*, 56 N. Y. 357; *Conger v. Duryee*, 90 N. Y. 594. The acceptance of rent by the landlord, therefore, after the adjudication and the appointment of a receiver, waived the right to re-enter because of such adjudication or appointment. The question whether the landlord has still a right of re-entry under the clause giving such right if the lease should, by operation of law, devolve upon any person other than the lessee, depends on the question whether such devolution took place before the acceptance of rent. The referee holds that, as the evidence did not establish that the trustee had affirmatively assumed the lease before the last rent was paid, no devolution had taken place at that time; but he held that, if the trustee should hereafter assume or sell the lease, such devolution would take place, and the landlord could re-enter and deprive any purchaser of the property. Of course, if this view is correct, nobody will buy the lease from the trustee.

I think that the correct view in this matter is that the condition of a bankrupt's property, after the adjudication and before the appointment of a trustee, is analogous to the condition of the personal property of a decedent before the appointment of an executor or administrator. Bankruptcy, like death, divests the owner of the title. It becomes thereupon in *custodia legis*. *Keegan v. King* (D. C.) 3 Am. Bankr. Rep. 79, 96 Fed. 758. Upon the appointment of a trustee, he takes title by relation back as of the date of the adjudication. The earlier English cases held that until the assignee of the bankrupt assumed a lease the title remained in the bankrupt (*Copeland v. Stephens*, 1 B. & Ald. 593); and there are earlier decisions in this country to the same effect (*Lowell on Bankruptcy*, § 372, and cases cited). The question has usually arisen in the case of suits for rent against assignees in bankruptcy, and the decision, although often put on the

ground that the title is not in the assignee until he has elected to assume the lease, might properly have been put on the ground that an assignee, by exercising his right to reject the lease within a reasonable time, frees himself from the obligation to pay rent. Judge Lowell says of the case of *Copeland v. Stephens*:

"It has had two unfortunate consequences. It has left the bankrupt liable to debts and obligations without the means of satisfying them, and has obscured the true principle of the vesting of all the bankrupt's property in the assignees, and has induced bankrupts and their creditors to suppose that whatever was not claimed by the assignees belonged to the bankrupt. Late statutes in England have so changed the law as to vest onerous property in the assignees, subject to their right of disclaimer, and to relieve the bankrupt whether they disclaim or not. This puts the doctrine on a just and intelligible basis." Lowell on Bankruptcy, § 372.

I think that under the present bankrupt act, in this country as well as in England, a trustee, upon his appointment, takes title, as of the date of the adjudication, to all the assets of the bankrupt, good or bad. He has a right to reject any assets which are worthless or burdensome. In the case of a leasehold, it is always a question whether a lease has any value. If the rental is higher than the regular market rate of rentals for such property, it has no value; if it is lower, it has a value; but, in my opinion, the title to the lease does not remain in the air until the trustee affirmatively takes action to assume the lease. The true view, in my opinion, is that the trustee, upon his appointment, is vested with the lease, subject to the right to decline to accept it, within a reasonable time, if his acceptance of it will not be advantageous to the estate. If this view is correct, the landlord, in this case, by accepting rent from the trustee, waived all the provisions in the lease authorizing re-entry, and the result is, in my opinion, that the trustee can sell this lease and give a perfect title to it, and the purchaser can take the premises for the term of the lease, not subject to re-entry so long as the purchaser complies with the provisions of the lease.

My conclusion is, therefore, that the referee's order should be modified to conform to this opinion. The order should be settled on notice.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. CORNELL
STEAMBOAT CO.

(District Court, S. D. New York. December 23, 1909.)

COLLISION (§ 105*)—EVIDENCE—UNAVOIDABLE ACCIDENT.

Collision in Hell Gate between the tow of the tug Morse and a lighter moored alongside of the steamer Whitney, lying stranded on Flood Rock. The Whitney went ashore in a fog and a permit had been obtained from the Supervisor of Anchorages for the libellant to moor such of its plant as might be found necessary in salvage operations. The Morse bound from Boston to New York with a light hawser tow brought two of her barges in contact with the lighter. Numerous charges of fault against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Morse dismissed and *held* that the collision was caused by the presence of a schooner in the channel between Mill Rock and Ward's Island, which forced the Morse to attempt a passage through the channel between the Whitney and Hallett's Point and rendered collision unavoidable.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.*]

(Syllabus by the Judge.)

In Admiralty. Action by the Merritt & Chapman Derrick & Wrecking Company against the Cornell Steamboat Company, to recover for injuries by collision. Libel dismissed.

Wing, Putnam & Burlingham, for libellant.

Amos Van Etten and J. Parker Kirlin, for respondent.

ADAMS, District Judge. This action was brought by the Merritt & Chapman Derrick & Wrecking Company against the Cornell Steamboat Company, the owner of the tug C. W. Morse, for the damages, said to be \$17,500, caused by the sinking and loss of the derrick Will and her cargo by collision with the tow of the Morse about 2:10 p. m. on June 2, 1908, in Hell Gate. The Will was lying on the starboard side of the steamboat H. M. Whitney, which was lying stranded on Flood Rock. The weather was clear and the tidal current running ebb at the rate of 5 or 6 miles per hour. The place of collision was near the middle of the channel between Hallett's Point and Mill Rock.

The libel alleges:

"Fourth. The Metropolitan Line Steamship H. M. Whitney, having stranded on Flood Rock in Hellgate during the evening of May 23rd, 1908, her master and agents had employed the libellant to save said vessel and cargo, and the libellant had duly procured a permit granted by the Supervisor of Anchorages for libellant's wrecking plant to anchor in the channel, in and about the Whitney, for the purpose of floating the ship and of recovering the cargo thereon. Immediately after the disaster above mentioned, the libellant was engaged in such services with its wrecking plant, including the derrick Will.

Fifth. On information and belief, in the afternoon of June 2nd—9 days after said stranding—the libellant in the course of its salvage operations, had the derrick Will along the starboard side or quarter of the H. M. Whitney which was lying on Flood Rock and heading nearly North and South. Cargo was being taken out of said ship, placed upon lighters, and transported to Brooklyn. The lighter Will at the time had on board a large quantity of salvaged goods, including cotton, wool, rubber and other merchandise. She was securely moored to said steamship, leaving a clear channel between them and Hallett's Point through which the larger vessels were accustomed to pass. There was also another and broader opening ahead of the Whitney, between Mill Rock and Ward's Island, which was also used by passing vessels. The weather at the time was clear, the wind light, and there were no other vessels in the immediate vicinity.

Sixth. At a little after two o'clock in the afternoon when the tide was ebb the respondent's tug, C. W. Morse, was seen to come around from the Sound with a long hawser tow. The Morse headed to the westward, then apparently changed its course to pass by Hallett's Point. Owing to the scope of hawser and the size of her tow, which consisted of 5 large barges in 2 tiers, the starboard barges came broadside against the lighter Will, with great force, so that the Will's bow was crushed in, causing her to fill and capsize with the loss of her entire cargo. She finally floated bottom up in the ebb-tide towards the northerly end of Blackwell's Island, where she was picked up and righted, but found to be a total loss. Said barges were without motive power, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were entirely dependent on the movements of the C. W. Morse, whose pilot and officers were directing their navigation."

* * * * *

"Eighth. Said collision and damages were not due to any fault on the part of the libellant, or of those engaged in its behalf in the salvage operations, but were solely due to the faults of the respondent, and its tug, the C. W. Morse, as follows: towing through the Gate with too long hawser; too large and unwieldy a tow; no competent officers properly acquainted with the locality and the salvage operations; no proper lookout; not seeing the Whitney as soon as she should have been seen; not making sufficient allowance for the currents and set of the tide; not keeping her tow clear from the salvor's plant in plain view; not taking reasonable precautions to pass; not slowing or stopping, so as to moderate the violence of the contact, and in other faults which will be shown upon the trial hereof."

The answer, after some admissions and denials, states:

"Fourth: It is admitted that the steamship H. M. Whitney was stranded on Flood Rock on or about the time set forth in the libel, but this respondent has no knowledge or information relating to the other matters alleged in the fourth paragraph of the libel, except upon information and belief it is alleged that on or about the 25th day of May, 1908, the libellant wrote a letter to the Supervisor of Anchorages in New York City as follows:

'Dear Sir: Permission is hereby requested to moor such of our plant as may be found necessary in the vicinity of Mill Rock, Hell Gate, East River, for the purpose of raising Steamship "H. M. Whitney" sunk there.'

To which letter the Supervisor of Anchorages on the 26th day of May, 1908, made reply as follows:

'Merritt & Chapman Derrick & Wrecking Company, #17 Battery Place, New York City.

Gentlemen: Agreeably to your request of the 25th instant, permission is hereby granted to moor such of your plant as may be found necessary in the vicinity of Mill Rock, Hell Gate, East River, for the purpose of raising Steamship "H. M. Whitney."

In granting this permit, it is understood that your plant must comply with all the navigation laws in regard to lights, fog signals, etc., and that the Government assumes no responsibility.'

Fifth: This respondent has no knowledge or information of the matters set forth in the fifth paragraph of the libel, except it is admitted that the derrick Will was alongside of the steamship H. M. Whitney, which was lying on or near Flood Rock, heading nearly north and south, and that such derrick was on the starboard side or quarter of the steamship. It is upon information and belief denied as true that there was a clear channel left between the derrick and Hallett's Point; the condition of the wind is denied, and the statement that there were no other vessels in the immediate vicinity is also denied.

Sixth: It is admitted that on the 2nd day of June at about two o'clock in the afternoon, the respondent's tug C. W. Morse came from the Sound with a hawser tow, consisting of five barges in two tiers. It is further admitted that the starboard barge collided with the lighter Will, injuring the lighter, and it is also admitted that the barges in tow of the Morse were dependent on the Morse for their movements. As to the remaining allegations in the sixth paragraph of the libel this respondent has no knowledge, and therefore denies the same."

* * * * *

"Eleventh: For a further and separate answer to the libel filed herein, this respondent, repeating all the foregoing allegations or such of them as are material to this separate answer the same as if they were herein realleged, respectfully shows to the court:

The steamtug C. W. Morse with a tow left New York on May 23d, 1908, at about two o'clock in the afternoon, destined for Boston; that the tug was in charge of a competent navigator, who was at the wheel at the time of the collision mentioned in the libel; that the said tug remained at Boston until

the 27th day of May, 1908, when she left Boston with a tow bound for New York; that while said steamtug was at Boston the master of the same was informed from a newspaper report in the Sunday Post published at Boston Sunday morning, May 24th, 1908, as follows:

‘Boston Liner Ashore.

Henry M. Whitney Strikes While Coming up East River, N. Y.

New York, May 23.—In heavy fog tonight the Henry M. Whitney of the Metropolitan Line, bound for Boston with a large cargo, went ashore on what is known as Nigger Point, Ward’s Island, in the East River.’

That the said steamtug with a tow as described in the libel arrived at Hell Gate on the 2nd of June, 1908, at about two o’clock in the afternoon; that the tow was properly made up and the tug had her tow on hawsers such as are ordinary and usual for proper navigation of such a fleet; that at that time the tide was strong ebb and the wind was a strong wind from the North-west; that when the Morse arrived at a point opposite Sunken Meadows, the tug slowed down to one bell and blew one whistle; that the master of said tug was expecting to find the Whitney at Nigger Point and directed his navigation accordingly; that no warnings or signals were given to indicate that there was any obstruction to navigation by the Whitney or by libellant’s lighter, and the captain of the Morse was unable to discover the position of the Whitney and the lighter until about opposite Nigger Point, and as he came around Nigger Point and observed the situation of the steamship and the lighter the course of the Morse was directed to the broader channel mentioned in the libel between Flood Rock and Ward’s Island, and just about as the master of the Morse was directing his course to take such channel he discovered a schooner navigating in such a manner as to prevent his going with safety in that channel; he then directed the course of the Morse as close as he could safely go to Hallett’s Point and proceeded through the easterly channel between the Whitney and Hallett’s Point; that the lighter Will was lying some distance south-easterly of Flood Rock and made a narrow and difficult channel for the tug and tow, and that without any fault on the part of the Morse the barges in the tow collided with libellant’s lighter or derrick and caused the injury mentioned in the libel. That reasonable diligence and skill were used by the master of the Morse in his attempt to avoid the Whitney and the lighter, but because of the wind and strong ebb tide and the narrowness of the channel it was impossible to navigate safely under the extraordinary circumstances, in which the navigator of the Morse did all that could be reasonably done to avoid libellant’s lighter.

This respondent alleges that the position of libellant’s lighter was a menace to navigation; that no warnings or signals were given to indicate the position in which the lighter lay, and this respondent upon information and belief alleges that the libellant permitted its lighter to remain a menace to navigation for an unreasonable time, and that the removal of the cargo or other necessary work within the permit from the Supervisor of Anchorages was unreasonably delayed.”

It appears that the Whitney, while proceeding in a thick fog at a speed of about 6 knots an hour, ran ashore on Negro Point on Ward’s Island on the night of May 23, 1908. Subsequently, on the same night, she got off and backed down past Hallett’s Point. Her engines were worked ahead and astern. She brought up on Flood Rock and lay stranded almost directly across the channel nearly midway between Hallett’s Point and Mill Rock, heading about north or north by east. Her position as she lay stranded left a channel of navigable water of something from 350 to 400 feet between her stern and the Astoria shore and a channel space of about 300 feet between the stern and Mill Rock.

Before the removal of Flood Rock, there was a channel which was occasionally used between that rock and Mill Rock, and although

there was some testimony in this case tending to show that the space was still available, the general concurrence of the opinions of experienced navigators was that with the Whitney lying as she was, the space could not be safely used. Therefore, there were two channels open to vessels navigating through the Gate at the time of this accident, the one between Hallett's Point and the Whitney, and the one between her and Ward's Island.

The New York and Boston newspapers noticed the accident to the Whitney but none of them, except the Boston Sunday Post of May 24th, 1908, came to the attention of those on the Morse, and that specifically stated that the Whitney had gone ashore on Negro Point, Ward's Island. The Morse left New York the same day the Whitney went ashore, about 2 p. m., with a loaded tow of barges, two for Boston and one for Newport. After delivering the Newport barge, she proceeded to Boston. Nothing had been heard of the stranding of the Whitney previous to her arrival in Boston, where the master happened to see the notice in the Post above alluded to. If the master had looked for other information, he probably could have found it but I do not see that he was under any obligation to search for the details of the stranding.

The Morse left Boston for New York May 29th, with the barges Caducia, David Wallace and Liberty in tow. At Newport she picked up the barges Pilgrim and Delhi. She reached the vicinity of Whitestone the 2nd of June with the 5 barges mentioned, which were then bunched up and the tow shortened, so that the distance between the tug and the first tier of barges, consisting of the Liberty, the David Wallace and the Caducia, was 25 or 30 fathoms. There were two hawsers running from the stern of the tug to the outside barges. The remaining barges, the Pilgrim and the Delhi, were placed in the stern tier and made fast with hawsers 25 to 30 feet in length. The stern tier was arranged so that the barges tailed behind the barges of the head tier in about the center, that is the Delhi, the starboard barge, when the tow was straight, was behind the Wallace and the Caducia, but did not extend as far to the starboard as the Caducia. The whole length of the tow from the stem of the tug to the stern of the last tier was from 775 to 800 feet. The width of the tow at its widest part was about 106 feet.

There was no communication with the shore at Whitestone. At Sunken Meadows the tow was slowed down, maintaining just enough headway to keep steerage way on the barges, and a long whistle blown by the tug for the channel bend. The tow before the slowing was going through the water about 5 miles an hour. The current was running 3 or 4 miles an hour. In the Gate it was running faster, probably 5 or 6 miles an hour. On approaching Negro Point, the tow was going at the rate of 2 or 3 miles in addition to the tide, which made her headway over the bottom about 8 or 9 miles.

The Morse approached Negro Point, where she expected to find the Whitney, somewhat to the southward of mid channel. On failing to see the Whitney there, the master of the Morse thought she had been removed. When, however, the Morse was about opposite

the wharf east of Negro Point, the Whitney was sighted lying across the channel on Flood Rock. This was the first intimation he had of her being in such a position.

He intended on rounding Negro Point to pass through the channel between Mill Rock and Ward's Island. The tail of the tow swung around as usual on an ebb tide toward Potts Cove. The Morse passed a ferryboat port to port between Hallett's Point and the Cove and ported her helm somewhat to allow the ferryboat more room.

Shortly after passing the ferryboat and also after rounding Negro Point so that the channel between Mill Rock and Ward's Island was fully opened, it was seen that a small schooner was standing down the channel, near the middle, in a southeasterly direction toward Negro Point and was then in a position about half way between Mill Rock and Hog's Back. The wind was then blowing from the N. W. with a force of about 24 miles an hour. The sails of the vessel were on her starboard side and she was making some leeway.

The master and the mate of the Morse, who was also in the pilot house, consulted as to the best course to pursue under the circumstances and it was concluded that if the Morse attempted to pass between the schooner and Ward's Island, the tow would swing over on the tide and sink the schooner, while if an attempt should be made to pass between the schooner and Mill Rock, the westerly set of the current would carry the tow on the Rock. It was accordingly decided that the best and only chance of safety was to go as close as possible to Hallett's Point at full speed in the hope that the tow could be pulled past the stern of the Whitney before the set of the current could force it on the wreck. The helm of the tug was therefore hard-a-starboarded when they were in a position to the southward and eastward of Hallett's Point. Her stem was kept as close to the tide rip near the Hallett's Point shore as was safe and practicable and every possible effort made to haul the tow quickly through the narrow channel. The strength of the current was too great, however, for the success of this attempt and its force swung the tow nearly broadside against the Will and the Whitney as the head barge was about to pass the bow of the Will. The barge in the head tier, the Caducia, damaged the front end of the lighter and the Delhi, in the stern tier, came up against the side of the Whitney and struck the Will at the stern, from the effect of which the latter capsized and dumped her load. It was about 3 minutes from the time the Whitney was first located until the collision occurred.

It is provided:

"That it shall not be lawful to tie up or anchor vessels or other craft in the navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft. * * *" Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543).

The permit, quoted in the answer, was granted in conformity with the authority vested in the Secretary of the Treasury (Commerce and Labor) by Act May 16, 1888, c. 257, 25 Stat. 151 (U. S. Comp. St. 1901, p. 3549). The Rules and Regulations issued under this authority provide:

"(b) No vessel shall anchor in any of the channels except in cases of great emergency, and then as near the edge of the channel as possible, so as not to impede or interfere with the free navigation of the same, and only until such time as they can procure assistance; and no vessel shall anchor so as to obstruct the approach to any pier or impede the movement of any ferryboat."

* * * * *

"(e) Permits may be granted by the supervisor of anchorages to wrecking plants to anchor in the channel for the purpose of recovering sunken property, subject to his supervision. Such wrecking plants must comply with all the navigation laws in regard to lights, fog signals, etc., and in granting such permit the Government assumes no responsibility."

The Plate of the permitted anchorages grounds shows that there is none at the place of collision.

The question of the effect of anchoring vessels under the foregoing acts was considered by Judge Brown in *The Chauncey M. Depew* (D. C.) 59 Fed. 791, and he held that it is obligatory upon the owner to raise vessels and that a derrick engaged in raising a sunken vessel in the channel way of the East River, although not unlawfully in her position, was not entitled to all of the immunities of vessels anchored on anchorage grounds. He did not consider the effect of the later statute, *supra*, but no doubt where a permit is issued, a wrecking plant can lawfully occupy part of a channel. Following the *Depew* case, I recently held in *The James McWilliams* (C. C. A.) 172 Fed. 919, affirmed on appeal, that a lawfully anchored derrick was entitled to damages from a tug whose tow collided with it because of the lack of ordinary skill and care.

It does not seem, however, that any presumption of fault arises from a collision under the circumstances of a case of this kind. The *Whitney* was, in a sense, authorized to occupy the channel but the mere fact of her being anchored or stranded in the channel did not create any presumption against the *Morse* as a moving vessel, or to relieve the *Whitney* of any precaution to advise navigating vessels of her presence in the channel.

The libellant understood that it was under an obligation to warn navigating vessels of her situation and she sought to do so by giving whistle signals but it appears that the signals were not given in time to be of any service because when they were sounded the *Morse* was already in a dangerous position and there was nothing she could do to extricate herself. No warnings reached the *Morse* until after she had rounded Negro Point and was in a position between it and Hallett's Point, entirely too late to be of any service to the *Morse* in avoiding the collision.

The fact that the *Morse* was unable to navigate her tow through the channel in safety is not evidence of any want of care on her part. While the vicinity was navigated in safety by vessels and smaller tows, there was nothing to show that any other tug, under similar conditions, had succeeded in doing what she failed to accomplish.

It does not appear that any of the numerous charges of fault against the *Morse* have been sustained. That of want of lookout has been urged but when a lookout could have seen the obstruction, the *Morse* was already in a precarious position and the services of a most vigilant person acting in that capacity would not have been of any avail.

The charge that the Morse had "too large and unwieldy a tow" is true in a sense but all hawser towing is subject to that criticism and it is too late now to attempt to place a tug in fault upon such ground. The charge that she was "towing through the Gate with too long a hawser" has not been proved. The testimony is uniform that the tow was made up in the customary manner. The charge that she was in fault in that she had "no competent officers, properly acquainted with the locality and the salvage operations" is not established. The master was a man of long experience and the mate was a licensed man, also of considerable practice in towing of this kind. They were not advised of the salvage operations. The question of lookout has been mentioned above. As soon as the conformation of the land permitted a view of the Morse, she was seen by the master and the mate. This also disposes of the charge of "not seeing the Whitney as soon as she should have been seen." The charge that the Morse was in fault in "not making sufficient allowance for the currents and set of the tide," in "not keeping her tow clear of the salvor's plant in plain view" and in "not taking reasonable precautions to pass" have been disposed of above, as has the further charge of fault in "not slowing or stopping sooner so as to moderate the violence of the contact." It is obvious that in towing on a hawser in a strong current, running in the same direction in which a hawser tow is proceeding, stopping and reversing would be of no avail to avoid a collision or to mitigate its force. The Morse's best chance in the situation in which she found herself was to proceed as fast as possible to pull her tow away from the Whitney.

The principal cause of the collision was the presence in the channel of the navigating schooner. It has been strongly urged that she was not actually there and testimony on the part of those on the wreck and surrounding vessels that they did not see her has been cited to establish such fact, but it seems to me that it is amply proved that she was there and obstructed the channel the Morse desired to take. This was shown not only by the testimony of the navigators of the Morse but by several independent witnesses on the tow. It was testified that she was a schooner with two masts, painted a dark color; that she looked like a fishing built vessel but was not equipped with dories; that she was of American type but apparently hailed from Nova Scotia; that she was from 80 to 100 tons burden, deep loaded and was drawing from 13 to 17 feet; that her sails were on the starboard side and she was sailing through the Gate, stemming the tide and making some leeway; that she was heading in a southeasterly direction and pointing right down the channel toward Negro Point; that her speed over the bottom was 3 or 4 miles, making good headway; that she had all of her lower sails and main gaff topsail set but had no fore topmast. All of these particulars were noted by the respondent's witnesses and there is nothing on the other side except the negative testimony of its witnesses, who were not especially looking out for anything of the kind and the fact that they failed to observe her can have little effect in view of the positive statements of the respondent's witnesses.

The collision would doubtless have been avoided if the tow had been permitted to use the channel between the Whitney and Ward's Island but then that was blocked by the schooner, the collision, as it turned out, was unavoidable.

The libel is dismissed.

THE AMERICA.

(District Court, S. D. New York. January 7, 1910.)

SHIPPING (§ 132*)—INJURY TO CARGO—SINKING OF VESSEL.

Seaworthiness of a boat sinking without apparent cause. Where it appeared that the boat was actually seaworthy, the presumption of unseaworthiness from the sinking *held* to be overcome.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 484; Dec. Dig. § 132.*]

(Syllabus by the Judge.)

In Admiralty. Action by the Bush Terminal Company against the steam lighter America for loss of cargo. Decree for libel. Dismissed.

Kneeland & Harison, for libellant.

Foley, Martin & Nelson, for claimant.

ADAMS, District Judge. The Bush Terminal Company claims in its libel that the steam lighter America was under charter to it on or about the 1st day of April, 1906, and while loaded with a cargo of coffee, staves, etc., which had been delivered to the libellant for carriage, she sank at a pier to which she was moored by reason of unseaworthiness. The owner of the coffee has assigned its claim to the libellant, amounting to \$2,415.26, and the libellant has become liable on other cargo, to the extent of \$1,203.53.

The answer of the claimant admits the charter, the sinking and loss or damage to cargo, and further alleges:

"Eighth: That the said steam lighter was under charter to the libellant herein, and that at the inception of the charter and delivery to the libellant and at all of the times during continuance of the charter of the said vessel by the libellant, the said steam lighter 'America' was in every respect tight, staunch, strong and seaworthy, and properly manned and equipped, and said steam lighter was inspected and kept in good repair and condition at all of the time during the continuance of said charter.

That said vessel, on or about the 31st day of March, 1906, took on board a small cargo of staves and general merchandise, and proceeded to Pier 3, Bush's Stores, Brooklyn, New York, to discharge the same; that by and under the order of an agent or servant of the libellant, the said steam lighter was placed alongside of the north side of Pier 3 at Bush's Stores, and that thereupon the libellant, through its agents and servants started to unload the said vessel; that the said vessel was properly moored, and at all of the time that she lay at said pier was sufficiently manned by competent men.

That while lying alongside of said dock aforesaid, and during the night of April 1, 1906, or in the early morning hours of April 2, 1906, the said lighter sunk at the pier aforesaid; that said sinking was not caused by any unseaworthiness of said vessel, and that the cause of the sinking is unknown to the claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

That the said sinking was not caused by any fault, neglect or want of care on the part of the claimant, or fault, neglect or want of care on the part of the master or the crew of the said steam lighter 'America.' "

The testimony shows that the charter was a verbal one and under its terms the Bush Company was to have charge and custody of the boat at night and the owner, the Commercial Coal Company, was to provide a crew of five men to navigate the boat in the day time.

On the trial the libellant simply proved the sinking of the boat but gave no evidence as to the cause of the sinking.

The claimant gave some evidence as to a scar on the starboard side of the boat tending to show, as it claimed, that the boat had rested on a sunken pile or other obstruction and had thus been caused to list taking in water which caused the sinking. There was however no evidence of the existence of such a pile and the fact that the boat had lain through several tides without injury, disposes of such claim.

The case therefore may be regarded as one of unexplained sinking and it is to be determined whether the vessel is liable under the circumstances of the case. Of course if properly attributable to some defect in the boat which caused the disaster, she is liable.

It appears that the Coal Company heard that the Bush Company desired a boat of the character of this one and a representative of the former saw an agent of the latter with respect to it. He asked if the Bush Company needed a steam lighter and was told that it did. The terms were discussed, the owner asking \$1,800 per month, which the Bush Company declined to pay, but a charter was finally effected by which the price was to be \$1,500 per month, the crew, to be furnished by the owner, to work 10 hours per day, and the Bush Company to take charge at night and load and discharge her. The latter was to be responsible for her at night if permission were given to work her, the owner's crew of 5 men to be a day crew. The pay of a watchman at night, if away from the Bush Company's wharves, was to be paid by it but it did not consider this necessary when at its own wharves. In order to work the boat night and day a double crew would be required. It was further agreed that the Bush Company should pay for the insurance premiums on the cargoes. The boat was then turned over to the Bush Company upon a trial of 30 days with the provision that if she proved satisfactory, she would be continued for 6 months or more. She was continued in service for the 6 months and was still in service when she sank a month or two thereafter. It was in consideration of the reduction in the amount of the hire that the insurance was to be borne by the Bush Company.

The relations of the parties as to responsibility for loss of cargo, as construed by them, was shown in a transaction where there was a loss amounting to \$235, which the Bush Company at first deducted from the hire due but subsequently acknowledged its liability and repaid the amount.

It appears that at the time of the accident a large part of the crew had left the boat, and there remained no one on board to give an account of the sinking but that under the circumstances does not seem to impose any liability on the vessel. It was the duty of the Bush

Company to provide a watchman, if one were necessary. There was one ashore at the place but he evidently did not consider it his duty to care for the boat. She was therefore practically unguarded. The vessel maintained fires on board so that the pumps and boilers could be used if desired but the contract did not require it to keep men on board to utilize the apparatus.

Numerous witnesses testified that the vessel was seaworthy at the time of the loss, giving particulars. She was only about two years old at the time of her first charter and was a good strong boat. She had had a general overhauling just before the charter. Presumably she was seaworthy and this presumption is sustained by credible testimony that she was actually so. She was examined every month and found to be in first class condition. The last examination was only three weeks before the sinking. She had been almost constantly employed in carrying cargoes for the Bush Company. It appears that shortly before the sinking she was not leaking. She carried about 200 tons and only had 40 or 50 tons aboard when she sank. She had been partly unloaded by the Bush Company the day before the sinking and was then and continued to be observed as being in good condition until the afternoon of that day, when she sank.

Something was suggested about the condition of the check valve in the syphons and that the water might have entered the boat in that way but it appeared that it was at least a foot above the water but even if the pipe were submerged, water could not get into the boat through it as there was a check valve to keep the water out and this valve was shown to be in good working order both before and after the sinking.

The boat was pumped out at pier 3, where she sank, and then towed to Jersey City to discharge her cargo and was there found to be absolutely tight. She was examined especially for the purpose of ascertaining the cause of the sinking but without result. Her condition even after what she had been through was good and what damage there was could be properly attributable to the effect of water while she was submerged.

The libellant's case rests altogether upon the presumption that because she sank without apparent cause she was necessarily unseaworthy but it does not seem that such a presumption can be of any force in the face of the controlling evidence that the boat was seaworthy.

In the case of *Terry & Tench Company v. Merritt & Chapman D. & W. Co.*, I applied that doctrine to account for the sinking of a boat being towed in the Hudson River, saying, in opinion delivered from the bench (168 Fed. 533, 536, 93 C. C. A. 613, 616):

"Still this boat sunk without any known cause and the only thing that the Court can do is to resort to such presumption as the law affords to aid it in determining a cause for the accident. The law says if a boat sinks without apparent cause she is to be deemed unseaworthy and I feel forced to come to that conclusion in this case, and I shall dismiss the libel on the ground that the boat was unseaworthy."

On the appeal, however, this decision was reversed. The court of appeals, in an opinion by Judge Noyes, saying (*Id.*, 168 Fed. 534, 93 C. C. A. 614):

"The respondent did show the circumstances of the accident, but offered no evidence to show the cause of the sinking of the vessel, and, to rebut the presumption against it, relied upon the presumption of unseaworthiness arising from the sinking of the vessel without apparent cause. The presumption of unseaworthiness generally arises in insurance cases, where a vessel is in the possession of the insured, and where means of knowledge concerning the condition of the vessel are available to him, rather than to the insurer. But where a vessel is in the exclusive possession of a charterer, means of knowledge are as readily available to him as to the owner, and we perceive no especial reason why there should be any presumption in the matter. We deem it unnecessary to decide this question, however, as we are of the opinion that, if the presumption of unseaworthiness exists in the case, the libellant rebutted it by its proof concerning the condition of the vessel before and after the accident. In our opinion the respondent failed to sustain the burden of proof imposed upon it as a bailee in possession, and the decree was erroneous."

This authority seems to be conclusive of the present case and while the cause of the sinking remains in doubt, in view of the evidence that the boat was actually seaworthy, the presumption must be disregarded. The libel is dismissed.

THE WM. H. TAYLOR.

THE P. R. R. NO. 32.

(District Court, S. D. New York. January 5, 1910.)

COLLISION (§ 79*)—TUGS AND TOWS—SIGNALS.

Collision between the tows of the Taylor and of the No. 32 in the Arthur Kill opposite Morse Creek. *Held* that the No. 32 was solely in fault for failing to comply with an agreement to pass to the left.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 123, 139; Dec. Dig. § 79.*

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]
(Syllabus by the Court.)

Libels by Isaac E. Ewing and by John Newman against the steam tug William H. Taylor and steam tug P. R. R. No. 32. Libels against the Taylor dismissed, and decree rendered against the steam tug P. R. R. No. 32.

James J. Macklin, for libellants.

Carpenter, Park & Symmers, for the Taylor.

Robinson, Biddle & Benedict, for the No. 32.

ADAMS, District Judge. These actions were brought by the owners of the canal boats Mary Ewing and Lillie & Nellie against the tug Wm. H. Taylor to recover for the damages, said to have been \$800 in each case, suffered by reason of a collision in the Arthur Kill on the 9th day of June, 1908, between the said boats and the Taylor and her tow of two loaded mud scows in the vicinity of Bay Way. The said boats were taken in tow by the No. 32 at the Pennsylvania Railroad stakes, New York Bay, bound for South Amboy, New Jersey. The tows were on hawsers, the boats in the No. 32's tow

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

being light, made up in 3 tiers, the hawser tier consisting of 2 boats, the 2d tier of 3 boats and the 3d tier of 2 boats. The Ewing was the outer starboard boat in the 2d tier and the Lillie & Nellie was the outer starboard boat in the 3d tier.

The Taylor's tow consisted of 2 scows, laden with mud, each drawing about 14 feet. The hawser from the tug was about 30 fathoms and the scows were close together, one behind the other.

The libellants charged the Taylor with fault: (1) in not keeping a proper lookout, (2) in being on the wrong side of the channel, (3) in not slowing and stopping in time, (4) in proceeding too fast and (5) in not going closer to the New Jersey shore, after having selected that side.

The Taylor brought in the No. 32 by petition, alleging that the tide was flood, running to the eastward; that when approaching the Baltimore & Ohio Railroad Bridge across the Kill, there was a dredge working in or near the South or Staten Island draw preventing the passage of vessels through that side of the draw, and coming through the northerly, or New Jersey side, was the No. 32 bound to the westward with a tow made up in the manner alleged; that the position of the dredge at the southerly side was well known to those navigating the No. 32 and it was not safe or practicable for the tows on account of the presence of the dredge and the set of the tide, for the tugs to pass port to port; that when the Taylor was about $\frac{3}{4}$ of a mile away she gave a signal of 2 whistles to the No. 32 to which the No. 32 replied with a similar signal and the helm of the Taylor was put to starboard and she ran over with her tow to the northerly or New Jersey side of the channel as far as she could go; that the No. 32 did not appear to change her course after the exchange of the said signals but kept on and thereupon the Taylor gave another signal of 2 and slowed down; that the No. 32 answered this signal but apparently did not comply therewith and go sufficiently to port and her tow was permitted to swing over to the northward so as to strike the first scow of the Taylor's tow, damaging two of the boats in the No. 32's tow. The Taylor then alleges that the No. 32 was in fault: (1) in not keeping a proper lookout and (2) in not keeping her tow sufficiently to the port.

The No. 32 answered the petition and after some admissions and denials, stated:

"Seventh: On the afternoon of June 9, 1908, the tug 'P. R. R. No. 32' was proceeding in the Arthur Kill bound for South Amboy, with a tow of seven light boats, the boat 'Mary Ewing' being the starboard boat of the second tier of three boats, and the boat 'Lillie and Nellie' being the starboard boat of the third tier of two boats. The tide was flood. A digger with a boat alongside was anchored in front of the eastern draw of the Baltimore & Ohio bridge, near Elizabethport. As the 'No. 32' was entering the western draw, the tug 'Wm. H. Taylor,' which had been sighted coming up the Sound with two loaded scows in tow, blew a signal of two whistles, which was answered by two whistles from the 'No. 32.' The 'No. 32' starboarded her helm and headed over to the Staten Island shore as close as possible without grounding. After passing through the draw the 'No. 32,' seeing that the 'Taylor' was coming on without altering her course, blew a signal of two whistles, which the 'Taylor' answered by two whistles. The 'No. 32' continued to head over toward the Staten Island shore as much as possible, but the 'Taylor' came on, heading

for the tow at full speed, and came into collision with the 'Mary Ewing' and brought her tow into collision with the said 'Mary Ewing' and the boat 'Lillie and Nellie,' damaging them.

Eighth: Said collision and damage were not caused by or through any fault or negligence on the part of the said steamtug 'P. R. R. No. 32,' or those in charge of and navigating her, but were caused wholly through the fault and negligence of the said steamtug 'Wm. H. Taylor' and those in charge of and navigating her in the following among other respects: 1. In not keeping a proper lookout, properly stationed and attending to his duties as such. 2. In not slowing, stopping and backing in time to avoid a collision. 3. In proceeding at too high a rate of speed. 4. In not going closer to the New Jersey shore after having selected that side. 5. In not keeping clear of the 'No. 32's' tow."

The testimony, in substance, sustains the allegations of the Taylor's petition. It appears there were 2 signals of 2 blasts each by the respective tugs and that the No. 32 did not conform thereto by keeping her tow on the agreed side but permitted it to be swung over into the waters which the Taylor and tow were entitled to. This no doubt was partly attributable to the south or south-east wind, of a velocity of 13 or 14 miles per hour, which prevailed, but that is something which the No. 32 should have considered when she agreed to the method of passing. If she could not manage her tow so as to comply with the course proposed by the Taylor, she should not have consented to it. She agreed that her tow should be kept on the Staten Island side of the channel and the Taylor was not in fault, in view of the signals, for assuming that the No. 32 could comply with her agreement. She navigated on the theory that the whistles constituted an agreement upon which she was entitled to rely. She did slow at about the time of the 2d exchange and navigated as far as possible to the New Jersey side of the channel but as it turned out could not keep clear of the No. 32's tow and the collision happened about opposite Morse Creek.

The libel against the Taylor should be dismissed and the libellants allowed decrees against the No. 32, with orders of reference.

BOUND v. SOUTH CAROLINA RY. CO. et al.

Ex parte EVANS.

(Circuit Court, D. South Carolina. May 11, 1894.)

RECEIVERS (§ 155*)—JUDGMENT AGAINST RECEIVER—INTEREST.

Liabilities of a federal receiver operating a railroad for negligence of his agents in the course of the business are a part of the expenses of operation, and, where evidenced by judgment of a state court, the question whether the judgment bears interest must be determined by the law of the state.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 288; Dec. Dig. § 155.*]

In Equity. Suit by F. W. Bound against the South Carolina Railway Company. On petition of H. S. Evans. Petition allowed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Smythe & Lee, for petitioner.
J. W. Barnwell, for receiver.

SIMONTON, Circuit Judge. The petitioner obtained a verdict against the receiver in the court of common pleas for South Carolina, sitting for Aiken county. He entered up judgment on the 15th October, 1892, in the sum of \$1,066. The cause of action was in tort for negligence of the agent of the receiver. A motion was made for a new trial and refused. The cause went up to the Supreme Court of the state, which affirmed the judgment below, with \$45 costs. The remittitur was sent down, but no further judgment was entered. He now files his petition in this court, in the main cause praying payment of this judgment.

No question is made as to the validity of this judgment or of its conclusive character as between the parties. The only question is as to a claim which the petitioner makes for interest thereon from the date of the entry thereof.

At common law judgments do not carry interest. *Williamson v. Broughton*, 4 McCord, 212; *Thomas v. Wilson*, 3 McCord, 166. In South Carolina interest was allowed upon judgments by Act Assembly 1815 (6 St. at Large, pp. 4 and 5), obtained on any cause of action bearing interest, and the provisions of the act are confined to such cases. But by the same session of the General Assembly another act was passed (6 St. at Large, p. 6), whereby it was provided that when there shall be an appeal from any final decision of any circuit court of law or equity in this state, and the final decision shall be against the appellant, interest on the amount recovered shall be allowed from the day the verdict was given to the time when the appeal shall be dismissed. This amount shall be indorsed on the execution and collected with the original debt. So although this verdict was in tort, and so did not of itself bear interest (*Daub v. Martin*, 2 Bay [S. C.] 193), and as the cause of action was not interest bearing, the judgment could not carry interest (*Trenholm v. Bumpfield*, 3 Rich. Law [S. C.] 376; *St. Pauls Church v. Washington*, 3 Rich. Law [S. C.] 381; *Bank v. Bowie*, 3 Strob. [S. C.] 443), yet the act of assembly as the result of the dismissed appeal makes the interest a necessary consequence of and a part of the judgment, whether the cause of action carry interest or not (*Kirk v. Richbourg*, 2 Hill [S. C.] 352).

When this claim therefore comes into this court as fixed by the decision of the court of last resort in South Carolina, it consists of the original judgment, with the interest thereon pending the appeal as a necessary part thereof. The learned counsel for the receiver, denying interest on the claims, relies upon *Thomas v. Western Car Co.*, 149 U. S. 116, 13 Sup. Ct. 824, 37 L. Ed. 663, quoting and adopting the decisions in *Williams v. American Bank*, 4 Metc. (Mass.) 323, and *Thomas v. Minot*, 10 Gray (Mass.) 263. There can be no doubt that when there is a fund of an insolvent estate in the hands of the court, to be marshaled and distributed, and creditors come in and prove their claims, interest is not allowed upon the claims proved as against the fund from the date at which they are established. And for two rea-

sons. One is that the delay, if any, in the settlement, is the act of the law, and interest therefore, cannot be awarded as damages. Perhaps another reason is that, the estate being insolvent, it is as broad as it is long to withhold the interest calculation on all claims. This is the conclusion reached from the cases quoted. But even in those cases, where one having an interest bearing demand proves it, he proves for the whole amount of principal and interest due at the time of the proof. And on this aggregate no further interest is allowed. But the present case bears no analogy to that. The receiver of the railway company placed in charge of it conducted its business as a railroad exercising its franchises, and as such receiver he is liable for all expenses incident to this business. Among these expenses, incident to the business, are claims arising against him for the negligent conduct of his agents. These expenses he pays out of the earnings of the road in his hands, and they must always be deducted before the net result of his operations can be ascertained. So far as his business as receiver in this respect is concerned, he is not insolvent. There are in his hands ample funds to meet his expenses in conducting his business, the first charge on the earnings. The judgment of a court of competent jurisdiction, and the law which governed that court, and in this matter controls us, has fixed the amount of the claim, a privileged claim. And no occasion arises for marshaling claims of equal rank with it. The petitioner is entitled to interest on his verdict from the day it was rendered, October 15, 1892, to the day the appeal thereupon was dismissed, and the costs of the Supreme Court.

Let an order be taken directing this payment.

MEYER RUBBER CO. v. GEORGETOWN & W. R. CO.

In re JONES.

(Circuit Court, E. D. South Carolina. May 26, 1909.)

1. JUDGMENT (§ 828*)—ACTION AGAINST FEDERAL RECEIVER IN STATE COURT—CONCLUSIVENESS AND OPERATION OF JUDGMENT.

Under Act March 3, 1887, c. 373, § 3, 24 Stat. 554 (U. S. Comp. St. 1901, p. 582), which authorizes the suing of a federal receiver in respect of any act of his in carrying on the business without the previous leave of the court which appointed him, but such suit to be subject to the general equity jurisdiction of said court, a judgment rendered against such a receiver by a state court in an action brought against him to recover damages for the death of an employé is conclusive on the federal court as to the existence and amount of the plaintiff's claim; but the time and manner of its payment must be controlled by such court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

Conclusiveness as between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. RECEIVERS (§ 155*)—EXPENSES OF CONTINUANCE OF BUSINESS—DAMAGES FOR INJURY TO EMPLOYÉ.

Damages for injuries to employés of a receiver of a railroad are a part of the operating expenses and should be paid as such from the earnings of the property.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 288; Dec. Dig. § 155.*]

3. INTEREST (§ 22*)—RIGHT TO INTEREST.

Under Civ. Code S. C. 1902, § 1660, all money judgments of the courts of that state are entitled to draw interest at 7 per cent.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 43-53; Dec. Dig. § 22.*]

In Equity. Suit by the Meyer Rubber Company against the Georgetown & Western Railroad Company. In the matter of the intervention of Leila A. Jones, as administratrix of the estate of James A. Jones, deceased. Claim of intervener against receiver allowed.

W. B. Gruher and Walter Hazard, for petitioner.

Le Grand G. Walker, Henry E. Davis, and Willcox & Willcox, for receiver.

BRAWLEY, District Judge. This is a petition of Leila A. Jones, as administratrix, setting up a judgment against the receiver, and praying an order directing payment thereof, which petition, on motion of the receiver, was referred to the standing master, D. B. Gilliland, with instructions to take the testimony on the issues raised and report the same to this court. Freeman S. Farr was appointed by this court in December, 1902, as receiver of the Georgetown & Western Railroad Company, and was authorized and directed to carry on the business of that company. Said receiver died February 28, 1905, and P. A. Wilcox was appointed as successor. Petitioner's intestate was in the employment of the receiver as an engineer, and on December 3, 1904, while so engaged in operating one of the locomotives in hauling a log train, the engine was derailed, and the engineer was killed. Leila A. Jones, the petitioner, having been duly appointed as administratrix of the estate of her husband, commenced on action February 2, 1906, against P. A. Wilcox, as receiver, in the court of common pleas for Georgetown county. The case was tried at the June term of said court in 1906; the jury rendering a verdict in favor of the plaintiff for \$7,500. Motion for new trial was made, and, the same being overruled, an appeal was taken to the Supreme Court of the state of South Carolina, which court subsequently rendered its judgment, dismissing the appeal, and affirming the judgment of the court below. 79 S. C. 69, 60 S. E. 231. The petition for rehearing was filed, which was refused, and the mandate of the Supreme Court was transmitted to the circuit court.

The receiver contends that inasmuch as Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 554 (U. S. Comp. St. 1901, p. 582), which provides that any receiver appointed by any of the courts of the United States may be sued without previous leave of the court, contains a proviso that such suits shall be subject to the general equity jurisdiction of the court in which such receiver was appointed, so far as the same

shall be necessary to the ends of justice, it is within the power of this court to review the judgment of the state court. If this petition sought to deprive the receiver of the possession of the property, or attempted to subject any portion of it to a lien, the enforcement of which would have the effect to impair the value of it as a whole, there can be no doubt that it would be the right and duty of the court, under its general equity jurisdiction, to adjust the equities between all persons having claims against the property, and to provide for a just distribution of the funds, according to the rights of the several parties interested in it; but I am of opinion that the judgment of the state court is conclusive. That court had jurisdiction of the parties and of the cause of action. The plaintiff had the right, under the act of Congress, to sue in that jurisdiction, and the leave of this court was not necessary. It is not a case of an issue out of chancery, where the chancellor directs an issue to be tried by a jury, where he is doubtful of the facts and wishes to inform his conscience. The finding of the jury in such a case is advisory only, and may be disregarded. Prior to the act of 1887, a receiver could not be sued without leave of the court which appointed him; but that act gave the right to sue the receiver in any court having jurisdiction of the subject-matter and of the parties.

I must hold therefore that the judgment of the state court is conclusive as to the existence and amount of the petitioner's claim. The time and manner of its payment must be controlled by the court appointing the receiver. *Central Trust Co. v. St. Louis, A. & T. R. R. Co.* (C. C.) 41 Fed. 551; *Dillingham v. Hawk*, 60 Fed. 494, 9 C. C. A. 101, 23 L. R. A. 517. Damages to employes are a part of the operating expenses and should be paid as such. The report of the standing master and the accounts of the receiver on file in this court satisfy me that he has received sufficient income from the operation of the road to pay this claim.

In behalf of the receiver, it is contended that the petitioner is not entitled to interest upon her judgment, and reliance is had upon a decision of Judge Simonton in *Bound v. S. C. Railway Co. et al.*, 174 Fed. 729. Any opinion of Judge Simonton would be justly entitled to and would have great weight with me, but his decision in that case seems to rest upon his construction of the act of 1815 (Act S. C. Dec. 15 [6 St. at Large, pp. 4. and 5]), and the decision of the Supreme Court of South Carolina construing that act. It seems to me that, under section 1660 of the Civil Code of South Carolina of 1902, all money decrees and judgments of courts are entitled to draw interest at the rate of 7 per cent.

It is therefore ordered, adjudged, and decreed that P. A. Wilcox, as receiver, do pay to Leila A. Jones, as administratrix of the estate of James A. Jones, deceased, the sum of \$7,986.33, with interest thereon at the rate of 7 per cent. per annum from February 5, 1907, to the date of such payment, and the further sum of \$79.50, with interest thereon at the rate of 7 per cent. per annum from April 28, 1908, to date of payment; and that he do also pay the costs and necessary disbursements incurred in this proceeding, to be taxed by the clerk, said payments to be made within 30 days from the date of the filing of this order, of which written notice shall be given by the clerk.

MOTLEY, GREEN & CO. v. DETROIT STEEL & SPRING CO. et al

(Circuit Court, S. D. New York. November 4, 1909.)

1. DISCOVERY (§ 86*)—EXAMINATION OF BOOKS AND PAPERS BEFORE TRIAL.

Where, in a suit for conspiracy to deprive plaintiff of the benefit of a contract for the sale of defendant's product, it was claimed that the codefendant was organized to prevent plaintiff's performance of the contract, that the officers were the same, and that they conspired to make the codefendant sales agent for defendant, giving to it the right previously enjoyed by complainant, and to break complainant's contract, complainant was entitled before trial to examine the minute books of stockholders, directors, and executive committee of the codefendant relating in any way to the purchase of defendant's plant and property, all correspondence between the two companies or officers thereof, relating to all contracts between the companies, or between them, or either of them, and others, relating to a transfer of defendant's business, or to the operation of its plant, to a specified date, all vouchers, checks, and book entries relating to the alleged purchase, and all books and papers showing the total sales of articles of the character specified in the contract sued on from defendant's old plant, but not the names of purchasers.

[Ed. Note.—For other cases, see Discovery, Dec. Dig. § 86.*]

2. DISCOVERY (§ 104*)—EXAMINATION OF BOOKS AND PAPERS BEFORE TRIAL—APPOINTMENT OF MASTER.

To avoid controversy in an inspection of books and papers before trial, a special master may be appointed to see that the order is fully and frankly complied with, and that plaintiff does not inspect anything not legitimately necessary to enable it to prove the cause of action at the trial.

[Ed. Note.—For other cases, see Discovery, Dec. Dig. § 104.*]

Suit by Motley, Green & Co. against the Detroit Steel & Spring Company and others. Application by plaintiff for an inspection of defendant's books and papers before trial. Granted.

See, also, 161 Fed. 389.

Luce & Davis, for plaintiff.

Joline, Larkin & Rathbone, for defendants.

LACOMBE, Circuit Judge. If all the books and papers of the Detroit Company are destroyed, the motion, so far as it is concerned, should be denied. But the affidavit of destruction should be more specific than the one now submitted. If such is not submitted on settlement of the order, the same relief will be given against both companies.

Plaintiff should be given inspection, etc., in advance of the trial, of the following books and papers of the Railway Steel Spring Company: So much of the minute books of stockholders, directors, and executive committee (if any) as relate in any way to the alleged purchase of the plant and property of the Detroit Company; all correspondence between the two companies, or any officers thereof, relating thereto; all contracts between said two companies alone, or between said two companies, or either of them, and others, relating to said transfer or purchase, or to the operation of the plant of the Detroit Company subsequent thereto down to November 18, 1902; all vouch-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ers and checks and all book entries relating to said alleged purchase. Also, covering the period from February 27, 1902, to November 18, 1902, all books and papers which will show the total sales of articles of the character specified in the contract sued on from the old plant of the Detroit Company, but not the names of the purchasers.

To avoid controversy during such inspection, etc., a special master will be appointed, who will see to it that the provisions of this order are fully and frankly complied with, and also that plaintiff does not get sight of anything not legitimately necessary to enable it to prove its case on the trial.

In re NAJOUR.

(Circuit Court, N. D. Georgia. December 1, 1902.)

ALIENS (§ 61*)—NATURALIZATION—"FREE WHITE PERSON."

A Syrian from Mt. Lebanon, near Beirut, is a free white person, within Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), providing for the naturalization of free white persons of other countries as citizens of the United States; such term being construed to refer to race rather than to color, and to include all members of the Caucasian race.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119-122; Dec. Dig. § 61.*]

Application for the naturalization of Costa George Najour. Granted.

Willis M. Everett, for applicant.

E. A. Angier, Asst. U. S. Dist. Atty.

NEWMAN, District Judge. In admitting to naturalization the petitioner, Costa George Najour, I wish to say this: Although the term "free white person" is used in the statutes (Rev. St. § 2169 [U. S. Comp. St. 1901, p. 1333]), this expression, I think, refers to race, rather than to color, and fair or dark complexion should not be allowed to control, provided the person seeking naturalization comes within the classification of the white or Caucasian race, and I consider the Syrians as belonging to what we recognize, and what the world recognizes, as the white race. The applicant comes from Mt. Lebanon, near Beirut. He is not particularly dark, and has none of the characteristics or appearance of the Mongolian race, but, so far as I can see and judge, has the appearance and characteristics of the Caucasian race.

Quite a recent work, which I have before me now, "The World's People," by Dr. A. H. Keane, classifies, without question or qualification in any way, Syrians as a part of the Caucasian or white race, and this they are, so far as my knowledge and information goes. Dr. Keane divides the world's people into four classes, the "Negro or black, in the Sudan, South Africa, and Oceania (Australasia); Mongol or yellow, in Central, North, and East Asia; Amerinds (red or brown), in the New World; and Caucasians (white and also dark), in North Africa, Europe, Irania, India, Western Asia, and Polynesia." Discussing the various nationalities and subdivisions of these four general di-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

visions, he unhesitatingly places the Syrians in the Caucasian or white division.

The Assistant United States Attorney, representing the government, objecting to the naturalization of Najour, seems to attach some importance to the fact that the applicant was born within the dominions of Turkey, and was heretofore a subject of the Sultan of Turkey. I do not think this should cut any figure in the matter. If it did, the extension of the Turkish Empire over people unquestionably of the white race would deprive them of the privilege of naturalization.

In my opinion the applicant belongs to the white race within the meaning of the statute, and the other requisites existing after careful examination, he is clearly entitled to naturalization.

HOLBROOK MFG. CO. et al. v. UNITED STATES.

(Circuit Court, S. D. New York. November 13, 1909.)

Nos. 5,417-5,422.

CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—OLIVE OIL.

Certain olive oil found to be edible, and *held*, therefore, to be excluded from Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685), relating to olive oil "fit only" for manufacturing or mechanical purposes.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*]

On Applications for Review of Decisions by the Board of United States General Appraisers.

These cases are also entitled in the names of Swan & Finch Company, Oil Seeds Company, A. Klipstein & Co., Welch, Holme & Clark Company, and Arnold, Hoffman & Co. The decision below (G. A. 6,833; T. D. 29,388) affirmed the assessment of duty by the collector of customs at the port of New York.

Brown & Gerry (James L. Gerry, of counsel), for importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Charles Duane Baker, Sp. Atty., of counsel), for the United States.

PLATT, District Judge. The question of fact in this case is simply and solely whether or not the olive oils covered by the invoices herein are fit or suitable for manufacturing or mechanical purposes and for no other (paragraph 626 of Free List, Act July 24, 1897, c. 11, § 2, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685]), as contended by the importers. The Board, upon conflicting testimony, has found that they were all edible oils (paragraph 40, same act). I do not think that the testimony so plainly points in the opposite direction that I am at liberty to decide the question of fact the other way, even if I felt like doing so; and after reading the testimony of Dr. Sharples and Dr. Fuller, witnesses for the importers, I am unwilling to say that I should do so if I could.

Decision affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ASHBY v. CITY OF JUNEAU.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1910.)

No. 1,589.

EMINENT DOMAIN (§ 9*)—CONDEMNATION OF LAND—PURPOSE—STREETS—STATUTES—CONSTRUCTION.

Carter's Ann. Civ. Code Alaska, c. 22, § 204, subd. 3, provides for the exercise of the right of eminent domain for raising the banks of streams, removing obstructions therefrom, widening, deepening, or straightening their channels, and for roads, streets, and alleys, and all other public uses for the benefit of any precinct, city, town, or other municipal division, whether incorporated or unincorporated, or the inhabitants thereof, which may be authorized by Congress or any other legislative authority of the district; and Act Cong. April 28, 1904, c. 1778, § 4, 33 Stat. 531, confers the right of eminent domain on municipalities to provide for the location, construction, and maintenance of necessary streets, alleys, crossings, sidewalks, sewers, and wharves. *Held*, that the words "roads, streets, and alleys" were used independently as within the public uses specified which were made the subjects of condemnation without further legislation of Congress; the words "which may be authorized by Congress or other legislative authority of the district" being construed to qualify and limit only the words "and all other public uses for the benefit," etc., and not to relate to "roads, streets, and alleys," or to the public uses enumerated, so that a city had power to condemn possessory rights in tide lands for the widening of a street.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 9.*]

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska.

Condemnation proceedings by the City of Juneau against Oscar Ashby. Judgment for plaintiff, and defendant appeals. Affirmed.

Malony & Cobb, for appellant.

L. P. Shackelford and Alfred Sutro, for appellee.

E. M. Barnes, amicus curiæ.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. The city of Juneau, appellee, brought this action against Oscar Ashby, appellant, to condemn a property right in and to certain tide lands possessed and occupied by Ashby. The city wished to widen a public street, and to do so it became necessary to have a right of way over a portion of certain tide lands held, claimed, and occupied by Ashby, so far as such lands abutted upon and extended into the proposed street. Prior to instituting proceedings in condemnation the city council passed an ordinance providing for the establishing, opening, and widening of the street, and set forth therein the necessity of opening the same to accommodate traffic.

Ashby demurred to the complaint upon the grounds, among others, that the city council had no authority to enact the ordinance referred to, that there was no power in the city to condemn tide lands for street purposes, that it did not appear that any necessity existed for widening the street, and that the proposed use was not authorized by law. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 174 F.—47

demurrer was overruled. Ashby answered, and, after denying the passage of the ordinance referred to, admitted possession and ownership of the premises described in the complaint, but denied that the same, or any part thereof, projected into the street as laid out or established, denied the necessity for opening the street to a width fixed by the city ordinance, and denied necessity for condemnation. He then set forth that the street was laid out and established in 1893, under the laws governing the entry of town sites in Alaska, and that, as laid out, it did not include any portion of his (Ashby's) premises, that the street was of ample width to accommodate the public, and that it was unnecessary to take part of his premises.

These affirmative defenses were denied by replication. The court heard evidence, and made its findings and conclusions in favor of the city. Thereafter a judgment or order of condemnation was made. Ashby is now before this court, asking a reversal of the order of the lower tribunal upon the ground (1) that the city of Juneau had no power to condemn his property for street purposes, and (2) that the evidence shows that there was no necessity for the taking.

In Alaska the right of eminent domain may be exercised in behalf of a public use as defined in section 204, c. 22, "Eminent Domain," Carter's Ann. Civ. Code Alaska, subdivision 3 of which reads as follows:

"(3) Public buildings and grounds for the use of any precinct, city, town, village, school district, or other municipal division, whether incorporated or unincorporated; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of any precinct, city, town, or other municipal division, whether incorporated or unincorporated; raising the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any precinct, city, town, or other municipal division, whether incorporated or unincorporated or the inhabitants thereof, which may be authorized by Congress or other legislative authority of the district."

We think that the words "roads, streets and alleys" are used independently as within the public uses defined by the statute, and relate to properties clearly made the subjects of condemnation without further legislation of Congress. The words "which may be authorized by Congress or other legislative authority of the district" qualify and limit the words "and all other public uses for the benefit," etc., but do not relate to roads, streets, and alleys, or the public uses just before specified and enumerated.

We are also of the opinion that the right of the municipality to proceed in eminent domain is conferred, when we consider the statute just quoted in connection with the express grant of power to municipalities to provide for the location, construction, and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers, and wharves, given in section 4 of the act of Congress amending and codifying the laws relating to municipal corporations in Alaska. Act Cong. April 28, 1904, c. 1778, 33 Stat. 531. The power to locate and construct a street can only be exercised by a municipality, and can only be made effective by invoking the power of eminent domain as given by the statutes hereinbefore cited. *City of Helena v. Harvey*, 6 Mont. 114, 9 Pac. 903.

Examination of the evidence discloses that the court was fully justified in finding that a necessity existed for the taking of the property sought to be acquired.

In a brief filed by counsel, as *amicus curiæ*, it is urged that no cause of action is stated in the complaint, because the city is seeking to condemn the shores of a channel, a navigable arm of the Pacific Ocean, and below the line of ordinary high tide. This point has no force, though, for the complaint alleges that the property sought to be taken is claimed and occupied by Ashby under a possessory right, which, under subdivision 3, p. 395, Carter's Codes of Alaska, is one of the estates and rights in lands subject to be taken. It is this possessory right, whatsoever value it may have, that the city may condemn.

These views lead to the conclusion that the order of condemnation must be affirmed. So ordered.

CITY OF OWENSBORO v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1909.)

No. 1,942.

1. COURTS (§ 407*)—FEDERAL COURTS—CIRCUIT COURTS OF APPEAL—PROCEDURE ON APPEAL FROM ORDER GRANTING INJUNCTION.

On an appeal to the Circuit Court of Appeals from an interlocutory order granting a preliminary injunction, the court will not ordinarily go into the merits of the case further than necessary to determine whether the court below had jurisdiction, and, if so, whether it exceeded a reasonable discretion in making the order, although if the record plainly exhibits the whole case, and the court is able without injustice to finally determine the entire merits of the case, it may do so.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 407.*]

2. COURTS (§ 282*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

Under the federal Constitution, a municipal corporation, although having power to regulate the rates to be charged by a telephone company, may not reduce such rates below a rate which will pay operating expenses, maintain the plant, and pay a fair return on the capital actually invested, and a bill to restrain the enforcement of a rate alleged to be confiscatory presents a federal question and is within the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purch. Co. v. Boston & M. C. C. & S. Min. Co.*, 35 C. C. A. 7.]

3. MUNICIPAL CORPORATIONS (§§ 680, 681*)—CONSTITUTIONAL LAW (§ 134*)—REGULATION OF STREETS—POWER TO GRANT RIGHTS TO TELEPHONE COMPANY—"REGULATE"—"CONTROL."

Under the law of Kentucky (Acts 1881-82, p. 817, c. 461), which holds that the use of a street by a telephone company is for a public and not a private purpose, general power expressly given to a city by a special charter to "regulate" the streets, alleys, etc., imports power to control their use, the word "regulate" being a word of wider import than "con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trol," and authorizes the city to grant the right to a telephone company to erect and maintain its poles in the streets, and such a grant in the nature of a contract, made before the adoption of the state Constitution of 1891, under which the company proceeded to build and operate its lines and exchange at a large expense, is not affected by such Constitution under the proviso of section 163.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1463; Dec. Dig. §§ 680, 681; * *Constitutional Law*, Cent. Dig. § 344; Dec. Dig. § 134.*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6041-6047; vol. 8, p. 7782; vol. 2, pp. 1549-1552; vol. 8, p. 7617.

Rights of telegraph and telephone companies to use of streets, see note to *Southern Bell Tel. & Tel. Co. v. City of Richmond*, 44 C. C. A. 155.]

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Suit in equity by the Cumberland Telephone & Telegraph Company against the City of Owensboro. Defendant appeals from an order granting a preliminary injunction. Affirmed.

The following is the opinion of Evans, District Judge:

The complainant was incorporated in 1883 under the laws of Kentucky, and by its charter was authorized to carry on a telephone business. It has established a system which extends over several states, including Kentucky. In the latter it has its principal place of business, and, besides those in Louisville and other places, it has an exchange in Owensboro. Radiating therefrom it has lines in many directions which reach nearby towns, as well as those in other states, and by which each of its patrons in Owensboro and others there who desire to use its lines can reach any one of its 160,000 subscribers. On December 4, 1889, the common council of Owensboro, the legislative body of the city, enacted an ordinance as follows:

"The following ordinance, after being twice read, was enacted by the following vote, to wit: Ayes, Mes. Borer, Brotherton, Vargeson, Cullon, Higdon, Decker, noes, none, viz.:

"Be it ordained by the mayor and common council of Owensboro, Ky.:

"That the Cumberland Telephone Company, its successors and assigns, is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city any number of telephone poles of proper size, straight and shaved smooth, set plumb and set erect, and any number of wires thereon with the right to connect such wires with the building when telephone stations are established, provided that such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city.

"Sec. 2. That the said Cumberland Telephone Company shall erect only one line of poles on a street, except for the length of one block upon the street upon which the exchange building may be located, and where the wires of said company enter such exchange building, the said company shall have the right to erect and maintain its poles on both sides of such street and the lowest wire of said telephone company shall not be less than twenty-five feet from the ground, except where such wires enter the exchange building or telephone stations.

"Nothing in this ordinance contained shall be construed as an exclusive right to said company to erect and maintain said poles upon the streets and alleys of said city, and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company. Such company shall enjoy such rights in common with all other persons or companies to whom said city may see proper to extend the same right.

"Sec. 3. The said telephone company shall repair all streets and alleys it may enter upon and use for the purpose herein provided, which by the acts of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said company or persons in its employ shall have become injured or damaged or been made unsafe. All proper precautions and safeguards shall be used to prevent such use from becoming either injurious or annoying to the inhabitants of said city, and should any damage or injury result to any person or property by reason of the erection and maintenance of such poles, or the failure to keep the streets and alleys in repair as herein required, and said city shall be held liable by reason thereof, such company shall pay all damages and costs resulting therefrom to the parties injured, or to the city, if paid by her.

"Sec. 4. The rights and privileges herein granted to said telephone company are upon the terms and conditions following, viz.: That said company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police headquarters and one for the mayor's office, making at this time only two such telephones to be furnished by said company for the use of the city, shall be kept in good order for constant use by said company. Said company shall also allow the city the exclusive use of two feet of one arm on each pole for its fire alarm telegraph. The fire alarm telegraph poles of the city may be used by said company for its wires, provided such wires be kept two feet from the said fire alarm telegraph wires, and such poles used by said telephone company shall be replaced by it when needed.

"Sec. 5. All poles of said telephone company shall be set close to the inner side of the sidewalk curbing.

"Sec. 6. This ordinance may be altered or amended as the necessities of the city may demand.

"This ordinance shall be in force from and after its passage."

The complainant promptly constructed its exchange and put up its wires in the city at great expense, and has for nearly 20 years maintained and operated its business in Owensboro. The city placed its fire alarm wires on complainant's poles, and the complainant installed telephones in the various city offices, as provided for in the ordinance, and the situation has remained thus for many years. In August, 1908, the common council of Owensboro, with the approval of the mayor, enacted another ordinance in the following language:

"An ordinance regulating the charges for telephone service in the city of Owensboro:

"Whereas, there has been irregularities in charges made by corporations or companies furnishing telephone service in the city of Owensboro, by which persons are often charged higher prices than others for the same service, and in the same locality; and, whereas, such prices are often exorbitant or unreasonable: Now, therefore, in order to regulate the same by establishing a uniform system of reasonable charge for said service, be it ordained by the common council of the city of Owensboro:

"Section 1. That all companies, corporations, firms, or individuals, who are now operating, conducting and maintaining a telephone system in the city of Owensboro, and all companies, corporations, firms or individuals who shall hereafter maintain, operate or conduct a telephone system or service in the city of Owensboro, shall regulate the prices or charge for such service as hereinafter provided.

"Sec. 2. For each telephone in a business house or office, the charge or price shall not exceed two dollars and fifty cents (\$2.50) per month, or at the rate of thirty (\$30.00) dollars per year; for each telephone in a residence, the charge or price therefor shall not exceed one dollar and fifty cents (\$1.50) per month, or at the rate of eighteen dollars (\$18.00) per year; for extension desk telephone, the price or charge therefor shall not exceed one dollar (\$1.00) per month, or at the rate of twelve dollars (\$12.00) per year, in addition to the regular prices herein before specified.

"Sec. 3. It shall be unlawful for any corporation, company, firm or individual, furnishing telephone service within the city of Owensboro, to charge therefor an amount exceeding that fixed in this ordinance, and any violation hereof shall be punished by a fine of not less than ten dollars (\$10.00), nor more than one hundred dollars (\$100.00); and each charge in excess of the amount so fixed shall constitute a separate offense.

"Sec. 4. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

"Sec. 5. This ordinance shall take effect from and after its passage."

The operation of this ordinance was suspended from time to time until January 1, 1909, when it became effective.

By its bill the complainant insists that the rates thus fixed and provided for by the city are unjust, and that their enforcement would confiscate its property in Owensboro for the use of the people of that city and would require the complainant to operate its lines and use its property in Owensboro for the benefit of the local public and not to any great extent for the benefit or profit of complainant or its stockholders, who expended the money necessary to erect, install, and operate telephone facilities there, all in violation of complainant's rights under the Constitution of the United States.

The complainant, upon the showing made by the bill, asked, and the court granted, a temporary restraining order forbidding the carrying into effect of the ordinance pending the hearing and determination of complainant's motion then made for an injunction pendente lite. The questions arising upon this motion were ably argued, as was, at the same time, the questions arising upon the demurrer of the defendant to the bill of complaint. The demurrer was based upon two grounds: First, that the bill was multifarious; and, second, that there was no equity in the bill. Some days ago the court sustained the demurrer upon the ground that the bill was multifarious, and gave the complainant leave to amend it, if so desiring, by electing which of the several causes of action covered by the bill complainant would prosecute in this suit, and by an amendment it elected to proceed upon its cause of action arising upon the ordinance we have copied, and thereupon so much of the bill as sought relief against another ordinance referred to therein, relating to the removal of complainant's poles from the streets of Owensboro, was stricken out. The ground of demurrer to the bill as it now stands is want of equity, and without discussing the matter in detail the court contents itself with saying that, if the averments of the bill are true, there is, in the opinion of the court, equity therein, and the demurrer will be overruled.

Whether the injunction pendente lite should be granted will depend upon whether the rates of charges established by the ordinance are shown in this hearing to be "plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just to the owner and the public." We have quoted the language of Mr. Justice Peckham in the opinion of the Supreme Court in *Willcox v. Consolidated Gas Co.* (delivered January 4, 1909) 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, as it authoritatively and clearly states the rule to be applied in this case.

As one factor in the problem, we ascertain and determine that the complainant is entitled to earn for its stockholders as much as 6 per cent. per annum net upon the fair value of its plant or upon the money actually invested therein at Owensboro, after taking into account the operating expenses and the various other items held in the case referred to to be appropriate in making the calculation.

At the hearing the sworn bill of complaint, read as an affidavit, was all the testimony offered by the complainant, and the defendant offered no testimony in contradiction of its statements. This omission is significant of defendant's inability to make a contrary showing, as it had ample time for preparation. Among the statements of the bill were the following:

"That on July 1, 1908, and likewise at the present time, your orator has expended largely in excess of \$100,000.00 in the construction of said exchange, and your orator charges that it could not be reproduced for a less amount at the present time, and that it has been built economically, prudently, and skillfully.

"Your orator charges that its operations in the city of Owensboro have almost from the beginning been disastrous, so that it has not in the aggregate earned as much as 1 per cent. upon the actual cost of its property in said city, nor has it during any one year since it has been operating said plant earned as much as 5 per cent. net upon the actual cost or value of its said plant.

"During the past year, to wit, 1908, it received the following revenue:

Exchange service.....	\$25,990 50
Proportion of tolls earned by exchange.....	1,403 26
Messenger	235 20
Miscellaneous	22 85
List ads.....	273 75

\$27,925 56

—and during the same year it paid out in expenses the following:

General:	Salaries and wages.....	\$ 815 39
	Rent, light and heat.....	40 14
	Traveling	146 84
	Postage, pting. and sta.....	6 80
	Legal	1,050 70
	Uncollectible	168 92
	Incidental	213 44

\$ 3,704 06

Operating:	Salaries and wagons.....	\$ 8,238 68
	Rent, light and heat.....	971 65
	Postage, pting. and sta.....	104 80
	Directory	312 90
	Advertising and canvassing.....	245 90
	Messenger expense.....	202 85
	Incidental	311 84

\$10,388 67

Maintenance:	Salaries and wages.....	\$ 4,995 33
	Rent, Light and heat.....	390 83
	Material	943 88
	Traveling	1,335 54
	Incidental	790 66
	Damage and compensation.....	60 66

\$ 8,516 90

	Instrument rental.....	\$ 1,225 83
	Insurance	261 10
	Taxes	1,617 16

Total \$24,487 89

"Your orator further states that the foregoing is the exact amount of money received from the operation of said exchange and the exact amount of money paid out by it in expenses in conducting said exchange; and nothing whatever is allowed therein for depreciation of its property, which your orator charges should be 7½ per cent. upon the actual cost of the property, less whatever amount was used during the year in reconstructing any part of the plant. From which it appears that your orator has a balance of \$3,437.67 of revenue above the actual amount paid out by it, and if a fair amount for depreciation be added to the expenses, it will more than consume this balance of revenue. So that your orator charges, and it is a fact, that your orator, on its present schedule of rates, is unable to earn any return whatever upon the actual cost of its plant in the city of Owensboro, Ky."

We find that the actual cost of the complainant's plant in Owensboro exceeded \$100,000, but, as the bill does not indicate the amount of such excess, we find the present reasonable value of the plant to be at least \$100,000. Upon this sum 6 per cent., of course, would be \$6,000, and we think plaintiff would be entitled, if it can do so, to earn that much per annum for its stockholders over and above expenses of operation, or, at all events, it should not be prevented from doing so by the imposition by the city of rates which would make it impossible. Instead of approximately 6 per cent., its earnings have

always been much less, and during the entire year 1908 its earnings at Owensboro were only \$3,437.67, or a trifle over 3.4 per cent. (instead of 6 per cent.) on \$100,000, and this without taking into account anything for the constantly occurring depreciation. This result was achieved when the local rates charged varied from \$3.75 to \$2.50 per month for business telephones, and from \$2 to \$1.50 per month for residence telephones; in each respect the different rate being dependent upon the character of equipment and service desired by the patrons. Upon their face these rates appear low, but, as we have seen, the ordinance provided that the local telephone rate for a business house or office should not exceed \$2.50 per month, and that the rate for a telephone in a residence should not exceed \$1.50 per month, and it is manifest that those rates would be lower by about one-third than those of complainant, and equally clear upon all reasonable hypotheses that the complainant's net earnings would be lessened in about the same ratio, which would reduce complainant's net annual earnings to about $2\frac{1}{2}$ per cent. upon \$100,000, and this, manifestly, is not "a fair return upon the reasonable value of the property at the time it is being used by the public," to quote further from the opinion of the Supreme Court. This does not seem to be a problematical or speculative result, but one which, under the operation of normal conditions, would be inevitable. Under such a state of case we do not suppose that it would be just or equitable to require that the matter should be first tested by putting the lower rates into operation for the purpose of ascertaining a result by actual trial. The only result of such a course would obviously be to inflict an irreparable injury upon the complainant, for certainly, when the experiment only made clearer what was already sufficiently clear, the loss would fall altogether upon the complainant, and could not be recouped from its patrons, as it could not hope to collect a higher rate for the time consumed in the trial of the ordinance rates. If the net earnings of the complainant under its own rates had been shown to be approximately but nevertheless below 6 per cent. per annum, it would have been our duty to refuse an injunction until the ordinance rates had been tried for a reasonable period; but the case as presented is too plain to make that course necessary or even proper. Upon the whole, we think it entirely clear from complainant's showing that the rates fixed by the legislative body of Owensboro are confiscatory, and do not permit a "fair return" upon complainant's investment, nor upon the reasonable value of its property now in use for this public utility.

It was argued that the complainant had not in any way acquired a franchise from the city, as required by section 163 of the Constitution of Kentucky. However important or difficult the questions growing out of that provision might be, we do not see how they arise or are presented upon the bill as amended, which does not refer to it. As we have seen, the complainant was organized under the laws of Kentucky, and authorized to do a telephone business in this state. The common council of Owensboro, having control of the streets, passed, in 1889, the ordinance we have copied, giving the telephone company the rights therein set forth under which to construct and install at its own expense a most important public utility. These rights, after large expenditures upon the faith of the ordinance, have been exercised, and the city has used the wires for its fire alarm, and has been supplied with free telephones in its public offices for nearly 20 years, and we will presume, for the purpose of this motion, that there was granted therefor a sufficient license and franchise, as nothing is shown by the record to the contrary, and in the determination of the pending motion we will lay entirely to one side all questions which may be supposed to arise under section 163 of the state Constitution. Especially must this result follow at this hearing because we cannot find that any question upon section 163 of the state Constitution and its requirements is raised by any averment of the bill as amended. It seems to the court that in more than one respect the demurrer introduces a statement of fact not found in the bill of complaint. It is therefore, to that extent, a speaking demurrer, and is condemned alike by text-writers like Daniell and Story and by the courts. *Stewart v. Masterson*, 131 U. S. 158, 9 Sup. Ct. 682, 33 L. Ed. 114. Such matters can be properly presented only by plea or answer.

We may sum the matter up by adding that, on the day the case of *Willcox v. Consolidated Gas Co.* was decided, the Supreme Court also decided the case

of Mayor, etc., of Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371. The opinions in the two cases clearly hold: First, that where there is any doubt as to whether the rates fixed by legislation are confiscatory an injunction should not be granted; second, that unless the previous history of the company's operations satisfactorily shows that the new rates will inevitably be confiscatory, they ought to be put into operation and given a fair trial before condemning them; though, third, this is not necessary nor proper where the facts are such as to show clearly that the new rates must inevitably be confiscatory as giving no chance for obtaining a fair return upon the value of the investment at the time the new rates shall be put into effect.

Whatever may be shown when the issues in this case shall have been made up and the facts fully developed from the standpoint of both sides to the controversy we cannot, of course, say; but the uncontradicted facts here are: That in nearly 20 years' experience the company's rates have yielded small but varying profits; that last year (which, we think, may fairly be regarded as typical) they yielded only 3.4 per cent. net; and that the reduction, which would obviously leave the rates at only two-thirds of what they previously were, could not produce a net revenue of anything approximating 6 per cent. per annum.

As the present motion is for a temporary injunction only to operate pending a full investigation, we think, *prima facie*, that the case is sufficiently made out to entitle the complainant to that much relief.

Another observation may probably not be inappropriate. Contentions over telephone rates come up after the expenditure of large sums of money by those who install the system while inducements for such expenditures are held out. That system increases its usefulness to the public in proportion to the increase in the number of subscribers whom it serves. The greater the number of the latter, the greater the chance that contentions will come up—there being then a greater variety of people to make complaints—and the more accustomed they become to the use of this modern but necessary public utility, the more pressing appears to be the demand for cheapness, with some tendency also to forget that those who had put up the money and pioneered the venture are entitled at least to a fair return upon the sums invested. The courts should not overlook the latter aspect of the case, while always aiding municipalities in their efforts to prevent extortionate or unreasonable rates or other abuses by telephone companies. Furthermore, if the complainant be refused an injunction *pendente lite*, it cannot take an appeal from that refusal, while the defendant may at once appeal if the motion for the injunction is sustained. All these matters have been taken into consideration as possibly entitled to exert some influence upon the court in the exercise of any discretion it may have in respect to granting or refusing an injunction at the outset of the litigation.

Upon the ground that the action of the city of Owensboro would obviously be confiscatory in its effects, the motion for an injunction *pendente lite* is sustained.

R. W. Slack, City Atty., and George W. Jolly, for appellant.

Wm. L. Granbery and Fairleigh, Straus & Fairleigh, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from an interlocutory order enjoining the city of Owensboro from putting in force, pending a final hearing, an ordinance of the common council of that city passed in August, 1908, regulating the charges for telephone service in that city.

The bill is filed by the Cumberland Telephone & Telegraph Company, a corporation created by the state of Kentucky for the purpose of engaging in the construction, maintenance, and operation of telephone and telegraph lines, which company has engaged in that busi-

ness for more than 25 years, and is now maintaining and operating an extensive telephone system covering the state of Kentucky and many other states. It is averred that at this time it owns and operates more than 500 telephone exchanges, one of which is in the city of Owensboro, and that by the aid of long distance toll lines these exchanges are connected one with another, scattered over seven states. Its capital invested in the business is said to exceed \$20,000,000, and that its Owensboro exchange absorbs a capital of more than \$100,000. The Owensboro wires are carried upon poles placed in the streets and alleys of the city which center in the Owensboro exchange in the well-known way in which such business is carried on. The long distance wires connecting its more than 500 exchanges are carried upon the poles which support and carry the lines running from the local Owensboro exchange to its Owensboro subscribers.

Its Owensboro plant was constructed under an ordinance passed by the common council of that city on December 4, 1889, and has ever since that time been maintained and operated under the terms of that legislation. It is unnecessary to set out its provisions. It is enough to say that the privilege of erecting its poles upon the streets and alleys and maintaining thereon its wires is specifically granted, subject to particular regulations therein set out in respect to location, number, and character of the poles, and repair of the streets injured or made unsafe by construction work. The rights thus granted were upon the following conditions and terms, namely:

"That said company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police headquarters and one for the mayor's office, making at this time only two such telephones to be furnished by said company for the use of the city, shall be kept in good order for constant use by said company.

"Said company shall also allow the city exclusive use of two feet of one arm on each pole for its fire alarm telegraph. The fire alarm telegraph poles of the city may be used by said company for its wires, provided such wires be kept two feet from the said fire alarm telegraph wires, and such poles used by said telephone company shall be replaced by it when needed."

It was further provided that the rights thus granted should not be exclusive, but enjoyed in common with others to whom the city might grant like rights.

The bill averred that the city has continuously enjoyed the rights and privileges for which it contracted, and has erected and maintained its fire alarm wires upon the poles of the company, and has received the benefit of free telephone service in its various city offices as provided by the ordinance.

The question in the case turns, not upon the power of the city, through ordinance duly enacted, to regulate the schedule of rates for service within the city, but upon the reasonableness of the rates prescribed.

The bill avers that the rates in force when this regulating ordinance was enacted ranged from \$2.50 per month to \$3.75 for a business telephone, depending upon the character of equipment and service which the customer required, and that its residence rates ranged from \$1.50 to \$2 per month. The regulating ordinance limits the rate for a busi-

ness telephone to a maximum of \$2.50 per month, and for a residence telephone to \$1.50 per month. It is then provided that a rate in excess shall constitute a misdemeanor, punishable by fine of not less than \$10 nor more than \$100, and that "each charge in excess of the amount so fixed shall constitute a separate offense."

The bill avers that the Owensboro Telephone Exchange has involved an expenditure of more than \$100,000, and that it was economically constructed and has been likewise economically operated; but that it has not, taking the entire life of the business, earned more than 1 per cent. per annum, net, upon the capital invested, and that even in the later and larger period of its business it has never in any one year earned as much as 5 per cent. To support this the bill sets out the income and expenditures for 1908, showing a net revenue over expenses of \$3,437.67.

It is then charged that the rates fixed by the rate ordinance are "unreasonable, unjust, unfair, and confiscatory"; that if enforced they will deprive orator of its property without due process of law and will take its property for public use without just compensation in violation of the Constitution of the United States.

It is further charged that the ordinance of 1889, under which it entered upon and constructed its poles and wires upon and along the streets of the city, upon the terms, conditions, and considerations named therein, constitutes a contract; and that the ordinance of 1908, in so far as it prescribes unreasonable and confiscatory rates for service, impairs the obligation of the contract.

The only questions which arise under the special or limited appeal from an interlocutory decree granting a preliminary injunction are those which are necessarily involved by the allowance of the injunction pendente lite. If the court below had jurisdiction and did not unreasonably exercise its discretion in the granting of an injunction to preserve the status until a final hearing, this court will not ordinarily go into the merits of the case any farther than necessary to determine this question. *Duplex Printing Press Co. v. Campbell Printing Press Co.*, 69 Fed. 250, 16 C. C. A. 220; *Loew Filter Company v. German American Filter Co.*, 107 Fed. 949, 47 C. C. A. 94. Nevertheless, if the transcript plainly exhibits the whole case, and the court is able, without injustice, to finally determine the entire merits of the case, it may do so. *Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co.*, 72 Fed. 67, 19 C. C. A. 13; *Smith v. Vulcan Iron Works*, 165 U. S. 518, 523, 17 Sup. Ct. 407, 41 L. Ed. 810.

In the present case the propriety of any injunction depends necessarily upon the jurisdiction of the court in the first instance, and, in the second, upon the merits of the case as the merits appear upon the face of the bill.

The jurisdiction of the Circuit Court depended upon the presence of a federal question. That is clear enough. Assuming the power of the municipality to regulate the schedule of rates to be charged for the service of public service corporations, it is plain that the rates of such a company may not be reduced to a point below a rate which will pay operating expenses, maintain the plant, and return a fair profit upon the capital actually invested. See: *San Diego Land Company v.*

National City, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154; Willcox v. Consolidated Gas Company, 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. Ed. 382.

Coming, then, to the question as to whether the learned circuit judge exceeded a reasonable discretion in awarding an injunction pendente lite:

It is first said that the court should not interfere with rate legislation before it goes into effect, except in clear cases, and that the court should in this instance have let the rate go into effect and be tried, or required the charges above the ordinance rates to be paid into court to abide the final result. *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382.

The averments of this bill are quite specific as to the revenue, cost of maintenance and operation, and as to the capital invested in the particular exchange involved. We are not, upon such an appeal as this, satisfied that the court below exceeded its fair duty and power or violated the spirit of the cases cited in allowing an injunction upon the strong averments of this bill, although we should have been better content if it had required the excess collected over the rates prescribed to be paid into court to await a final decree.

But counsel say that the charter of the city of Owensboro, under which its government was conducted when the street rights of the Cumberland Telephone Company were granted, is a public law of which this court must take notice, and that neither under the power granted therein, nor under the general law of the state, did the city of Owensboro have power to permit telephone poles to be placed in or along its streets, nor to allow the stringing of wires upon poles so placed, and that the ordinance of December 4, 1889, is therefore void as in excess of power. From this premise it is urged that, if the telephone company has no valid street easement, it is a trespasser, and cannot therefore object to the rate ordinance, even if the rates are so confiscatory as to prohibit the carrying on of its business. This claim comes with bad grace, in view of the conceded fact that this company has for 20 years conducted its business, supplied the city with free telephone service, and carried the city's fire alarm wires upon its poles with at least the acquiescence of the appellant. The harshness of the claim is all the more evident, and the inconsistency only the more apparent, when such a position is taken in defense of an ordinance which is professedly one to regulate the charges of a company now said to have no right to complain of the unreasonableness of the rates fixed, because it has no rights which need be regarded in making rates. For this position, counsel cite *Rural Home Telephone Co. v. Kentucky & Indiana Tel. Co.*, 128 Ky. 209, 107 S. W. 787, 32 Ky. Law Rep. 1068, and *Frankfort Telephone Company v. City of Frankfort*, 125 Ky. 59, 65, 100 S. W. 310. But both of these cases are based upon sections 163 and 164 of the Kentucky Constitution of 1891. That Constitution provides that no street easement may be granted to public service companies by any municipal corporation save for a limited time and after advertisement to the highest bidder. Those cases were in relation to street rights acquired after that Constitution went into ef-

fect, and in plain violation of the organic law of the state. The rights of the appellee were acquired before that Constitution by an ordinance, contractual in character, passed by the city of Owensboro when governed by a special charter granted in 1882.

Aside from any question as to the violation of the obligation of a contract, if an ex post facto effect should be claimed for sections 163 and 164 of the Constitution of 1891, it is specifically provided by section 163 that its provisions shall have no effect upon franchises theretofore granted when work had been in good faith begun thereunder. See *L. & N. R. Co. v. Bowling Green*, 110 Ky. 788, 63 S. W. 4, 23 Ky. Law Rep. 273, and *City v. Louisville Water Company*, 105 Ky. 754, 49 S. W. 766.

But it is said that neither the general law of the state nor the special charter under which the city was then operating delegated to the city the power to permit the streets of the city to be occupied by the poles and wires of a telephone company.

It may be conceded that neither a telegraph nor a telephone company can lawfully occupy the streets or alleys of a town without direct legislative authority, or by municipal consent in pursuance of powers delegated by the state. *Morristown v. East Tennessee Telephone Company*, 115 Fed. 304, 305, 53 C. C. A. 132.

That both the municipality and the telephone company supposed that the city had the authority under its charter powers to permit the establishment of poles and the stringing of wires along its streets and alleys is clear from the exercise of the power by the mayor and common council and the action which the telephone company took under this ordinance in entering upon and constructing a telephone system at a cost of more than \$100,000.

That power to permit the use of highways and streets for such purposes must reside somewhere is obvious. Primarily, it resides in the Legislature of each state, but, as is well known, is almost universally delegated to the municipality concerned. Reasons of convenience, as well as theories of local rule in strictly local matters, lead us to expect that the local government has the power to regulate the use of its own streets.

Did the local government of Owensboro usurp the legislative functions of the state when it granted a street easement to the Cumberland Telephone & Telegraph Company? We think it did not.

The charter under which Owensboro was governed in 1889 was a special act of the Kentucky Legislature enacted in 1882. See Acts 1881-82, pp. 817-856, c. 461. It provides for a complete system of municipal government and includes no less than 120 sections, many of which are divided into subsections. Among the powers conferred by section 10 is that of "control of the finances and all property, real and personal, belonging to the city," and to enact ordinances for a large number of purposes later enumerated. Among the purposes for which it is given legislative power is "to regulate the streets, alleys and sidewalks, and all improvements and repairs thereof," etc. Unless this provision gave to the city the power to control its own streets by regulating the uses to which they might be put in the public interest, it was without any such power, aside from that which might be regarded as

inherent in a corporation created for the purposes of a municipal government. That such a corporation can exercise only those powers which are either expressly granted or plainly implied from those so granted, or essential to the declared purposes and objects of the corporation, is well settled law. *Detroit, etc., Ry. v. Detroit*, 64 Fed. 628, 639, 12 C. C. A. 365, 26 L. R. A. 667.

But the use of a public street for the construction of poles to carry the wires of such a company is a use within the range of the purposes for which a street may be legitimately used, whether the fee be in the city or its interest be confined to an easement in the land for street purposes. This seems to be the settled rule in Kentucky. *Cumberland Telephone & Telegraph Company v. Avritt et al.*, 120 Ky. 34, 38, 85 S. W. 204. In the case just cited, the Kentucky court held that such a use was for a public and not a private purpose, and that the easement of the public included such a method of use, and imposed therefore no new burden upon the owner of the fee in the street. If, then, such a use is within the general objects and purposes to be served by the power of opening and maintaining public streets, why is the grant of a right to so use the public streets an act beyond the powers of the municipal legislature? What power is delegated by the express power to "regulate" the streets and alleys of the city? Manifestly, something was meant by the power to "regulate." The word "regulate" imports the power to control the use of the streets, and is indeed a word of wider import than "control" or the power to "consent" to an easement of way.

In *Detroit, etc., Ry. v. City of Detroit*, 64 Fed. 628, 636, 12 C. C. A. 365, 26 L. R. A. 667, this court held that if under the law of the state of Michigan a street railway was but an improved mode of street use, and therefore not an additional servitude which might be restrained by abutters, the general powers vested in the city of Detroit to "prescribe, control and regulate" the manner in which the city streets might be used was broad enough to permit the use of its streets for such a purpose by a company having the requisite franchise of a street railway from the state.

In section 575 of *Dillon on Municipal Corporations*, the author, after stating that the usual powers of a general nature delegated to municipal corporations are not sufficient to confer upon them the right to authorize the presence of commercial steam railways upon the streets, says:

"But it is otherwise as respects street railways; and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit or refuse to permit the use of streets within their limits for such purposes."

In *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 469, 13 Sup. Ct. 990, 992 (37 L. Ed. 810), the court, in discussing the power conferred upon St. Louis over its streets, said:

"The word 'regulate' is one of broad import. It is the word used in the federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions

upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street."

So in 28 Cyc. p. 867, note 55, it is said:

"Under the power to 'regulate' the use of streets, municipal authorities may permit their use for railroad tracks, poles, wires, pipes, etc., of a public nature not inconsistent with the public uses to which the streets were dedicated. *State v. St. Louis*, 161 Mo. 371, 61 S. W. 658; *State v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515; *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783; *Pikes Peak Power Co. v. Colorado Springs*, 105 Fed. 1, 44 C. O. A. 333."

See, also, *State v. Jacksonville R. Co.*, 29 Fla. 590, 10 South. 590.

Counsel for the appellants have cited *East Tennessee Telephone Company v. City of Russellville*, 106 Ky. 667, 51 S. W. 308, as supporting their claim that the general powers found in the charter of Owensboro are not sufficient to sustain the ordinance in question. The ordinance, there referred to as antedating the present Constitution of the state, granted an "exclusive" franchise. The court said of that exclusive franchise that:

"At that time the councilmen of the city had no legislative authority, express or implied, which authorized them to grant such a privilege to him."

The ordinance under which the Cumberland Telephone Company exercises its street easement expressly provides that the privilege shall not be exclusive. Furthermore, in the Russellville Case, had the ordinance been valid, Clark, to whom the privilege was granted, had not started work, in good faith, before the adoption of the new Constitution. Hence his easement was not saved by the proviso found in section 163. But aside from all this, it does not follow that because Russellville did not have power to grant a right or easement to a telephone company under its charter that Owensboro had not the power. The opinion does not show whether Russellville had the power to "regulate" its streets as Owensboro had.

The case of *Louisville Railway v. City of Louisville*, 8 Bush (Ky.) 415, is not in point. The only question in the case was whether the city might require a street railway company to remove its rails in order to allow the city to repave the street. The city railway was in the streets under an ordinance authorized by express legislative power. All that was said in reference to the insufficiency of a power to control and regulate, to support consent to occupation of streets by a street railway, was foreign to the case and not authoritative.

Other decisions of the Kentucky court cited have been examined. None of them made prior to the inception of the rights here involved concerned the interpretation of any such municipal power as is implied from the general power to "regulate" the use of streets, and none made since the rights of appellee arose are controlling upon this court in the exercise of its independent judgment in respect to rights which arose before such decisions.

Neither do we find it necessary to determine the duration of the franchise. All of the allegations of the original bill which related to an ordinance subsequent to the rate ordinance which directed the removal of poles and wires from the streets were stricken out. Whether the duration be presumed as for the life of the Cumberland Telephone Company, as seems to be the better rule (see *Turnpike v. Illinois*, 96 U. S. 63, 68, 24 L. Ed. 651, and *Electric Light Company v. Wyandotte*, 124 Mich. 43, 82 N. W. 821), or as in perpetuity, or as a mere revocable license, is for the purpose of the present appeal immaterial. It was not a trespasser when this rate ordinance was passed and may challenge its validity.

There was no error in the granting of the preliminary injunction, and the decree in that respect, is, accordingly, affirmed.

CITIZENS' BANK & TRUST CO. v. THORNTON et al.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1909.)

No. 1,872.

1. BILLS AND NOTES (§ 340*)—REDISCOUNT OF NOTES—LIABILITY ON INDORSEMENT.

A bank accustomed to rediscount paper for a correspondent bank, which in the usual course received from its president for rediscount a negotiable note of third parties payable to such president, and indorsed by him and also by the bank, has a right to rely on such indorsements, unless there were extrinsic circumstances which charged it with notice of some irregularity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 826, 845; Dec. Dig. § 340.*]

2. BANKS AND BANKING (§ 113*)—REPRESENTATION BY OFFICERS—ESTOPPEL TO DENY AUTHORITY OF OFFICER.

A bank which has intrusted the conduct of its affairs to its president, such conduct being within the range of the authority customarily given to such an officer, is bound to one who has parted with his money in good faith in reliance upon the authority so exercised, whatever may be the limitations which the by-laws or resolutions of the board of directors in fact place upon it, of which he has no knowledge.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 273-276; Dec. Dig. § 113.*]

3. BILLS AND NOTES (§ 340*)—REPRESENTATION BY OFFICERS—ESTOPPEL TO DENY AUTHORITY OF OFFICER.

Defendant national bank succeeded a state bank and assumed its obligations. Both banks were correspondents of complainant bank, which from time to time discounted notes for them, and rediscounted customers' notes, the business being conducted for them by the cashier of the state bank who became president of defendant. A short time before the change, at his request, complainant rediscounted a note of third persons payable to him and indorsed by him and the state bank, placing the proceeds to the credit of such bank in the account, which was later transferred to defendant at its request; its president stating that it succeeded to the assets and assumed the liabilities of the state bank. On maturity of the note, complainant sent it to defendant for collection, but defendant forwarded a new note made by the same parties in renewal. This complainant returned for the indorsement of defendant, and it was so

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

indorsed by its president, who stated that the failure to indorse it at first was an oversight, and it was thereupon accepted by complainant. *Held*, that complainant became a bona fide holder for value, and that defendant could not on the facts avoid liability as indorser on the ground of want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 826, 845; Dec. Dig. § 340.*]

4. PLEDGES (§ 18*)—CONSTRUCTION OF CONTRACT.

Pledges are to be construed and enforced according to the intent of the parties as gathered from the instrument of pledge and the subject-matter and course of dealing to which it relates.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 41; Dec. Dig. § 18.*]

5. PLEDGES (§ 19*)—DEBTS OR LIABILITIES SECURED—CONSTRUCTION OF CONTRACT.

Defendant bank was a correspondent of complainant bank, which frequently lent defendant money and rediscounted notes for it. On the occasion of a \$10,000 loan, defendant pledged with it collateral "to secure the payment of this or any other obligation * * * upon which the owner shall be in any way bound primarily or secondarily * * * due or to become due." *Held* that, construing the contract in the light of the relations and dealings between the parties, the pledge extended to a note subsequently received by complainant from defendant in renewal of one which it had previously rediscounted for defendant, and which was indorsed by the latter.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 61; Dec. Dig. § 19.*]

6. BANKS AND BANKING (§ 287*)—NATIONAL BANKS—EFFECT OF INSOLVENCY—LIQUIDATION BY RECEIVERS.

A provision of a promissory note that, if not paid at maturity, the makers and indorsers shall be liable for all costs of collecting or attempting to collect the same, including an attorney's fee, cannot be enforced beyond the allowance of statutory costs against the receiver of an insolvent national bank who took charge of its assets for the purpose of liquidation before the note matured.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 287.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Alabama.

Suit in equity by the Citizens' Bank & Trust Company against T. M. Thornton, receiver of the First National Bank of Attalla, and others. Decree for defendants, and complainant appeals. Reversed.

The appellant, the Citizens' Bank & Trust Company, a banking corporation under the laws of Tennessee, filed its bill in the circuit court against the First National Bank of Attalla, and Thomas M. Thornton, as receiver, appointed by the Comptroller of the Currency to liquidate its affairs. The original bill sought a decree against the bank and the receiver for \$21,000 upon two promissory notes of the First National Bank for borrowed money, and a note for \$5,000, hereafter referred to as the Buckmaster and Williams note, which appellant bank had discounted for defendant bank, and also to subject certain collateral for the debts, attorney's fees, etc.

The defendants' answers admit that the First National Bank of Attalla received the Buckmaster and Williams note for collection some time in April, 1906, but averred that the defendants never collected said note, or received any benefit therefrom, but that L. M. Dyke secured a renewal of the note and sent it to the appellant; that appellant returned it with the request that it be indorsed by the First National Bank of Attalla; that it was so indorsed by said L. M. Dyke, but that the said indorsement was a mere accommoda-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion indorsement, and was made by Dyke without authority; and that the same was ultra vires so far as the bank was concerned, and created no liability. The answer further denied that the First National Bank of Attalla ever discounted said note with appellant, or received any benefit from its indorsement, and averred on information that the note was the individual debt of L. M. Dyke; and that the transaction with reference thereto was entirely for his benefit. The bill was twice amended in particulars not now material, since all the claims were paid, except the Buckmaster and Williams note, and by stipulation entered into in the court below, the controversy is resolved into an issue of the liability of the defendant bank upon the note, and the right to apply in satisfaction thereof certain collateral deposited with the appellant, under a written agreement, the nature and terms of which are hereafter stated.

The appellant did a banking business at Chattanooga, Tenn., and was the correspondent of the Bank of Attalla, a state banking institution at Attalla, Ala., from some time in October, 1904, until October 19, 1905, when that bank ceased to do business, and was succeeded by the First National Bank of Attalla, which took over the business of the Bank of Attalla, and appellant continued as the correspondent of the First National Bank of Attalla until it was closed by order of the Comptroller of the Currency, and Thornton placed in charge as receiver on May 15, 1906.

As the rights of the parties concerning the Buckmaster and Williams note turn upon the dealings between the Bank of Attalla and the First National Bank of Attalla and their transactions with the appellant, as their correspondent, it will conduce to a better understanding of the case to give the correspondence between them, premising that L. M. Dyke was cashier of the Bank of Attalla until it ceased to do business, and afterwards became president of the First National Bank of Attalla upon its organization October 19, 1905, and acted as such until that bank was placed in the hands of a receiver May 15, 1906. The proof also shows that the original Buckmaster and Williams note, in renewal or payment of which the Buckmaster and Williams note in suit was given, was indorsed by the Bank of Attalla, and not by the First National Bank of Attalla, and that the inaccurate statement in that respect in the correspondence was due to confounding the two transactions.

On September 19, 1905, Dyke, as cashier of the Bank of Attalla, wrote appellant as follows:

"Attalla, Ala., Sept. 19, 1905.

"Mr. Herbert Bushnell, Cashier, Citizens' Bank & Trust Co., Chattanooga, Tenn.—Dear Sir: I herewith inclose note of \$5,000.00, due October 20th, 1905, for discount and credit. You may charge our account note of \$5,000.00 due 20th instant, and send to us cancelled. I also inclose note of \$5,000.00 due October 19th, 1905, which we will thank you to discount and place to our credit, as cotton is beginning to move and we will need a little help for the next two or three weeks. We can send you collateral if you prefer it. If it is not asking too much, we would appreciate your sending us the collateral you now hold as security to our notes for collection, subject to the note you hold against us. We hope to be able to increase our balances with your good bank in a short time, and also take up our rediscounts in full. We expect to change this bank in a short time to a national bank, which I think will increase our deposits, as we will have two or three good men interested in the new organization, that we could not secure otherwise. Our deposits (are) now about \$65,000, or about \$20,000 more than this time last year.

"Very truly yours,

L. M. Dyke, Cashier."

On October 3, 1905, Dyke, as cashier of the Bank of Attalla, wrote appellant as follows:

"Attalla, Ala., Oct. 3rd, 1905.

"Mr. H. Bushnell, Cashier, The Citizens' Bank & Trust Co., Chattanooga, Tenn.—Dear Sir: I herewith inclose our note for \$5,000 due on the 15th instant, which we will thank you to discount and place to our credit. We are carrying \$20,000 on cotton and as the market went off during the last few days our customers do not want to sell just as (at) this time. We also have notes maturing the next thirty days which will amount to about \$40,000.00,

and it seems to us we ought to be able to collect at least half of the amount on or before maturity. We may also ask for an extension on part of our paper for something like thirty days, but will be able to take it all up by that time. Thanking you for your kindness, I am,

"Very truly yours,

L. M. Dyke, Cashier."

On October 18, 1905, the day before the First National Bank of Attalla commenced to do business, Dyke, as cashier of the Bank of Attalla, wrote appellant as follows:

"Attalla, Ala., Oct. 18th, 1905.

"Mr. H. Bushnell, Chattanooga, Tenn.—Dear Sir: I herewith inclose note of Buckmaster and Williams, for \$5,000, for discount and credit. You will notice this note is made payable to me and endorsed by me and also by the Bank of Attalla, which seems to me will make it perfectly safe. The new organization will assume any liability that the Bank of Attalla may have outstanding at the time the change takes place. This paper is further secured by mortgage made payable to me and other personal security. Although these parties have no rating in either Bradstreet or Dun's they are responsible for their contracts. They now have a balance with us of \$3,000.00, but will need it in their new job down in La., where they have a contract that I think they will clear at least \$10,000 on in five months. I think we will be able to meet our obligations as they fall due, although we are pretty heavily loaded on cotton just now. We only have one cotton buyer now that we are furnishing money to, and therefore we are not ordering any as heretofore, but we think we will have to ship some out in a few days. I suppose it will be agreeable with you for me to place the same amount of the new bank stock as collateral to my note as you now hold of the Bank of Attalla.

"Very truly yours,

L. M. Dyke, Cashier."

The proof shows that the note inclosed in that letter was received for discount by the Citizens' Bank & Trust Company, and the proceeds amounting to \$4,850 credited to the Bank of Attalla, on October 19, 1905. On October 20, 1905, a note of the Bank of Attalla to the appellant for \$5,000 matured, and by instructions of Dyke appellant charged that note to the Bank of Attalla on that day. The books of appellant show there was a general credit balance upon its books in favor of the Bank of Attalla of \$6,840.31 at that date, in which was included the item of \$4,850, the proceeds of the discount of the Buckmaster and Williams note. On October 19, 1905, Dyke as cashier of the Bank of Attalla wrote appellant as follows:

"Attalla, Ala., Oct. 19, 1905.

"Mr. H. Bushnell, Cashier, Chattanooga, Tenn.—Dear Sir: If we should have checks to come in that would overdraw our account, please protect them and we will appreciate it very much. We have a cotton draft tomorrow for \$4,000.00 or \$5,000.00 which will be forwarded to you on to-morrow's mail. You can charge our note of \$5,000.00 maturing on the 20th instant and return to us cancelled. We are converting or changing the Bank of Attalla to The First National Bank of Attalla, to-day, and you may charge the account accordingly, as what checks we shall give on your bank hereafter will be issued from the national bank.

"Yours truly,

L. M. Dyke, Cashier.

"Signatures for the First National Bank of Attalla for the transaction of the business, will be myself as President and W. R. Lawley, Cashier."

The books of appellant at the close of business October 3, 1905, show there was a credit balance in favor of the Bank of Attalla of \$4,560.92. On November 1, 1906, appellant opened a new account with the First National Bank of Attalla, and the credit balance of \$4,560.92 in favor of the Bank of Attalla was included in the new account, and credited to the First National Bank of Attalla. It was shown by the testimony of Henson, president of appellant, that it was customary to render the Bank of Attalla and its successor, the First National Bank of Attalla, a detailed statement of the credits and debits against the account during the month; such statement showing the credits and debits and opening balance at the beginning of the month and the closing

balance. Such statement was sent to the Bank of Attalla at the close of October, 1905, or a day or two later. This statement was a transcript of the face of the ledger for the month covered therein, and inclosed in a letter as follows:

"Bank of Attalla, Ala."

"Citizens' Bank & Trust Company, Chattanooga, Tennessee—Sir: Your statement for our account current for the month of October, showing a balance due you of \$4,560.92 has been found correct, with exceptions noted below. Please examine promptly, sign and return this sheet, noting exceptions thereon."

This verification sheet was returned to complainant bank on the 3d of November, 1905, signed First National Bank of Attalla, by W. R. Lawley, Cashier, having the words, "with exceptions noted below," erased, so that Lawley's acknowledgment read: "Your statement for our account current for the month of October, showing a balance due you of \$4,560.92 has been found correct."

On the 28th of February, 1906, the Bank of Attalla borrowed of appellant the sum of \$10,000, evidenced by note as follows:

"\$10,000.00

Chattanooga, Tenn., Feb. 28th, 1906.

"Sixty days after date we promise to pay to the order of Citizens' Bank & Trust Company, ten thousand and no/100 dollars, value received, negotiable and payable at Citizens' Bank & Trust Company, Chattanooga, Tennessee.

"To secure the payment of this or any other obligation to said bank, due or to become due, the undersigned hereby pledges to said bank, or its assigns, holders of the same, the collateral described on the back hereof, or hereunto attached, and it is hereby agreed that upon the non-payment of this obligation said bank or holder, may sell the same at public or private sale, for cash or on credit, as a whole or in parcels, at any place in the city of Chattanooga, without notice; and said bank, or holder, may at any such sale, purchase the same, or any part thereof, for its or his own account, and after deducting all costs of sale, the balance of the proceeds shall be applied to this obligation, and any surplus to any other note, obligation, bill, overdraft, or open account upon which the undersigned shall be in any way bound, primarily or secondarily, absolutely or contingently, due or to become due. Such application to be made in the manner and proportions as to said bank or holder may seem fit. Upon the discharge of this obligation said bank or holder may deliver the collateral to the undersigned or order, but shall have the right to retain the same to answer any other obligation, note, etc., as above described, just as if specially pledged under an agreement in the exact terms of this, and in no event shall said bank or holder be in any way responsible in dealing with said collateral to any person bound with the undersigned in any debt to said bank. It is also agreed that said collateral may from time to time, by mutual consent, be exchanged for others, which shall also be held by this bank, or assigns on the terms above set forth. The undersigned also hereby agrees to give said bank or its assigns, such additional collateral as its President, Vice-President or Cashier may at any time demand, and if said collateral shall not be promptly given when demanded, this note shall become immediately due and payable. It is agreed that said bank shall not be responsible in any way for nonpresentment, or for failing to protest any item in said collateral requiring presentment and protest. If this note or any collateral attached thereto, is collected by an attorney, by suit or otherwise, or if suit be brought upon either, we agree to pay all fees and cost of collection. It is agreed by the makers and indorsers hereof that demand, protest and notice of nonpayment of this paper are expressly waived.

"First National Bank of Attalla,

"By L. M. Dyke, President."

Indorsed on the back: "As collateral on the within note are pledged bills receivable amounting to \$16,285.50."

The original Buckmaster and Williams note matured on April 15, 1906, and a few days before that was sent to the First National Bank of Attalla for collection. On April 14, 1906, Dyke wrote the cashier of appellant as follows:

"The First National Bank of Attalla,

"Capital \$30,000.00 fully paid.

"Attalla, Ala., April 14, 1906.

"Mr. H. Bushnell, Cashier. Chattanooga, Tenn.—Dear Sir: Inclosed please find note of Buckmaster and Williams in renewal of one for same amount due on the 15th instant. Please make draft for amount of interest and charge to our account, and return draft to us to be charged to account of Buckmaster & Williams. These parties seem to be getting along fairly well, and will be able to reduce this loan considerably at maturity.

"The weather has done them considerable damage or has been so they could not put in full time and therefore asked me to carry the full amount for four months at which time they would reduce it. Trusting this will be satisfactory, I am,

"Very truly yours,

L. M. Dyke,"

To this letter appellant replied on April 16, 1906, as follows:

Citizens' Bank & Trust Co., Chattanooga, Tenn. April 16, 1906.

"Mr. L. M. Dyke, President, Attalla, Ala.—Dear Sir: We are returning herewith note Buckmaster & Williams, \$5,000.00, sent us in your favor of the 14th to renew their paper for like amount, which we discounted for your bank. As the old note bore the indorsement First National Bank, Attalla, we return this note for the purpose of having indorsement supplied on new note. Please have this done and return the paper to us at your early convenience. We are to-day charging your account two notes discounted, one Curtis-Attalla Lumber, \$1,000.00 due on the 16th; the other J. S. Brothers, \$900.00, due on the 12th.

"Yours truly,

H. Bushnell, Cashier.

"JH."

On April 17, 1906, Dyke replied as follows:

"The First National Bank of Attalla,

"Capital \$30,000.00 fully paid.

"Attalla, Ala., April 17th, 1906.

"Mr. H. Bushnell, Cashier, Chattanooga, Tenn.—Dear Sir: Please find inclosed note indorsed as requested by you. This was an oversight by us.

"Very truly yours,

L. M. Dyke, President."

On the day when the First National Bank of Attalla was placed in the hands of a receiver, the notes in suit not being charged in the account, the books of the Citizens' Bank & Trust Company showed a general credit balance in favor of the First National Bank of Attalla of \$2,694.46. It was admitted that the collateral referred to on the back of the note of February 28, 1906, was after the insolvency of the First National Bank of Attalla turned over by the appellant to the receiver for collection, and that since the filing of the bill the \$6,000 and \$10,000 notes referred to have been paid by Thornton, receiver, in full, and that there remains on hand a sufficient sum arising from collections on collateral by said receiver to pay off the Buckmaster and Williams note.

Henson, president of the appellant, testified that at no time did Dyke have any individual account with his bank. Dyke, who was also examined, made no contradictory statements on that point. He testified that whatever statements were made in the letters as to the First National Bank of Attalla succeeding to the business and assuming the obligations of the Bank of Attalla were true, and that the accounts of the Bank of Attalla with its customers were transferred to the First National Bank of Attalla on its organization. He testified, also, that the proceeds of the discount of the first Buckmaster and Williams note went to the credit of the Bank of Attalla with the Citizens' Bank & Trust Company, but "that the First National Bank of Attalla never received any part of the proceeds of the Buckmaster and Williams note, and that the First National Bank of Attalla never assumed payment of the note, and that witness paid the interest on the renewal of the note himself, and charged it to his account with the First National Bank

of Attalla, and credited the Citizens' Bank & Trust Company with the amount. Section 27 of the by-laws of the First National Bank of Attalla provided that all contracts, checks, and drafts for this bank, and all receipts and circulating notes received from the Comptroller of the Currency, shall be signed by the president or cashier." On the 20th of January, 1906, the board of directors passed a resolution that "L. M. Dyke, president, be and he is hereby authorized to borrow or rediscount with the National Park Bank of New York, the whole, or any part of \$20,000.00 and deposit with said bank as collateral security for the payment thereof notes or any other collateral which may be required by said National Park Bank, and execute all papers necessary for the safe assignment and transfer of said securities." There was nothing on the minutes showing any authorization to Dyke to indorse any paper for Buckmaster and Williams, or to rediscount its notes or to borrow money from appellant. A short time before the bank failed the board of directors made an investigation of its affairs. It was discovered that there was a shortage in the notes which should have been on hand to the amount of about \$40,000. Dyke, according to Brown, the vice president of the bank, explained by saying that he had sent these notes to New York for rediscounting, having kept no copy of the notes. He further testified that, as far as he knew, the attention of the board of directors had never been called to the fact that Dyke had ever discounted or rediscounted any notes of the First National Bank of Attalla with the Citizens' Bank & Trust Company. He further testified that "he could not be positive whether Dyke showed him a list of the notes he had sent off to be rediscounted, but said it seemed to him he looked over the list, but whether the notes sent to New York were included he was not sure." The list purported to be a list of the notes sent there or somewhere to be rediscounted, but there were \$40,000 of note which should have been on hand, and the discrepancy was explained by Dyke as above stated.

The Circuit Court dismissed the bill on final hearing, having previously sustained a demurrer to so much of the bill as sought to apply the collateral securities which complainant had turned over to the receiver to the payment of the Buckmaster and Williams note, and these rulings are now assigned as error.

Knox, Acker & Blackmon and Pritchard & Sizer, for appellant.
Hood & Murphree, for appellees.

Before PARDEE, Circuit Judge, and JONES and FOSTER, District Judges.

JONES, District Judge (after stating the facts as above). The Buckmaster and Williams note reads as follows:

"\$5,000.00

Attalla, Ala., April 14th, 1906.

"On the 12th of August, 1906, fixed, I, we, or either of us, promise to pay to L. M. Dyke, or order, five thousand & 00/100 dollars, value received, and with interest from maturity, negotiable and payable at the First National Bank of Attalla, Ala. Maker and indorser hereby agrees to pay any and all costs of collection, of whatever nature, either of collecting or attempting to collect, securing or attempting to secure, in part or in full, and also including a reasonable attorney's fee, if not paid at maturity. And all right to claim any exemption under the Constitution and laws of this or any other State is expressly waived by the maker and indorser of this note, and the maker and indorser also hereby waive notice of protest if not paid at maturity.

"Given under our hands and seals, this 14th day of April, 1906.

"Buckmaster & Williams. [L. S.]
"E. Buckmaster. [L. S.]"

Indorsed on the back:

"L. M. Dyke."

"First National Bank of Attalla, by L. M. Dyke, President."

The substance of the defense to the suit upon the note is that the appellee bank never collected the note or received any benefit whatever from it, that the indorsement was an accommodation indorsement by the president without authority, and was *ultra vires*, and that the transaction was an individual matter of its president, and it is further insisted, if the appellee be liable, that the indorsement on the note was subsequent to the time when the collateral was pledged, and that the note was not at that time an obligation "due, or to become due," and therefore does not fall within the terms of the pledge.

The record, under the admissions of the parties, presents three questions: (1) Is the First National Bank of Attalla bound to the Citizens' Bank & Trust Company for the payment of the Buckmaster and Williams note? (2) If so, may the Citizens' Bank & Trust Company, under the terms of the pledge of collateral to secure a prior note, have the collateral applied to the satisfaction of the Buckmaster and Williams note? (3) If the collateral may be so applied to the satisfaction of that note, may the expense of collection and attorney's fees be added to the sum due upon the note, and the collateral applied to the satisfaction of such expenditures, as well to the principal and interest?

Plainly the note fills all the requisites of negotiable paper under the statutes of Alabama. Ordinarily a person purchasing such a paper for value before maturity from one having it in possession, whose name is upon it, may assume that the title of the holder, as well as the liability of all prior parties, is precisely that indicated by the paper itself. *Auten v. United States National Bank*, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920. As the appellant had the right to act upon appearances, it is entitled to judgment, unless there be something else growing out of the relations of the parties or the nature of the transaction which charged appellant with notice of the defenses now attempted against the note in its hands. There is nothing outside the paper itself to put appellant upon notice, except that appellant knew that the president of the First National Bank of Attalla, who indorsed the note in its behalf and procured its discount on its account, was also the payee of the note and indorsed it individually. That knowledge, coupled with the face of the paper, only charged appellant with notice that the First National Bank of Attalla had discounted the paper for its president.

There is nothing in the national bank act which prohibits a national bank from loaning money to one of its officers, or discounting a note payable to him, or to prevent it from rediscounting it with another bank. These circumstances, especially where the note rediscounted is for an amount not unusually large compared with other transactions of the bank seeking the rediscount, do not indicate that the paper was not taken and disposed of in due course of business. The rediscounting by a bank of its bills receivable is not unusual in banking circles, and is of frequent occurrence in many localities. The movement of crops at certain seasons of the year involves large use of money and creates demands for loans by local banks to their customers, far in excess of that part of its capital and deposits which a prudent bank usually keeps in cash to meet the or-

dinary current demands of its business. Under such conditions, a bank, however sound and honestly conducted, must either refuse to accommodate its customers, and lose their business or else borrow money temporarily to lend them. In this case, according to all appearances, appellant was justified in assuming that the appellee bank had met such exigency by rediscounting its bills receivable. There was nothing in any of the facts known to appellant which charged it with any duty to inquire into the history of the negotiable paper, or to put it on notice of any defense which might be available against the paper in the hands of any of the original holders.

Looking, however, to the actual case as the proof presents it, the right of recovery against the appellee is still stronger. Appellant, before the note in suit was given, had been the correspondent both of the Bank of Attalla and of the First National Bank of Attalla, which took over most of the business of the former bank. Dyke as president conducted the business of his bank with the appellant, and was often borrowing money from it for his bank, and paying these loans as they matured, and having settlements with the appellant. Dyke, speaking for the appellee bank, frequently advised appellant of the business conditions which made it desirable for his bank to obtain loans and discounts, detailing the sources from which the loans and discounted notes would be paid, going into particulars as to the value of the papers offered, the original Buckmaster and Williams note being one of them, and representing all the while that the bank was strengthening its financial position. If appellant had entertained suspicion of any sort, the conduct of the appellee bank would have disarmed it, and naturally lead appellant to believe that matters were exactly as Dyke represented them to be. The appellee having left its affairs to be conducted by its president, and his conduct being within the range of the authority customarily intrusted to such an officer, it is bound to one who has parted with his money, in good faith in reliance upon his exercise of authority, whatever might be the limitations which the by-laws or the resolutions of the directors, in fact, put upon Dyke's authority in the premises, so long as appellant was not informed of them. *Case v. Bank*, 100 U. S. 446-455, 25 L. Ed. 695.

Moreover, the appellee, when it sent the first Buckmaster and Williams note to the appellant for rediscount, informed appellant that the business of the Bank of Attalla would soon be merged into that of the First National Bank of Attalla, and that it would assume any outstanding liability of the Bank of Attalla. Dyke testified that the statements in his letters to his correspondent were true. Although examined about other matters, he did not mention any dealings with the appellant on his own account, or claim to have had any. Its officers testified positively that he never had any personal account with appellant. When the original Buckmaster and Williams note was discounted for the Bank of Attalla, the proceeds thereof, \$4,850, were placed to its credit, and its accounts, in which said credit was included, were afterwards merged in the account of the First National Bank of Attalla, which itself had the actual benefit of that credit in subsequent settlements it had with its correspondent, and with full

knowledge of the facts, appellee received and retained the money paid by appellant on the discount of that note. It could not repudiate the transaction, and at the same time retain its benefits. Besides, it assumed the outstanding obligations of the Bank of Attalla, and was bound to provide for them. When, therefore, it indorsed the new Buckmaster and Williams note, the one in suit, it was simply indorsing the paper in renewal of its own debt. Appellee was also bound by its indorsement of the note in suit for another reason. Appellee was appellant's banking correspondent. The old paper, payable at appellee's bank, was sent by appellant to appellee for collection. It was appellee's duty to collect it in money, or, if it could not do that, to return it. It did neither. It returned appellee a new note of the same parties, asking that it be received in renewal of the old paper. The appellant declined the arrangement, and returned the new note, insisting upon appellee's indorsement upon it. Appellee returned the new paper with its indorsement, stating that its failure to indorse it was an "oversight." The new note was then accepted by appellant and the old debt thereby extended. Under the circumstances, there was abundant consideration for appellee's indorsement of the new note in suit, and appellant took the negotiable paper in due course of business, and became a holder for value. *Muirhead v. Kirkpatrick*, 21 Pa. 237; *Railroad Company v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580.

Property in a thing involves the right of the owner to deposit or pledge that thing with another person to secure any obligation or to provide for any undertaking of the owner upon such terms and conditions, and for such purposes as he may see fit, so long as the pledge or deposit is not tainted with a purpose to accomplish a result forbidden by law, or contrary to its declared policy. Plainly, when the \$10,000 loan was made for which the collateral was primarily pledged, appellee and appellant did not contemplate it would be the only transaction of the kind. On the contrary, it is evident from their relations and dealings they contemplated that the customer then pledging the collateral might obtain further credit or make other loans, and both of them had it in mind that the collateral deposited for the security of the particular debt should, in that event, stand pledged to secure any other indebtedness in future dealings. The language of the pledge is not only consistent with this view, but inevitably excludes any intention to restrict the pledge to the indebtedness then existing. It is the duty of the courts to construe and enforce pledges according to the intent of the parties as gathered from the instrument of pledge or deposit, and the subject-matter and course of dealing to which it relates. The words are emphatic—"To secure the payment of this or any other obligation to said bank." Not content with this, the words are added: "Due or to become due." Provision is made, not only for the application of the collateral in satisfaction of the particular obligation, but for its application as well, if any surplus remained, "to any other obligation, bill, overdraft, or open account, upon which the owner shall be in any way bound, primarily or secondarily, absolutely or contingently, due or to become due." This explicit language is used regarding the disposition of

collateral, which at the time the agreement was entered into could only take place in the future, and inevitably extends the pledge to "any other note or obligation due or to become due." After language could not be used to convey the intent to pledge the collateral for the protection of "any other debt" the pledgor might contract thereafter. The original Buckmaster and Williams note, which the parties recognized as one of the debts for which appellee was liable, was outstanding at the time the deposit of collateral was made. By its express terms the pledge secured "any other debt due or to become due." The renewal of the old Buckmaster and Williams debt by giving a new note would not release or destroy the pledge as a security for the debt, or deprive the debt, in its new form, of the benefit of that pledge. We cannot doubt that the collateral in the hands of the receiver is subject, under the terms of the pledge, to the satisfaction of the principal and interest due upon the Buckmaster and Williams note in suit. *Selma Bridge Co. v. Harris*, 132 Ala. 179, 31 South. 508; *Merchants' Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434; *Hallowell v. Blackstone National Bank*, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315.

Notwithstanding the provision in the note—"that the maker and indorser hereby agrees to pay any and all costs of collection of whatever nature, either of collecting or attempting to collect, securing or attempting to secure, in part or in full, and also including a reasonable attorney's fee, if not paid at maturity"—we are of opinion under the facts of this case that the collateral in the hands of the receiver cannot be applied in satisfaction of such disbursements, nor can the amount be tacked onto the original debt in order to swell the proportionate amount upon which the creditor shall receive dividends. A national bank is an instrumentality of the government, whose administration is vested in the Comptroller of the Currency, who, in case of insolvency, appoints a receiver and directs his acts. The statutes provide a complete system for the administration of the assets of an insolvent bank, which are trust funds in the hands of the Comptroller. Their purpose is to put upon him the duty of getting in the assets and paying therefrom, ratably all the just claims against the insolvent bank, according to their priorities and equities. The statutes do not contemplate that the assets in his hands are to be charged with the expense of creditors in establishing the validity of their claims, otherwise than as the general law allows them to be taxed in their favor, as in the case of other successful suitors, and then such costs are a part of the general expense of administration, which is to be deducted from the assets before dividends are declared. If a creditor's claim is disallowed, the law opens the court to the dissatisfied creditor to establish his claim, notwithstanding the insolvency and that the assets are being administered by the receiver. But beyond this, save to prevent improper diversion of funds applicable to the particular debt and the like, the courts cannot control the receiver in the administration of the assets. It would defeat the policy of the statutes to enforce a contract by an insolvent bank and its creditor, whereby it is agreed, if a note be not paid at maturity, and the owner of the debt goes to expense in "collecting or attempting to collect" and brings

suit, that the amount of such expense and attorney's fees shall be added to the real debt, and correspondingly swell the dividend to be declared out of the insolvent estate in favor of such creditor, necessarily to that extent prejudicing other creditors. It would give the particular creditor power to displace the general law as to costs, which, when the receiver is sued by a creditor to establish a rejected claim, is part of the system of winding up insolvent banks, and substitute for it a provision that whatever the nature of the expense or the amount spent in litigating his debt the creditor shall recover it as part of the costs to be paid out of the assets of the insolvent bank, and, if the claim itself be a preferred one, that such costs and expenses shall also be a preferred claim against the estate. Every creditor who takes a note with provisions like this is charged with knowledge of the law providing for the administration and settlement of the affairs of an insolvent bank that it enters into his contract, and that it does not contemplate that the creditor who litigates the settlement of his claim with the receiver shall be reimbursed out of the trust funds beyond the statutory costs for his expenses in getting his claim allowed and paid. Besides, the contingency upon which the expense of collection and attorney's fees are to become due is that the note be "not paid at maturity." The contingency upon which the debt is to be increased by the addition of expenses and attorney's fees had not occurred when the insolvent bank was placed in the hands of a receiver; for the note was not then due. When it matured, the insolvent bank was in process of administration, and the payment of the claims of the creditors was necessarily delayed for investigation, the getting in of assets, and the declaration of dividends for ratable distribution to creditors. The bank itself was disabled by the act of law from paying out anything or meeting the note at maturity. Under these circumstances, to increase the debt of a particular litigant by the addition of attorney's fees and the expense of "attempting to collect" simply because he has so contracted, is, in effect, whatever it may be technically, the visitation of a penalty upon other creditors to the extent that the amount allowed the particular creditor for such disbursements diminishes the dividends, which otherwise must be based ratably upon the real indebtedness of the insolvent debtor. Whatever may be the rights of the parties under a note of this kind as to reimbursement for attorney's fees and expenses when suit is brought, or effort made to collect, before the insolvent bank is placed in the hands of a receiver, we are of opinion, where the note did not mature, and suit was not brought or effort made to collect, until the insolvent bank was taken in charge by the receiver for the purpose of liquidation, that the agreement should not be enforced by a court of equity. So long as the debtor is not insolvent, it is no concern of other creditors what the creditor may agree to pay another creditor if he does not meet a note at maturity; but when the agreement attaches other than the ordinary legal consequences of the reimbursement of principal and interest, and the costs of litigation as allowed and taxed in the courts, on failure to pay at maturity, other creditors whose share in a trust fund is diminished thereby have the right to complain of an effort thus to change the law of costs in the

administration of that fund. Agreements of the kind here must be construed as intended to apply to ordinary suits brought against the bank while it is a going concern and in charge of its affairs. Complainant is in a court of equity, asking equity, and it must do equity.

As it is admitted that the other claims of appellant have been settled and paid by the receiver in full, and that there remains in his hands a sufficient sum arising from the collection of collateral deposited to secure the payment of appellee's note of February 28, 1906, which collateral appellant surrendered to the receiver without prejudice to its rights, and as we have reached the conclusion that the proceeds of the collateral must be applied in satisfaction of the Buckmaster and Williams note, the decree of the Circuit Court must be reversed, and a decree entered that the complainant's claim, as evidenced by the Buckmaster and Williams note, be allowed for the principal of said note and interest at the rate of 8 per centum per annum, and that the receiver certify such allowance to the Comptroller, the amount thereof to be paid out of the funds in the hands of the receiver arising from the collections on the collateral.

The decree appealed from is reversed, and the cause is remanded to the Circuit Court, with instructions to enter a decree in accordance with the views herein expressed, and otherwise proceed as equity may require.

GERMAN ALLIANCE INS. CO. v. HOME WATER SUPPLY CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 882.

1. WATERS AND WATER COURSES (§ 206*)—MUNICIPAL WATER SUPPLY—CONTRACT WITH CITY—BREACH—LIABILITY TO PROPERTY OWNER.

Where a water company contracted to furnish water to a city for fire and other purposes by an agreement to which property owners were not parties, and there was neither ordinance nor provision in the contract between the city and the company imposing a liability on the latter to property owners, the company was not liable *ex contractu* for breach of the contract, to a property owner whose property was destroyed by fire by reason thereof, on the theory that the city acted as agent for the citizens separately and individually in making the contract, or that the property owners furnished the consideration for the agreement, or at all.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

2. WATERS AND WATER COURSES (§ 206*)—PUBLIC WATER SUPPLY—CONTRACT WITH CITY—INJURIES TO PROPERTY OWNERS—LIABILITY IN TORT—"PUBLIC CALLING"—"DANGEROUS CALLING."

Where defendant contracted with a city to furnish water for fire and other purposes, it did not thereby enter into a "public calling" in any sense different from the public duty to supply the city with water with which it could combat fire; nor was the water company's business a "dangerous calling," so as to impose upon it a duty to property owners within the city to furnish proper fire pressure so that for mere nonfeasance property owners damaged could recover against it in tort.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1827.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

Action by the German Alliance Insurance Company against the Home Water Supply Company. From a judgment dismissing the action on sustaining a demurrer to the complaint, plaintiff brings error. Affirmed.

Hartwell Cabell (Wilson & Osborne, on the brief), for plaintiff in error.

Ralph K. Carson (Kirkland & Smith, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

McDOWELL, District Judge. This is an action at law, brought by an insurance company against a water company; the complaint being drawn in accordance with the Code of South Carolina. The facts may be very briefly stated. Under a contract between the city of Spartanburg, S. C., and a water company (defendant in error), the latter was, as is alleged, required to lay six-inch water mains, to place hydrants at certain intervals, and to maintain a certain pressure. It is alleged that the water company failed to comply with its contract in the respects above mentioned, and that in consequence a fire, which could have been readily extinguished in its incipency if the contract had been complied with, destroyed a number of houses belonging to the Spartan Mills, a corporation, doing business in Spartanburg, with all of its property in the city, and a city taxpayer, entitled to protection from fire. The houses had been insured by the plaintiff below (plaintiff in error), and, after payment of the losses to the mill company by the insurance company, the former executed a "subrogation receipt" to the insurance company, whereby the rights of the mill company were assigned to the insurance company. A demurrer to the complaint was sustained and the action dismissed.

As no question is made as to the right of the insurance company to maintain an action where a property owner could maintain it, we shall consider only the alleged liability to the property owner. It should also be stated that we have here no contract between the water company and the property owner, and neither ordinance nor provision in the contract between the city and the water company to the effect that the water company shall be liable to the property owners.

In considering the question of the alleged liability of the water company to the property owner, let us first consider the action at bar as being *ex contractu*, founded expressly on breach of contract. The property owner is not a party to the contract, and it is conceded that the city does not owe him the duty of furnishing water. The benefit to him is clearly not a direct benefit. A mere supply of water, adequate in amount and under full pressure, would not of itself avail him anything. It seems to us that the overwhelming array of authority denying liability must be held sound in result on the accepted principles of the law of contract. The argument that the city acts as the agent of the property owners in making such contracts does not seem to us to be sound. The

city is in some sense the agent of the citizens in the aggregate. It is not the agent of the citizens separately and individually. This theory, if carried to its logical conclusion, would result in intolerable conditions, and is subversive of thoroughly established principles. No further weight seems to us to be given the argument in behalf of the property owner by the fact that the consideration for the water company's agreement comes in large measure from the property owners. The connection is too remote. The water company in case of default in payment by the city must sue the city and force it to collect from the citizens. The water company cannot sue the individual citizen.

For rulings in favor of the right of recovery, see *Paducah Lumber Co. v. Paducah Water Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536 (which has been followed by some subsequent cases in Kentucky); *Gorrell v. Water Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598 (which was followed in *Fisher v. Supply Co.*, 128 N. C. 375, 38 S. E. 914); *Planters' Oil Mill v. Monroe Waterworks*, 52 La. Ann. 1243, 27 South. 684; *Mugge v. Tampa Co.*, 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207. We are also referred to *Crone v. Stinde*, 156 Mo. 262,¹ which we have not been able to see, but which is said to intimate that *Howsman v. Trenton Co.*, 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654, and *Phoenix Ins. Co. v. Trenton Company*, 42 Mo. App. 118, are unsound.

A sufficient number of the decisions against the right of recovery are found in *Lovejoy v. Bessemer Co.*, 146 Ala. 374, 41 South. 76, 6 L. R. A. (N. S.) 429; 1 *Farnam on Waters*, § 160b; 30 Am. & Eng. Ency. (2d. Ed.), 429 et seq. See, also, *Ancrum v. Camden Co.*, 82 S. C. 234, 64 S. E. 151, 21 L. R. A. (N. S.) 1029.

Can a right of action be maintained on the theory that this is an action in tort?

Having reached the conclusion that the property owner has no right of action *ex contractu*, it would seem to follow that no liability in tort can exist, because the assumed duty arises only from a contract by which the plaintiff is not given any right of action. However, the opinion in *Guardian Trust Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367, seems to us to call for the discussion which follows, especially in view of the following:

"* * * If the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and, if they avail themselves of its conveniences and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for tort."

The first inquiry, of course, is whether or not the Supreme Court, in the case above mentioned, has rendered a binding decision on the right of the property owner to recover from a water company under the circumstances alleged in the case at bar. We are of opinion that

¹ 55 S. W. 863, 56 S. W. 907.

the court did not in that case decide this question. In that case the Supreme Court did decide that the judgment in the state court was a judgment in tort and also that the effect of section 1255, Code N. C. 1883, was to make a judgment in tort against the successor in interest of a corporation mortgagor as effective as such a judgment against the mortgagor. In the opinion it is said:

"The statute subordinates the mortgage to judgments for torts. Now what is the judgment? It is a determination that upon the facts stated the plaintiff is entitled to recover so much money. It may not be essential that it recite whether the facts stated show a breach of contract or a tort, but it is essential that the judgment should be considered as a determination that upon those facts the plaintiff is entitled to recover. And it must be assumed that under the statute the mortgagee and the bondholders it represents agree to accept the judgment as conclusive in this respect, or, if not conclusive, at least *prima facie*, evidence."

We have therefore a case in which the mortgagee had in effect contracted that its property, so to speak, should be bound by any judgment obtained without fraud against the mortgagor (or its successor), if the judgment were in tort. It follows that the character of the judgment obtained by Fisher in the state court was the only question presented to and decided by the Supreme Court. In other words, the question before the court was this: It being conceded in effect that Fisher had a right of action against the supply company, can this right of action be properly classed as sounding in tort? It is also to be remembered that the judgment in *Fisher v. Supply Company* came from North Carolina, one of the few states holding that there is privity of contract between the water company and the property owner. *Gorrell v. Water Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598. Such being the fact, there being a conclusively adjudicated privity of contract and a liability *ex contractu*, the ruling that there is a liability in tort for neglect in the performance of the contract is simply affirmatory of all of the large class of cases illustrated by the liability in tort of a common carrier to its passengers.

The question before us is therefore not settled by *Guardian Trust Co. v. Fisher*, *supra*; but in view of what is there said some discussion of the question is necessary.

It can only tend to clearness of thought to lay out of consideration at the outset that large class of cases in tort in which there is a direct contractual relation between the plaintiff and the defendant; such as the liability in tort of a common carrier to its passenger, including the "invitation to alight" cases; of the blacksmith to his customer, where the blacksmith by incompetence or negligence lames the horse; of the attorney to his client; and of the physician to his patient, where the contract of employment is made by the patient. In all such cases there is a relation between the plaintiff and defendant such as does not exist here—a clear privity of contract.

It will also tend to clearness to lay aside those cases in which liability in tort arises from a violation of statute or lawful ordinance by the defendant. For instance, cases in which the plaintiff is injured at a public crossing by the failure of a railway company's servants to sound warnings or to check the speed of the train, in violation of stat-

utes or ordinances. In such cases there is no contract relation at all, but the duty owing by the defendant to the plaintiff is more readily referable to the statute or the ordinance than to the common-law duty.

Cases in which there is no statute or ordinance governing the duty of a railway company at public crossings will be considered later on. And it may not be amiss to here call attention to the fact that in such cases the complaint is of a misfeasance, while in the case at bar the complaint is for what is to be classed as a nonfeasance.

Can it be said that the defendant here has entered upon the performance of a public duty? If so, there is a liability in tort to the property owner specially injured by neglect in the performance of such duty.

We are cited to *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713, and *Fulton Ins. Co. v. Baldwin*, 37 N. Y. 648. In the first of these cases the defendant had contracted with the state to keep in repair the locks on certain sections of the Erie Canal, and it was held that:

"A public officer, or a contractor engaged to perform the duties of a public officer, is liable for negligence or malfeasance to any one sustaining special damage in consequence thereof."

In the *Baldwin* Case the defendant had contracted to keep a section of the canal free from obstructions and was held liable to an insurance company which had paid losses to the owner of a canal boat sunk by reason of a snag negligently left in the canal by the contractor.

In *Robinson v. Chamberlain*, *supra*, it is said:

"The only question in this case is whether an action will lie against a contractor, employed by the state, pursuant to law, to keep a portion of the canals in proper condition and repair, who neglects his duty, whereby the plaintiff sustains special damage.

"It is a familiar doctrine that, 'when a corporation or individual is bound to repair a public highway or navigable river, they are liable to indictment for the neglect of their duty' (Per Nelson, J., in *People v. Corporation of Albany*, 11 Wend. [N. Y.] 539 [27 Am. Dec. 95]).

"A navigable river is a public highway; our canals, open and free to all for navigation, upon payment of the toll fixed by law, as our turnpikes are, for travel upon like terms, are, I think, in every sense, public highways.

"A failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of any one who has sustained special damage."

In the cases above mentioned there are features which distinguish them from the case at bar. In them the contract serves no necessary purpose other than to identify the person who should perform the duty. The duty is created by law; existed before the contract was made; an indictment lies for failure to perform it; and the public is the direct, and the state the indirect, beneficiary. In the case at bar the duty, if it exists, did not exist until the contract was made; the contract alone furnishes the measure of the duty; no indictment lies for failure to comply with the contract; and the city is the direct beneficiary, while the property owner is only indirectly and incidentally benefited. We have said that the contract alone creates the duty, if it exists. This is true because it is universally conceded that the city owes

no duty to its property owners to establish waterworks, and, if the city does establish such works, it is not liable to its property owners for neglect in operation. *United States v. Sault Ste. Marie* (C. C.) 137 Fed. 258; 2 Dill. Municip. Corps. § 975; 28 Cyc. 1303; *Boston Co. v. Salem* (C. C.) 94 Fed. 238; *Metropolitan Co. v. Topeka Co.* (C. C.) 132 Fed. 702, 704. We have said that the contract alone furnishes the measure of duty, if it exists. In a case such as we have here it would be clearly erroneous to say that the duty is to lay reasonably large mains, to install hydrants at reasonable intervals, and to maintain a reasonable, or a reasonably adequate, pressure. Such requirements may exceed the requirements of the contract. Consequently, if a duty to the property owner exists, it is a duty to use care to perform the contract. No indictment lies for failure to perform the contract because such breach of contract is neither a crime nor a misdemeanor. The remaining distinction is obvious without elaboration. In a contract to perform a true public duty the citizen is benefited directly. In the case at bar the property owners are indirectly benefited, and only then in the event that the city properly utilizes the water supplied by the water company.

It would seem therefore that we could not consider the defendant here as having entered upon the performance of a public duty, even if the contract itself did not negative such hypothesis.

In so far as the expression "public calling" conveys any meaning other than that implied in the term "public duty," it may here be said that it seems to us that the defendant here has not undertaken a public calling. The contract restricts its calling, in respect to supplying water for combating fire, to that of supplying the city. The defendant distinctly has not entered upon the calling of supplying water, for fire purposes, to the public. In the sense that a public calling is one that brings the one following the calling into contact with the public, in the sense that the calling is such that the public has an interest (even an indirect interest) in the manner in which it is carried on, the defendant has entered upon a public calling. But the question remains whether this particular public calling is such that a liability in tort to the public arises for acts of nonfeasance.

Let us now consider some cases of liability in tort where there is no contract, or in which the contract can be disregarded. Such cases may be illustrated as follows: Where a surgeon is employed by the father of the patient (*Gladwell v. Stiggall*, 5 Bing. N. C. 733, 35 E. C. L. 393), or by the husband (*Pippin v. Sheppard*, 11 Price, 400) of the patient, and is liable in tort at the suit of the patient for malpractice or neglect; or where the physician is employed by the county authorities to attend charity patients at the almshouse (*Du Bois v. Decker*, 130 N. Y. 325, 29 N. E. 313, 14 L. R. A. 429, 27 Am. St. Rep. 529) and is liable in tort to a charity patient for incompetence or neglect; where a manufacturing pharmacist negligently labels a poison as a harmless drug and is held liable in tort, to one who is thereby injured and to whom it was administered by a remote vendee (*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455), and the case of a railway company injuring a person at a crossing by neglect, in the absence of statute or ordinance (23 Am. & Eng. Ency. [2d Ed.] 756), or where it is held

liable notwithstanding compliance with an ordinance (Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485).

The most noticeable feature of these cases, which is common to all of them, is the danger to the public from neglect by the defendant. In each of these cases we may with some propriety say that the defendant had entered upon a dangerous calling. See, also, Oil Co. v. Deselmo, 212 U. S. 159, 178, 29 Sup. Ct. 270, 53 L. Ed. 453—an excellent illustration of a dangerous calling.

In considering whether or not the water company has entered upon a calling to be properly classed as "dangerous," we are confronted by some differences between the cases instanced above and the case at bar.

There is in marked degree a helplessness on the part of the physician's patient, of the one who takes a mislabeled drug, and of the traveler on a level crossing, which is far from being so pronounced in the case of the property owner. He still has fire insurance, chemical extinguishers, and the same crude methods of combating fires in their incipency that he had before the city water plant came into existence.

If the danger of neglect in water company cases were so imminent as in the cases above mentioned, in view of the length of time that water companies have been in existence, we should have a "cloud" of decisions asserting liability in tort to property owners on the ground of "dangerous calling"; whereas, the absence of authority for taking such position is most marked.

If neglect by a water company in respect to supplying water for combating fire is so dangerous to the public that the company must be held to have entered upon a "dangerous calling," it would seem that the courts would long since have swept away the defense on the part of the city (furnishing water for fire purposes) that it is performing a governmental function. "*Salus populi suprema lex.*" The very fact that such defense is so universally held good seems to us a strong argument for holding that the danger to the public from neglect in supplying water for fire purposes is not so imminent or so extreme as to justify the courts in classifying the calling as "dangerous." The citizens had no right of action when the city was doing itself what it has since engaged the water company to do, and they are in no worse plight now. No very good reason suggests itself for holding that danger to the public becomes suddenly the dominant feature of the calling, because a private person or corporation has undertaken it.

There remains a further distinction between the case at bar and the "dangerous calling" cases. In the latter the duty is independent of contract. In the case at bar, if the duty exists, it is created by and originates in a contract made with some one other than the plaintiff, and is so entirely measured by the contract that the supposed duty is simply to perform the contract.

In *Longmeid v. Holliday*, 6 E. L. & E., 562, 6 Exchq. 761, Baron Parke said:

"There are other cases, no doubt, besides that of fraud, in which a third person, although not a party to the contract, may sue for damage sustained by him if it be broken. These cases occur where there is a wrong done to a person for which he could have a right of action, although no such contract had been made. * * *

The very fact that the duty, if it exists, originates in, and is only to be measured by, the contract, forbids the conclusion that the duty arises in behalf of any one not in sufficient privity with the contractor to maintain an action *ex contractu*. In other words, the want of privity which denies to the plaintiff a right of action *ex contractu* forbids a finding that a duty to the plaintiff is created by the contract.

A difference between the case at bar and the admitted liability in tort of a water company which, for instance, leaves a trench open in a street, is found in the respect last above mentioned. In leaving a trench open, the duty to the person injured thereby does not originate in and is not measured by the contract between the city and the water company. The duty exists independently of and without reference to the contract. And this difference exists without reference to the further fact that in the case supposed the act complained of is in a sense affirmative, a misfeasance; while in the case at bar the act is negative, a nonfeasance.

Let us now mention a few decided cases, generally accepted as sound, which seem to us to afford precedents for denying the existence of a right of action in tort in the plaintiff here.

In *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621, an attorney at law, employed and paid solely by his client and without knowledge as to the purpose for which it was obtained, gave to his client an opinion on the title of real estate which the attorney supposed belonged to his client, to the effect that the title was good and the property unincumbered. The client had previously conveyed the property to another, and this conveyance, although on record, was overlooked by reason of the negligence of the attorney. The client used the opinion and thereby obtained a loan from the bank, mortgaging the real estate as security therefor. By reason of the unreported conveyance the bank lost the loan and thereupon sued the attorney. The court, although not unanimously, held that the attorney was not liable to the bank.

In *Winterbottom v. Wright*, 10 Mees. & W. 109, it was held that the driver employed by the owners of a coach line could not maintain an action in tort against the builder of the coach, whose negligence in the construction of the coach caused an injury to the plaintiff.

In *Longmeid & Wife v. Holliday*, 6 Eng. Law & Equity Repts. 562, 6 Exchq. 761, A. sold a lamp manufactured by A. to B., and by reason of negligence in the construction of the lamp B.'s wife was injured. It was held that an action in tort by the wife against A. did not lie.

It cannot be denied that an attorney who prepares an opinion on title must know that it may be used to the injury of some one or more of the public; the coach builder must know that negligence in the construction of a coach, especially if it is to be used in public service, may result in death or injury to some of the public; the manufacturer of lamps must know that a lamp sold by him is likely to be used by others than his immediate purchaser, and that negligence in construction is to such extent dangerous to the public. And yet in these cases liability in tort was denied. A duty to the plaintiff was in each case held not to have existed, and in each case the plaintiff was injured as the result of a breach by the defendant of a contract with a third party.

We do not think it necessary to discuss at length the liability of a water company in case it were under no contract to supply water for fire purposes but nevertheless undertakes to do so. *Guardian Trust Co. v. Fisher*, 200 U. S. 69, 26 Sup. Ct. 186, 50 L. Ed. 367. We have no such case here, but still it seems not improper to say that in our opinion there would be no liability in tort to the property owner unless there were also a liability ex contractu upon an implied agreement between the company and the property owner. If the consideration was paid by the city, and not directly by certain property owners, it would assuredly prevent the implication of an agreement between the water company and the individual property owners. And inability to maintain an action ex contractu on the part of the property owner would defeat his right to maintain an action ex delicto. If the water company were to collect from certain property owners direct, it is inconceivable that there should not be first an agreement at least as to the amount to be charged, and an implied promise to render some ascertainable service to the property owners paying therefor. No such case is likely to arise; but if it should it would be so unlike the case at bar as to afford us no aid in reaching a proper conclusion.

Among the water company cases in which the question of liability in tort to the property owner was considered and denied may be mentioned: *Nickerson v. Bridgeport Co.*, 46 Conn. 24, 33 Am. Rep. 1, 5; *Foster v. Lookout Co.*, 3 Lea (Tenn.) 42 (see note 33 Am. Rep. 8); *Fowler v. Athens Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313, 315; *Nichol v. Huntington Co.*, 53 W. Va. 348, 44 S. E. 290; *Britton v. Green Bay Co.*, 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856; *House v. Houston Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; *Ancrum v. Camden Co.*, 82 S. C. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029; *Fitch v. Seymour Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258.

Our conclusion is that the judgment below must be affirmed.

MARTIN v. ORGAIN.*

(Circuit Court of Appeals, Fifth Circuit. November 16, 1909.)

No. 1,908.

BANKRUPTCY (§ 191*)—LIENS—LIEN FOR RENT TO BECOME DUE.

Where the landlord of a bankrupt had a lien on the property on the leased premises for "rent due and to become due" by the express terms of the lease and also by *Sayles' Tex. Ann. Civ. St. 1897, art. 3251*, for rent due and to become due for the current contract year, such lien is enforceable against the trustee in bankruptcy for rent to become due during the remainder of the contract year in which the bankruptcy occurs, and which has become due prior to the adjudication of the claim.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 290; Dec. Dig. § 191.*]

Appeal from the District Court of the United States for the Northern District of Texas.

In the matter of *E. H. Lowe Company*, bankrupt. *Julia Martin* appeals from an order disallowing her claim to a lien. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

‡ Rehearing denied December 7, 1909.

In the matter of E. H. Lowe Company the appellant filed before the referee the following claim:

"At Ft. Worth, in said district of Texas, on the 17th day of July, A. D. 1908, came Julia Martin of Ft. Worth, in the county of Tarrant, in said district of Texas, and made oath and says:

"That E. H. Lowe Company, a corporation, against which a petition for adjudication of bankruptcy had been filed and which has heretofore been adjudged bankrupt, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent for a sum of money representing the rents due and to become due for that portion of the current contract year according to the terms of a certain lease made by deponent to and with said bankrupt, extending from the first day of January, A. D. 1908, to the first day of September, A. D. 1908. That the total amount of said indebtedness for said period is the sum of thirty-eight hundred, fifty-six and 18/100 dollars (\$3,856.18), as shown by the statement of account hereto attached marked 'Exhibit A' and made part of this proof; that no part of said debt has been paid except the sum of eighteen hundred, fifty-eight and 78/100 dollars (\$1,858.78), as shown by the items credited on said attached account; that the consideration of said debt is rents due and to become due as aforesaid; that there are no offsets or counterclaims to said indebtedness except as set forth in said attached account, and that the balance after allowing same is the sum of nineteen hundred, ninety-seven and 40/100 dollars (\$1,997.40); that no note has been received for said indebtedness or any part thereof, and no judgment has been obtained for same; that the only security held by this deponent for said debt is a landlord's lien on the property of the said bankrupt on the premises let in said lease secured by the said contract of lease and by the statute law of the state of Texas, and that by agreement whatever rights in said bankruptcy deponent has under and by virtue of said lien extend to the funds in the hands of the trustee for said bankrupt derived from the sale of the property of said bankrupt on said leased premises at the time of said bankruptcy; that said claim is entitled by law to priority of payment out of the assets of said bankrupt in the hands of its trustee. Julia Martin.

"Subscribed and sworn to before me this 17th day of July, A. D. 1908.

"[Seal.]

N. G. Denison,

"Notary Public in and for Tarrant County, Texas."

The trustee answered the said claim, in substance, charging that, as to the rent due after the adjudication in bankruptcy, it was not a provable claim, and he prayed that the same should not be allowed.

A hearing was had before the referee on an agreed statement of facts as follows:

"In the Matter of the E. H. Lowe Co. No. 461, in Bankruptcy.

"In the matter of the claim of Mrs. Julia Martin against the estate of the bankrupt aforesaid for rents, the following facts are agreed to:

"The E. H. Lowe Company, a corporation, was adjudicated a bankrupt on the 9th day of March, 1908.

"That the contract of which the following is a copy, was duly executed and was in force at the date of said bankruptcy as an obligation of the said E. H. Lowe Company, it having acquired the rights of E. H. Lowe named in said contract as the original lessee.

"The stock in trade of the said bankrupt remained on the premises described in said contract of lessee as the property of said bankrupt estate from the date of said adjudication to and including the 9th day of April, 1908, the trustee in bankruptcy being in control of said premises from the date of his election to and including the said 9th day of April, 1908, when he sold the said stock in trade.

"Contract.

"State of Texas, County of Tarrant.

"This contract of lease made and entered into on this, the 14th day of September, 1906, by and between Julia Martin, an unmarried woman, of the

county of Tarrant and state of Texas, party of the first part, and E. H. Lowe, of said county of Tarrant, party of the second part, witnesseth:

"That said first party, in consideration of the rents, covenants, and agreements hereinafter contained and by said second party to be paid and performed, does hereby grant, demise and lease to said second party, the premises described as follows, to wit: lots one (1) and two (2) in block five (5), Hirschfield's addition to the city of Fort Worth, in Tarrant county, Texas, together with the improvements now on said lots.

"To have and to hold the same with the appurtenances thereunto belonging, unto the said party of the second part from the 15th day of September, 1906, to and including the 31st day of December, 1911, being a term of five years, three months and fifteen days, fully to be completed and ended on the 31st day of December, 1911, said lessee yielding and paying therefor the sum of twenty-two thousand, two hundred and twenty-five (\$22,225) dollars, as hereinafter provided, and the further sum of all taxes of every character which shall be levied on or assessed against said property during said term, and the further sum of all premiums which shall be paid for insurance for said term on said property, as hereinafter provided, and the further sum for all moneys which shall be paid for repairs on the improvements on said premises during said term, as hereinafter provided.

"Provided, however, that if said rent, or any part thereof, shall remain unpaid for ten days after it shall become due and payable, as hereinafter set forth, or if said lessee shall fail to pay said taxes, or procure and pay for said insurance, or make and pay for repairs, in manner as hereinafter agreed to be done, and default in any such case shall continue for ten days after notice thereof to said lessee given by said lessor or her agent or assigns; or if said lessee shall assign this lease or sublet said leased premises, or any part thereof, without the written consent of said lessor or her agent or assigns; or if said lessee's interest in this lease shall be taken or sold under execution or other legal process, then and in any of the events aforesaid, it shall be lawful for said lessor, her heirs or assigns, at their option, without further notice or demand, into said premises to reënter and the same to have again, repossess and enjoy, as in their first and former state, and thereupon this lease and everything therein contained on the part of said lessor to be done and performed shall cease, determine and become utterly void; provided, however, that it is contemplated by the said parties to this lease that the said lessee may associate with himself in a mercantile business in dry goods or similar lines, other person or persons, in a partnership relation with him, and the use and occupancy of said premises, under terms of this lease, by such firm or partnership of which the said lessee shall be an active member, shall not be deemed a violation of the above stated provision against assigning and subletting the said premises; and the occupancy and use of said premises by said lessee and his associates in business as aforesaid, shall subject said associates and members of said partnership or firm, and all their property in and on said leased premises, to the full terms, obligations and liabilities of and provided in this lease.

"Said lessee covenants and agrees with said lessor as follows: This is to say, said lessee will pay said money rent, to wit, the said sum of twenty-two thousand, two hundred and twenty-five (\$22,225) dollars in installments as follows: the sum of one hundred and seventy-five (\$175) dollars on the 15th day of September, 1906, the sum of three hundred and fifty (\$350) dollars on the first day of each and every month thereafter to and including the 1st day of December, 1911, and until the whole amount of twenty-two thousand, two hundred and twenty-five (\$22,225) dollars shall have been paid.

"Said lessee further covenants and agrees that as part of the rents and consideration for said premises and lease, that said lessee will pay promptly from year to year, as the same become due and payable, all taxes levied on or assessed against said premises, for and during the full term of this lease, and will keep said premises during the full term of this lease, insured in first class insurance companies, in a sum of not less than twenty-

eight thousand (\$28,000) dollars in the name and for the use and benefit of Julia Martin, the said lessor, or her heirs or assigns, as the case may be, and will promptly pay all premiums for said insurance when due; and will, during the full term of this lease, at the expense of the said lessee, have done and made promptly as occasion arises, the ordinary repairs on said premises and improvements necessary to keep same in as good condition as they now are, ordinary wear and tear excepted.

"Said lessee further agrees and covenants that if he should at any time fail or refuse to pay said taxes when due and payable, or to keep said property insured and pay premiums for said insurance as above stipulated, or to make said repairs as above stipulated, then and in that event, said lessor, her heirs or assigns, shall have the right at her or their option, to pay said taxes, procure said insurance on said property and pay premiums therefor, and make said repairs, or to do one or more of said things, and in the event she, or they, so do or act, then any and all money paid out by said lessor, her heirs or assigns, for any of said purposes, together with ten per cent. per annum interest on said money from date of payment of same, shall be and constitute a debt against said lessee, which he hereby promises to pay on demand, and until the same shall be paid it shall constitute a part of the unpaid rents for said premises and may be collected as such.

"And said lessee further covenants and agrees that he will not do or suffer any waste on said premises; that he will not assign this lease or sublet said premises, or any part thereof, without the written consent of said lessor, her heirs or assigns (subject to the right of said lessee to associate others with him in partnership relation in the occupancy of said premises for purposes and on terms as aforesaid) and at the end of said term said lessee will deliver up said premises in as good order and condition as they now are or may be put by said lessor, her heirs or assigns, reasonable use and ordinary wear and tear thereof, and damage by fire or other unavoidable casualty, excepted.

"Provided, however, that in the event said improvements be destroyed or rendered untenable by fire or other extraordinary cause, and said lessee be thereby compelled to abandon said premises, this lease shall terminate, and said lessee shall thereupon be liable only for the rents, taxes, insurance premiums and repairs, earned, accrued or incurred to the time said lease shall so terminate.

"Provided, further, that if said improvements shall be partially injured from any cause, and are not thereby rendered substantially untenable for said lessee, that said lessor, her heirs or assigns, shall have the option to at once repair same, and this lease shall in that event in all its provisions continue in full force, and if such injury is from such cause or of such nature as to be covered by the insurance in force for the protection of said improvements, then and in that event said lessor, her heirs or assigns, shall be required and obligated to make the repairs made necessary by said injury, the expense of such repairs, however, not to exceed in any event, the amount of the insurance money received for said injury by said lessor, her heirs or assigns.

"Said lessee further covenants and agrees that for the whole of said rents to be paid by said lessee, including any moneys paid by said lessor, her heirs or assigns, or owed by said lessee for taxes, insurance or repairs, as hereinabove provided for, a lien is hereby reserved and given upon said premises, the interest of said lessee in same, and all the property of said lessee in and upon said premises, in favor of said lessor, her heirs or assigns, prior and preferable to any and all other liens of whatsoever character thereupon.

"Said lessee hereby waives all notice to quit said premises which by law are required to be served upon him in the event any writ of ejectment or forcible detainer be brought, and agrees that no alteration shall be made in said premises or improvements without the written consent of said lessor, her heirs or assigns.

"Said lessor covenants and agrees for herself, her heirs and assigns, with said lessee, that said lessee paying the rents and charges hereinbefore stipulated for and observing and keeping the covenants of this lease on his be-

half to be kept, shall peacefully and quietly hold, occupy and enjoy said premises during said term without let, hindrance, ejection or molestation by said lessor, her heirs or assigns, or any other person or persons lawfully claiming or to claim the same or any part thereof.

"In witness whereof, the said parties have hereunto set their hands to this instrument in duplicate on the date first-above written.

"[Signed]

Julia Martin, Party of First Part.

"E. H. Lowe, Party of Second Part.

"State of Texas, County of Tarrant.

"Before the undersigned authority on this day personally appeared Mrs. Julia Martin, an unmarried woman, and E. H. Lowe, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

"Given under my hand and official seal at Fort Worth, Texas, this the 15th day of September, 1906.

"W. Storer, Notary Public in and for Tarrant County, Texas.

"State of Texas, County of Tarrant.

"The sum agreed to be paid for rents, in the attached lease made by Julia Martin to E. H. Lowe, dated September 14, 1906, is, in consideration of certain expenditures made by said lessor, Julia Martin, on the said leased premises, increased in the sum of seven hundred and sixty-six and 76/100 dollars (\$766.67), which said sum is to be added to the sum stipulated for rents in said lease, and is to be paid in monthly instalments, on the rent day fixed in said lease, of thirteen and 22/100 dollars (\$13.22) each, and all the terms, provisions and obligations of said lease in favor of the lessor therein with reference to the payments of rents and the lien and security for same, are expressly agreed to extend to and cover this the said additional sum agreed to be paid for rents as aforesaid.

"Witness our hands this 1st day of March, 1907.

"Mrs. Julia Martin,

"Earle H. Lowe,

"E. H. Lowe Company,

"By W. T. Potter, President."

"That the bankruptcy corporation has paid the amounts due by it to Mrs. Julia Martin to the 1st day of January, 1908, and that it paid to Mrs. Martin the amounts due as the money rents for the months of January and February, 1908, to wit, the sum of \$726.44.

"That the trustee of the bankrupt concern paid to Mrs. Julia Martin \$625.26 for the use of the premises during the time which he occupied them as such trustee.

"That the trustee rejected the contract of lease so far as under the law he was authorized and empowered to do so, and notified the lessor that the estate of the said E. H. Lowe Company, bankrupt, would not be bound for the rent of the premises after he ceased to occupy them as such trustee.

"That by an agreement between the trustee and Mrs. Julia Martin, O. H. Martin & Company occupied the premises from the 10th day of April to the 15th day of May, 1908, for which that company paid to Mrs. Martin the sum of \$548.39.

"That under a like agreement E. S. Kirk occupied the premises from the 18th day of May until the 15th day of June, 1908, for which he paid the petitioner the sum of \$300.

"Each of these occupancies were had with the distinct understanding that by allowing the premises to be so occupied Mrs. Martin would not waive any rights that she might have.

"That the E. H. Lowe Company before its bankruptcy had paid in premiums on insurance upon the premises for the year 1908, the sum of \$283.95.

"That if the claim of petitioner, Mrs. Julia Martin, is a provable claim against the estate of E. H. Lowe Company, bankrupt, the following would be a correct statement of the amount of her claim:

Rent from March 1st, 1908, to Sept. 1st, 1908, 6 months at \$363.22 per month.....	\$2,179 32
Proportion of the state and county taxes for the year 1908, upon the property leased, which would have accrued from the 1st day of January until the 1st day of September.....	187 50
Proportion of city taxes for the year 1908, upon the property leased which would have accrued from the 1st day of January until the 1st day of September.....	525 00
Proportion of the insurance for the year 1908 upon the property leased which would have accrued between the 1st day of January and the 1st day of September.....	229 58
Total	\$3,121 40

Credits.

April 9, 1908, rent paid by O. H. Martin & Co., April 10th to May 15th, 1908.....	\$ 548 39
Rent paid by E. H. Kirk, May 18th to June 15th, 1908.....	300 00
Rent paid by E. M. Orgain, trustee, for the use of the premises for one month and nine days.....	625 26
Insurance premiums paid by E. H. Lowe Company for the year 1908	283 95
Total	\$1,757 60
Balance	\$1,363 80

"That it was agreed that whatever rights petitioner, Mrs. Julia Martin might have by virtue of any lien upon the property of the bankrupt corporation situated on the premises leased, should extend to the funds that were derived as proceeds of the sale of said property and that the funds so derived from the sale of said property exceeded largely the amount of petitioner's debt.

"That the claim of Mrs. Martin ends with the 1st day of September, 1908, because at said date by agreement between the said trustee and herself, without prejudice to the rights of either in this contention, the said premises were leased by Mrs. Martin for a long term."

On this statement of facts the referee, on the 19th day of November, 1908, denied the claim, and on petition to the District Court the referee's decision was affirmed. The claimant sues out this appeal.

Leroy A. Smith and R. W. Flournoy, for appellant.
C. K. Bell, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). Under the agreed statement of facts, the appellant has by contract in writing a lien for the amount of rent due and to become due, and she also has such lien by force of the statutes of the state of Texas. Article 3251, Sayles' Tex. Ann. Civ. St. 1897, reads as follows:

"All persons leasing or renting any residence, storehouse or other building, shall have a preference lien upon all the property of the tenant in such residence, storehouse or other building, for the payment of the rents due and that may become due; provided, the lien for rents to become due shall not continue to be enforced for a longer period than the current contract year, it being intended by the term 'current contract year' to embrace a period of twelve months, reckoning from the beginning of the lease or rental contract, whether the same be in the first or any other year of such lease or rental contract. Such lien shall continue and be in force so long as the tenant shall occupy the rented premises, and for one month thereafter; but this article

shall not be construed as in any manner repealing or affecting any act exempting property from forced sales."

This lien is good and valid in cases like the present for rent due and to become due. See *Marsalis v. Pitman*, 68 Tex. 624, 5 S. W. 404; *Livingston v. Wright*, 68 Tex. 706, 5 S. W. 407; *Allen v. Brunner*, 33 Tex. Civ. App. 128, 75 S. W. 821; *Bateman v. Maddox*, 86 Tex. 546, 26 S. W. 51. Under the agreed facts, the lien claimed herein was given and accepted in good faith and for a present consideration. It is not pretended that it was given in fraud of the bankruptcy law, or that record thereof was necessary to impart notice.

Section 67d of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) reads:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Section 64b of the same law reads:

"The debts to have priority except as herein provided and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (5) debts owing to any person who by the laws of the states or the United States is entitled to priority."

Against this showing of statutory and declaratory law in favor of the appellant's claim, it is urged (and the referee and the District Court so ruled) that although the appellant's claim by contract and statute is valid, and although her lien is not affected by the bankruptcy law, yet her claim of lien must be denied because "of the uncertainty existing with reference thereto, and because of such fact it was not and could not have been a fixed liability owing by the bankrupt at the date of bankruptcy." The argument is that the claim is contingent—e. g., the leased premises may be destroyed before the rent becomes payable, and this renders the claim nonprovable under section 63 of the bankruptcy law. It may be noticed here that at the time the referee made his decision respecting the appellee's claim all the rent claimed had become due. As to this aspect of the case, we refer to Judge Brown's opinion in *Re Smith* (D. C.) 146 F. 923, as strongly persuasive, if not convincing. In his well-considered opinion the referee says:

"It is my understanding of the law that a provable debt is a sum of money absolutely owing at the commencement of the proceedings in bankruptcy, certainly, and in all events, payable without regard to the fact whether then due, past due, or to become due; that is, it must be at the date of the bankruptcy a fixed liability. This does not have reference to unliquidated demands and claims of creditors holding securities."

If a contract and a statute can fix a liability, it must be conceded that it was fixed in this case. Without conceding that appellant's claim is required to be proved under section 63, or that it may not be provable under clause 1 or 4 of that section as a fixed liability founded upon an express contract evidenced by an instrument in writing and absolutely owing at date of filing petition, we are of opinion that section 63 relates principally to unsecured debts, and that

all creditors who wish to participate in creditors' meetings and dividends must bring their cases under some one of the heads therein specified, but that in relation to claimed liens, such as here presented, section 57, Proof and Allowance of Claims, section 63, Debts Which may be Proved, section 64, Debts Which Have Priority, and section 67, Liens, should be construed together and to the effect that a lien under a state law given in good faith, not impaired or affected by the bankruptcy law, should be allowed and given its legal priority.

Industrious counsel have cited in argument, and we have examined, the following reported cases: *Longstreth v. Pennock*, 20 Wall. 575, 22 L. Ed. 451; *In re Byrne* (D. C.) 97 Fed. 762; *In re Mahler* (D. C.) 105 Fed. 428; *Atkins v. Wilcox*, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118; *In re Hoover* (D. C.) 113 Fed. 136; *In re Mitchell* (D. C.) 116 Fed. 87; *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719; *In re McIntire* (D. C.) 142 Fed. 593; *In re Smith* (D. C.) 146 Fed. 923; *In re West Side Paper Co.*, 162 Fed. 110, 89 C. C. A. 110; *In re Pittsburg Drug Co.* (D. C.) 164 Fed. 482, all involving questions pertinent to the discussion of this case, and we find in none of the reported opinions anything really inconsistent with the views herein expressed. It is not necessary to review them further than to note that in neither *Watson v. Merrill*, supra, nor *In re Mahler*, supra, much relied upon by the referee, is the matter of a landlord's lien dealt with, and that in *Atkins v. Wilcox*, also cited by counsel for trustee, that the effect of the state lien was not considered.

For the reasons given, the judgments of the referee and of the district court are reversed, and the cause is remanded, with instructions to allow the lien appellant claims for the amount agreed to be due thereon, to wit, \$1,363.80, and order payment of the same out of the reserved funds in the hands of the trustee.

ALLEN v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, First Circuit. December 13, 1909.)

No. 805.

1. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—STATUTE.

In an action by a servant for injuries under Rev. Laws Mass. c. 106, excluding the fellow servant rule and making the master liable where an employé is injured by another employé in charge of a locomotive engine or train, etc., provided the person injured was at the time in the exercise of due care, contributory negligence of the servant injured is a complete defense.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 670; Dec. Dig. § 228.*]

2. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—RAILROADS—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a car marker in a railroad yard, having had six years' experience, was injured by a standing car set in motion by a switching train, which was moving at an unusual and unreasonable rate of speed,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

without any warning being given by the conductor or engineer. Plaintiff knew the train was switching in the yard, and spoke to the engineer several minutes before the injury, but did not look up to see where the train went, or make any other observation for his safety as he was taking the numbers of certain cars. If he had cast his head to one side for a moment, he could have determined whether anything was coming down the track toward him. *Held* that, under the law of Massachusetts, plaintiff was negligent, precluding a recovery under the fellow servant law (Rev. Laws Mass. c. 106).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 756; Dec. Dig. § 240.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by John S. Allen against the New York, New Haven & Hartford Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Daniel F. Gay (George A. Gaskill, on the brief), for plaintiff in error.

Frank W. Knowlton (Choate, Hall & Stewart, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. In the court below a verdict was directed for the defendant upon the ground that the evidence was not such as to entitle the plaintiff to go to the jury upon the question of his due care.

We have had some difficulty in reaching a result in this case, but our conclusion is that the question involved is controlled by the Massachusetts decisions upon situations so nearly like the one here as to require them to be accepted as authoritative. The plaintiff invokes a statutory remedy under which the elements of his case are, in a sense, in derogation of the common law. The statute (chapter 106 of the Revised Laws of Massachusetts), as applied to a case like this, excludes the common-law fellow servant rule, and makes a defendant liable where an employé is injured through the negligence of another employé in charge or control, among other things, of a locomotive engine or train upon a railroad, provided the person injured was, at the time of the injury, in the exercise of due care. Thus it is that, although the statute, in a large sense, modifies the rigor of the common law, it was unquestionably intended that due care on the part of the person sustaining injury should remain an element of his case.

The plaintiff was a marker in a freight yard in Worcester, Massachusetts. While between the tracks in the act of taking numbers from a car, he was struck by a standing car set in motion by a shunting train, which was moving at an unusual and unreasonable rate of speed, and its approach was not signaled by either the engineer or the conductor. The circumstances of the case are such as entitle the plaintiff to recover, provided he was in the exercise of the due care contemplated by the statute. The plaintiff testified that he understood the situation was such that he was to look out for himself; that he had been work-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing in the yard for six years; that he knew that they were shifting and switching, and knew how trains were made up and moved about, but did not look to see where they went; and that, under the circumstances leading up to the injury, if he had cast his head to one side for a moment he could have determined whether anything was coming down the track. He not only said that he did not look up after seeing the engineer of the shunting train several minutes before the injury and speaking to him, but that he did not make the slightest effort to see what the engine and cars were doing.

While we do not find it necessary to accept the look and listen rule as arbitrarily controlling a case like this, where an employé is in the act of discharging his duties between railroad tracks in a freight yard, we do accept the fact of the failure to look and listen as a thing impressing itself very strongly upon the question of the plaintiff's due care, and as something to be considered with all the other circumstances surrounding the aggrieved party at the time of the injury. In some jurisdictions, in a case of negligent conduct of responsible agents, where the evidence tends to show that a plaintiff was surprised into the hurt by the sudden approach of a shunting train, which strikes and violently sets in motion an unbraked standing car, which injures him, the question whether plaintiff's due care was not one for the jury, under all the circumstances, might be a difficult one for a defendant. The Massachusetts cases, however, involving similar or analogous questions as to due care and contributory negligence, proceed upon the idea that, if the injured party had been reasonably alert, rather than wholly indifferent, or, in other words, in the exercise of some degree of care, rather than wholly negligent, he would not have been surprised, and would have avoided the danger, and that admitted failure on the part of the employé to do anything to safeguard himself in respect to surrounding dangers is conclusively persuasive and controlling upon the question of his want of due care, and that it therefore results as a matter of law that there is no question of fact left for the jury in that respect. It is quite possible that the local authorities are somewhat exceptional, in that they go further than the authorities of some other jurisdictions in the direction of holding the question of want of due care to be one of law under the given circumstances of a particular case; but we think the Massachusetts cases are so decisive and controlling upon this local quasi statutory question of the plaintiff's due care that we need not concern ourselves much, if at all, with outside authorities. Still, in the case of *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, where the plaintiff admitted that he placed himself with his face away from the direction in which the cars were expected, and continued his work without turning to look, it is said that such indifference was negligent inattention; and, while that case was different from the one at bar, because there the train was running with usual slowness, while here it was running carelessly and dangerously, the court said that, if by any means negligence could be imputed to the defendant, even then the plaintiff by his indifference and negligent inattention contributed directly to the injury.

It is quite apparent that the Massachusetts cases go to the extent of holding, where an injured party admits that he knew he was in a field of danger, like that of a railroad yard where trains are broken up and the cars shifted about to different tracks, and that he gave not the slightest attention to the hazards or to the matter of his own safety, that he is not in a position to invoke the doctrine of surprise for the purpose of making the question of due care one of fact for the jury. It is to be supposed that this doctrine is held upon the idea that the relation of the parties and the nature and hazard of the service are such that the obligation rests upon the employé to give some attention to the matter of safeguarding himself from injury, and, if he fails to discharge that obligation, and pays not the slightest attention to the dangers that in legal effect his indifference and inattention contribute to the injury.

Basing the decision, as we do, upon local holdings in respect to similar and analogous situations, we have, as already observed, no occasion to deal with outside authorities, or to enter upon a general discussion of the circumstances (involving reliance upon the assumption that due care will be exercised by the employer and his responsible agents), under which the question of due care becomes one for the jury.

The following are some of the Massachusetts cases which bear upon the question before us: *Lynch v. Boston & Albany Railroad Company*, 159 Mass. 536, 34 N. E. 1072; *Tumalty v. New York, New Haven & Hartford Railroad Company*, 170 Mass. 164, 49 N. E. 85; *Jean v. Boston & Maine Railroad*, 181 Mass. 197, 63 N. E. 399; *Morris v. Boston & Maine Railroad*, 184 Mass. 368, 68 N. E. 680; *Dolphin v. New York, New Haven & Hartford Railroad Company*, 182 Mass. 509, 65 N. E. 820; *Blute v. New York, New Haven & Hartford Railroad Company*, 195 Mass. 395, 81 N. E. 188; *Lizotte v. New York Central & Hudson River Railroad Company*, 196 Mass. 519, 83 N. E. 362.

While a casual view of *Meadowcroft v. New York, New Haven & Hartford Railroad Company*, 193 Mass. 249, 79 N. E. 266, might suggest that case as one furnishing an exception from the rigor of the rule of the above authorities, and while the recent case of *Berry v. New York Central & Hudson River Railroad Company*, 202 Mass. 197, 88 N. E. 588, might be accepted as a measurable relaxation, a more careful examination discloses that neither of these cases has the element of the plaintiff's admission of inattention or clear and unmistakable evidence of indifference to danger.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

MEYERS v. CHEESMAN et al.

(Circuit Court of Appeals, Sixth Circuit. December 18, 1909.)

No. 1,953.

APPEAL AND ERROR (§ 157*)—GROUNDS FOR DISMISSAL—REVIEW INEFFECTUAL—COMPLIANCE WITH JUDGMENT.

An appeal from an injunctive order requiring a postmaster to deliver to complainants all mail matter addressed to them received at his office between certain dates and to pay all money orders contained therein will not be entertained, where by reason of a full compliance with said order by appellant by delivering such mail and paying the orders the opinion of the appellate court will be on a purely moot question and it would be powerless to execute any decree it might render in appellant's favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 971-978; Dec. Dig. § 157.*]

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Suit in equity by J. W. Cheesman and Clark B. Youtsey against John H. Meyers, as Postmaster. From an order granting a preliminary injunction, defendant appeals. Appeal dismissed.

R. M. Allen, for appellant.

Constant Southworth, for appellees.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. This is an appeal, under the 7th section of the Court of Appeals Act of 1891 (Act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 550]), from an interlocutory injunction. The appellees, Cheesman and Youtsey, were engaged in a mail order whisky business at Newport, Ky., under the name of the York Distilling Company, or the York Company. It appears from the record that on December 26, 1908, an assistant attorney employed in the Post Office Department of the United States filed a memorandum with the Assistant Attorney General, charging that one Joseph W. Cheesman and one Clark B. Youtsey were engaged in operating a scheme devised to defraud, and of obtaining money through the mails, by means of fraudulent pretenses, representations, and promises, from the public generally, which said scheme was intended to be effected by the use of the post office establishment of the United States. This memorandum, containing an outline of the alleged fraudulent scheme so being carried on by Cheesman and Youtsey under the name of the York Distilling Company, of Newport, Ky., and the York Company, of Newport, Ky., concluded by recommending that the parties be required to show cause, if any they had, why a fraud order should not be issued against them. On December 28, 1908, John H. Meyers, postmaster at Newport, was notified by the Postmaster General that the appellees herein had been charged with the fraudulent use of the mails, and he was ordered to withhold the delivery of all mail ad-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

addressed to the York Distilling Company, or the York Company, until the disposition of said charge. It further appears that the mail so directed to be held was withheld from that date, to wit, December 28th. It further appears that the defendants were given notice of this fraud order and required to appear and show cause, and that they did appear before the Postmaster General, and did contest the sufficiency of the facts, but that on January 12th the Postmaster General made a technical fraud order, in pursuance of his authority under sections 3929 and 4041 of the Revised Statutes, as amended (U. S. Comp. St. 1901, pp. 2686, 2749), which order was in the following words:

"Post Office Department,

"Order No. 2003.

Washington.

January 12, 1909.

"It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that the York Distilling Company and the York Company, and their officers and agents of such, at Newport, Ky., are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of the act of Congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes,' approved September 19, 1890:

"Now, therefore, by authority vested in him by said act, and by the act of Congress entitled 'An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States,' approved March 2, 1895, the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concerns and parties, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order of a duplicate thereof applied for and obtained under the regulations of the department.

"And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and parties to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'Fraudulent' plainly written or stamped upon the outside of such letters or matter. Provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed in that case to send such letters and matter to the Division of Dead Letters with the word 'Fraudulent' plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

"G. L. Meyer, Postmaster General."

On January 15th the appellees filed their original bill in the United States Circuit Court at Covington, Ky., praying for a writ of injunction against the said fraud order, and against the detention under the fraud order of such mail as had accumulated between December 28, 1908, the date of the detention, and January 12, 1909, the date of said fraud order. Later the matter came on to be heard before Judge Cochran upon motion for a preliminary injunction based upon the bill and certain affidavits. Upon that hearing the court below held that the finding of fact by the Postmaster General upon which he based the fraud order complained of was correct, and that the Postmaster General had not exceeded his jurisdiction in making the order which he did make on January 12th. In reference to the mail withheld prior to January 12th, the court below, in an opinion filed and made a part of the transcript, said:

"On December 28, 1908, the Postmaster General made an order directing the defendant to withhold complainants' mail until the charges against them could be investigated and determined, and under this order their mail has been withheld from that date until the making of the fraud order on January 12th. The Postmaster General's right to proceed in such matters is purely statutory. I see nothing in the statutes authorizing the making of such an order. The sole power conferred is to make the fraud order, and that is an order directing the return of complainants' mail, not simply to withhold it until it is determined whether a fraud order shall be made. That order, as I view it, then, was void, and no justification to defendant in withholding complainants' mail. Authority for this position may be found in the case of *Donnell Mfg. Co. v. Wyman* (C. C.) 156 Fed. 415. The application for a preliminary injunction against further withholding the mail which has been withheld under the order; i. e., prior to the date of the fraud order, to wit, January 12th, is sustained."

Thereupon the court made an order in the following words:

"The court finds that the complainants are entitled to have delivered to them all mail received by the defendant prior to the making of the fraud order on January 12, 1909, and therefore grants said motion for preliminary injunction for the delivery of said mail, and overrules the motion for the preliminary injunction requiring the delivery of the mail received by defendant after said date. * * * Wherefore it is ordered that the defendant, John H. Meyers, postmaster at Newport, Kentucky, deliver to the complainants forthwith all mail received by him addressed to the York Distilling Company or the York Company, their officers or agents as such, up to the making of the fraud order on January 12, 1909, and to pay all money orders inclosed in such mail. * * *"

On the same day the defendant in said injunction bill, John H. Meyers, being the United States postmaster at Newport, Ky., prayed and was allowed an appeal to this court from the aforesaid interlocutory order and injunction. No supersedeas was asked at the time this appeal was prayed, and it has been conceded at the bar that the appellant obeyed the order of the court below and immediately delivered all mail matter which had been detained between December 28, 1908, and January 12, 1909, and has paid all postal orders contained in any such mail payable to the appellees.

This fact makes it most evident that the question now before the court is a mere moot question. It is not a case of where property has, by direction of the court, been taken from one party and turned over to another, or where money has, under the direction of the court, been paid by one litigant to another; for in such cases the court might find itself able to undo that which had been done, by compelling a restitution of that which has been erroneously delivered or paid. Mail matter actually delivered to the addressee, and postal orders actually paid to the persons entitled, constitute executed transactions, and leave the court helpless in the matter of undoing that which may possibly have been unadvisedly done. The court will not do an idle thing, and will not sit to consider whether a thing has been rightfully or wrongfully done, when it has no power to effectually correct the matter.

From this order this appeal was duly allowed, but no stay of proceedings was sought or directed. It is now conceded at the bar that the order directing the delivery of mail detained between December 28, 1908, and January 12, 1909, and the payment of postal orders contained in the mail detained before the fraud order of January 12th, has been

in all respects executed by the delivery of all such mail and the payment of all such money orders. After such compliance with the order of the court below, it is difficult to see what this court can do which would be of any practical effect to either party. Of course, there may be situations in which, after property has been delivered by one party to another under an erroneous order of a court, the wrong might be remedied by a redelivery or restoration; but in respect to such an order as is here complained of no practical method of undoing that which has been done is suggested or appears to us. In *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, the Supreme Court said:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

This statement of the rule was approved and followed in *American Book Company v. Kansas*, 193 U. S. 49, 52, 24 Sup. Ct. 397, 48 L. Ed. 613. The rule and its general application to the case has not been denied, but counsel for the government have urged a determination of the question raised as to the powers of the Postmaster General to detain mail pending a hearing of a proposed fraud order as one of much practical importance in the administration of the authority of that officer under the statute against the use of the mails for carrying on fraudulent schemes. This would be to give an opinion upon a moot question—an opinion for the future guidance of executive officers of the government. To express an opinion as to the powers of the Postmaster General in a case where the court would be powerless to execute any decree or judgment in the premises would not be the exercise of judicial powers. *United States v. Evans*, 213 U. S. 297, 29 Sup. Ct. 507, 53 L. Ed. 803.

The proper judgment is that the appeal should be dismissed.

DAVIS v. DAVIS.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1909.)

No. 890.

1. JUDGMENT (§ 818*)—FOREIGN JUDGMENT—FULL FAITH AND CREDIT.

The constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of every other state, and the act of Congress passed pursuant thereto, does not prevent inquiry in an action on a foreign judgment into the jurisdiction of the court rendering it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1458; Dec. Dig. § 818.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. JUDGMENT (§ 870*)—REVIVAL—STATUTES—SCIRE FACIAS.

St. Westm. II, 13 Edw. I, c. 45, extended the remedy of scire facias to revive a judgment, which theretofore existed at common law only as to real actions and writs of annuity, to include judgments in personal actions which had not become dead, but only dormant by a failure to issue execution within a year and a day.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1609; Dec. Dig. § 870.*]

3. JUDGMENT (§§ 853, 870, 910*)—REVIVAL.

Where no execution had been issued on a judgment at common law within a year and a day, it became dormant, but was not dead, and could still be the foundation of a new action of debt, or, at plaintiff's election, could be revived by scire facias, so as to again become a lien on which execution might issue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1565, 1609, 1732; Dec. Dig. §§ 853, 870, 910.*]

4. JUDGMENT (§ 870*)—REVIVAL—SCIRE FACIAS—NATURE OF ACTION.

The writ of scire facias to revive a judgment at common law was not a new action, but a continuation of the old one.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1613; Dec. Dig. § 870.*]

5. JUDGMENT (§ 853*)—LIENS—STATUTES—CONSTRUCTION.

Act Pa. June 1, 1887 (P. L. 289), provides that all judgments entered in any court of record, or revived as prescribed by the act, shall continue a lien on defendant's real estate for five years from the date of entry or revival, and no longer, unless revived within that period by agreement of the parties or by a writ of scire facias. *Held*, that such act merely dissolved the lien of a judgment not revived on real estate at the expiration of five years, but had no effect on the life of the judgment as a debt, or on the right of its owner to have execution against personality.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1565-1570; Dec. Dig. § 853.*]

6. JUDGMENT (§ 866*)—LIFE OF JUDGMENT—REVIVAL.

Act Pa. May 19, 1887 (P. L. 132), provides that execution may issue on any judgment of record, notwithstanding its loss of lien on real estate, without a previous writ of scire facias to revive it, provided execution shall not issue after 20 years, and that at the issue of execution a scire facias shall be issued to revive the judgment, and, in case defendants in such writ shall file an affidavit alleging a just and legal defense, the court may stay the writ of fieri facias by an order preserving the lien. *Held*, that the life of a judgment in Pennsylvania under such act is 20 and not 5 years, during which execution may issue against real estate, and that scire facias may be had to revive a judgment at any time within 20 years after its entry.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1604; Dec. Dig. § 866.*]

**7. JUDGMENT (§ 933*)—FOREIGN JUDGMENT—ACTION—DECLARATION—DEMUR-
RER.**

In an action on a foreign revived judgment, the declaration was not demurrable because the defendant was not a resident of the state in which the judgment was revived, and therefore the court acquired no jurisdiction as against her to revive the judgment, where her nonresidence did not appear in the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1763; Dec. Dig. § 933.*]

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling.

Action by Daniel J. Davis against M. C. Davis, alias Mattie M. Davis, on a judgment. From an order sustaining a demurrer to the declaration (164 Fed. 281), plaintiff brings error. Reversed.

On the 4th day of December, 1897, a judgment was entered in the court of common pleas (No. 1) of Allegheny county, Pa., in favor of plaintiff in error against defendant in error, upon a confession entered by an attorney for defendant pro hac vice, for the sum of \$2,000, with interest thereon from July 19, 1897, costs of suit, and an attorney's fee of 5 per cent., as provided in the judgment note sued upon, with waiver of inquisition, and voluntary condemnation and agreement to sale of any and all property levied on under execution, and waiver of exemption laws. Upon this judgment an execution was issued on December 4, 1897, and levied upon certain goods, which yielded the costs of suit (amounting to \$161.75) and \$383.40 upon the debt, after payment of certain preferred claims for rent, wages, etc. No further executions were issued upon this judgment; and on October 17, 1906, a scire facias to revive and continue the lien of said judgment was issued to first Monday of November, 1906, upon which the sheriff made return of "nihil habet." Thereupon, on the 13th day of November, 1906, an alias sc. fa. was issued to first Monday of December, 1906, upon which a similar return of "nihil habet" was made by the sheriff, and upon such two successive returns of "nihil habet" judgment was entered upon the affidavit of the plaintiff for the sum of \$2,664.85, on the 26th day of December, 1906.

On February 28, 1907, a summons in debt was sued out of the clerk's office of the Circuit Court of the United States for the Northern District of West Virginia, returnable at March rules, at Wheeling, and was duly served on the defendant and returned on March 2, 1907, and at said rules the plaintiff in error filed in the clerk's office of said court his declaration in debt, reciting the recovery of the said last-mentioned judgment, and filed with his said declaration a bill of particulars, which included a complete exemplification of the record in the Pennsylvania court, from which the facts hereinbefore set forth appear. The declaration recites that the plaintiff is a citizen and resident of the state of Pennsylvania, and that defendant is a citizen of the state of West Virginia and an inhabitant of the Northern district thereof, thus showing the necessary diversity of citizenship to confer jurisdiction, as well as that the amount involved is sufficient for the cognizance of the United States court. At March rules, 1907, a special appearance was entered by the defendant for the sole purpose of moving to set aside and quash the return of service and the writ, which motion was overruled by the court. On September 17, 1907, the defendant craved oyer of the record of the judgment of the court of common pleas No. 1 of Allegheny county, Pa., mentioned in the declaration, and, the same being read to her in open court, demurred to the declaration, and the plaintiff joined issue in demurrer. On October 15, 1907, the court, by order, for reasons set forth in an opinion filed therewith and made a part of the record, sustained said demurrer, and, the plaintiff not desiring to amend his declaration, judgment was entered in favor of the defendant, to which the plaintiff sued out this writ of error.

S. L. Reed (T. M. Garvin and D. A. McKee, on the brief), for plaintiff in error.

Charles Powell, for defendant in error.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

KELLER, District Judge (after stating the facts as above). The plaintiff in error assigns as error the action of the court in sustaining the demurrer to the declaration and rendering judgment in favor of the defendant in error, and in refusing to render judgment in favor of plaintiff for the amount of the judgment entered by the court of common pleas No. 1 of Allegheny county, Pa.

Upon another state of the record it might be necessary for us to discuss some questions which, by reason of the fact that the opinion of the court below is made a part of the record, are rendered unnecessary. From that opinion, copied in full in the record, it appears that the learned trial judge, while emphasizing the doctrine announced in *Thompson v. Whiteman*, 18 Wall. 457, 21 L. Ed. 897, to the effect that neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevent an inquiry into the jurisdiction of the court of another state by which a judgment offered in evidence was rendered, held that there is nothing in the record to show that the Pennsylvania court did not have jurisdiction over the person of the defendant at the time the original judgment was pronounced, and concludes that said original judgment was a valid one. The court further held that although, under West Virginia law (Code 1906, § 3812, c. 124, § 10), "no judgment shall be rendered on a scire facias, or in any other case, on returns of nihil," in Pennsylvania, by reason of the act of July 9, 1901 (P. L. 615), of the Legislature of Pennsylvania providing that "two returns of nihil habet shall be equivalent to personal service, in writs of scire facias to revive judgments entered in personal actions," two returns of "nihil habet" would be good as service upon a scire facias to revive a judgment, if said writ were sued out within five years after the rendition of the judgment.

The court below based its judgment sustaining the demurrer upon the theory that, under the laws of Pennsylvania, "the life of a judgment is five years from the date of its rendition," and that, consequently, no scire facias can be sued out to revive a judgment after the lapse of five years, because the judgment is then "dead." This, therefore, is the only question really before us upon the present record, and we will proceed to examine the origin of the scire facias to revive or continue the lien of a judgment, and also the laws and some of the decisions of Pennsylvania touching this question.

In *Foster, Sci. Fa. 2*, it is said that scire facias post annum et diem (after a year and a day) lay at common law in real actions and on a writ of annuity, where the plaintiff did not sue out execution on his judgment within a year and a day. In personal actions, prior to the statute of Westminster II (13 Edw. I, c. 45), if the plaintiff did not have execution within a year and a day, he was put to a new action upon his judgment. This statute, however, extended the remedy by scire facias to personal actions, and its provisions have been re-enacted generally in the United States, though the new acts have generally extended the time within which execution may issue without revival by scire facias.

Treating of the methods of executing judgments, Blackstone says (book 3, p. 421):

"But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the court concludes *prima facie* that the judgment is satisfied and extinct. Yet, however, it will grant a writ of scire facias in pursuance of St. Westm. II, 13 Edw. I, c. 45, for the defendant to show cause why the judgment should not be revived, and execution had against him, to which the defendant may plead such matter as he has to al-

lege in order to show why process of execution should not be issued; or the plaintiff may still bring an action of debt founded on his dormant judgment, which was the only method of revival allowed by the common law."

It will thus be seen that the Statute of Westminster II served to extend to personal actions the remedy by *scire facias* to revive a dormant judgment, which theretofore existed at common law only as respected real actions and writs of annuity. It will be observed from the quotation from Blackstone that the judgment, in default of execution within a year and a day, did not become "dead," but merely dormant. It still subsisted as a debt, and could still be the foundation of a new action of debt, or, at the election of the plaintiff, be revived by *scire facias*, so as to again become a lien upon which execution might issue. And the writ of *scire facias* to revive a judgment was not a new action, but a continuation of the old one. *Eldred v. Hazlett*, 38 Pa. 16.

The court below based its decision upon its view of the effect of the act of March 26, 1827 (P. L. 129), now replaced by that of June 1, 1887; but as that act merely has reference to the lien of judgments upon the real estate of defendants, and has no reference to either its life as a debt, or the right of its owner to an execution against personalty, it becomes evident that the court must have misconceived its purpose and effect. We here quote so much of the act of June 1, 1887 (P. L. 289), as suffices to show its purpose and effect:

"All judgments entered in any court of record in this commonwealth, or revived in the manner prescribed by this act or the act to which this is a supplement, shall continue a lien on the real estate of the defendant for the term of five years from the date of entry or revival, and no judgment shall continue a lien on such real estate for a longer period than five years from the day on which such judgment may be entered or revived unless revived within that period by agreement of the parties and terre tenants filed in writing and entered on the proper docket, or a writ of *scire facias* to revive the same be sued out within said period, according to the provisions of the act to which this is a supplement," etc.

The case of *Miller v. Miller*, 147 Pa. 545, 548, 23 Atl. 841, shows that the effect of this act was merely to allow the lien upon real estate to lapse if the judgment was not revived within five years, but not to render the judgment dead, and that it is only as to its lien upon real estate that the judgment is affected. In that case it was said:

"Under the act of May 19, 1887 (P. L. 132), real estate cannot be taken in execution under a judgment more than five years old prior to revival of such judgment."

The act of May 19, 1887, referred to in this decision, is as follows:

"From and after the passage of this act, execution may issue upon any judgment of record in any of the courts of this commonwealth, notwithstanding such judgment may have lost its lien upon real estate without a previous writ of *scire facias* to revive the same: Provided, however, that such execution shall not issue after the lapse of twenty years from the maturity of the judgment. And provided, further, that at the same time execution is issued a *scire facias* shall be issued to revive the judgment upon which said execution is issued, and in case the defendant or defendants in said writs file an affidavit alleging a just and legal defense against the revival of said judgment, it shall be lawful for the court, or a judge thereof in vacation, to stay

the writ of fieri facias by an order preserving a lien thereof, and to order the scire facias on the head of the list for trial at the next term for the trial of civil cases."

The Miller Case shows that the act just quoted is not applicable to executions against real estate; but it, and the act itself, both show that the life of a judgment in Pennsylvania is 20 years, and that scire facias may be had to revive a judgment at any time within 20 years after its entry.

The defendant in error in her brief seeks to sustain the judgment of the court below upon the demurrer by the assertion that on December 26, 1906, when the judgment entered in 1897 was revived, M. C. Davis, alias Mattie M. Davis, was not a resident of Pennsylvania, and had not been such for several years. Such fact may be material upon the merits, especially in view of the fact that, unlike the practice in England and in most of the other states of the Union, the judgment upon scire facias in Pennsylvania is a judgment quod recuperet, and it is only by reason of that fact that the jurisdictional amount for suit in the United States courts is made out. But it is sufficient for the present purpose to say that no such fact appears in the record, and hence that there is no parallel between the case at bar and such cases as *Hepler v. Davis*, 32 Neb. 556, 49 N. W. 458, 13 L. R. A. 565, 29 Am. St. Rep. 457, and *Owens v. McCloskey*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837, cited by defendant in error in her brief. In each of those cases the defense was based on the fact that at the date of the revival of the original judgment the defendant was not a resident of the state in which the judgment was revived, and that, considered as a new action, it had no binding force for want of personal service of process or voluntary appearance, and, viewed as a continuation of the original action, its only effect was to revive the local lien, and could not be availed of as removing the statutory limitation of the *lex fori*, which limitation period had elapsed in both of these cases since the rendition of the original judgments before suit brought thereon.

Such defense could not arise by way of demurrer in the absence of a showing in the record that the defendant was not a resident of Pennsylvania when the judgment against her was revived. If she was such resident, she was certainly subject to the laws of the state of Pennsylvania in respect to the character of process necessary to proceedings by way of scire facias to revive personal judgments. If she was not, such defense must be raised by an appropriate pleading in that behalf.

It results that the judgment of the court below must be reversed, with costs.

Reversed.

VERMONT et al. v. UNITED STATES. †

(Circuit Court of Appeals, Eighth Circuit. December 4, 1909.)

No. 2,854.

1. INTERNAL REVENUE (§ 16*)—TAXES—OLEOMARGARINE—STATUTES—CONSTRUCTION—"ANY PERSON."

Oleomargarine Act 1886 (Act Aug. 2, 1886, c. 840, § 3, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2229]), as amended by Act May 9, 1902, § 2, 32 Stat. 194 [U. S. Comp. St. Supp. 1909, p. 864], imposes a tax on manufacturers of oleomargarine, and declares that every person who manufactures oleomargarine for sale, and "any person" that sells, vends, or furnishes oleomargarine for use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter, shall be held to be a manufacturer of oleomargarine within the act. *Held*, that the words "any person" are not limited to licensed wholesale or retail dealers in oleomargarine, but are comprehensive enough to embrace any or all persons, whether licensed dealers or not, selling, vending, or furnishing oleomargarine to which he has added coloring matter to represent butter.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 16.*]

2. INTERNAL REVENUE (§ 16*)—TAXES—OLEOMARGARINE—"MANUFACTURER."

Oleomargarine Act 1886 (Act Aug. 2, 1886, c. 840, § 3, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2229]), as amended by Act May 9, 1902, § 2, 32 Stat. 194 [U. S. Comp. St. Supp. 1909, p. 864], defines a manufacturer of oleomargarine as any person who sells, vends, or furnishes oleomargarine for use or consumption by others who shall add to or mix any artificial coloration so as to make it resemble butter. *Held*, that the actual selling, vending, or furnishing of oleomargarine for use and consumption by others is not one of the necessary components of a manufacturer as contemplated by such act, so as to require proof of actual selling, vending, or furnishing of some of the product to constitute the offense; the term "manufacturer" as so used being construed to mean one engaged in the business of selling, vending, or furnishing oleomargarine for consumption of others.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4347-4358.]

3. INTERNAL REVENUE (§ 47*)—OLEOMARGARINE—OFFENSES—COLORATION—EVIDENCE.

Evidence *held* sufficient to warrant a conviction of defendants as manufacturers of oleomargarine for mixing coloring matter therewith to represent butter without having paid the federal tax and obtained the required license, and for selling, vending, or furnishing oleomargarine for use and consumption of others.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 47.*]

4. INTERNAL REVENUE (§ 40*)—OLEOMARGARINE TAX—DESTRUCTION OF STAMPS—OMISSION—OFFENSES.

The oleomargarine act of 1886 (Act Aug. 2, 1886, c. 840, § 13, 24 Stat. 211 [U. S. Comp. St. 1901, p. 2232]) provides that, whenever any stamped package containing oleomargarine is emptied, the person in whose hands the same is shall destroy the stamps thereon, and any person who willfully neglects or refuses to do so shall be fined, etc. *Held* that, in order to constitute an offense under such section, the package must have been stamped, denoting the payment of the tax, it must have been emptied of its tax paid contents and been in defendant's possession in its emptied condition, and defendants must have neglected or refused to destroy the stamp during such possession.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 40.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 1, 1910.

5. INTERNAL REVENUE (§ 47*) — OLEOMARGARINE — PACKAGES — STAMPS — OMISSION TO DESTROY.

Evidence held to sustain a conviction of willfully refusing to remove the stamps from oleomargarine packages on removal of the contents therefrom, in violation of the oleomargarine act of 1886 (Act Aug. 2, 1886, c. 840, § 13, 24 Stat. 211 [U. S. Comp. St. 1901, p. 2232]).

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 47.*]

Carland, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Missouri.

Roy Vermont and another were convicted of violating the oleomargarine law, and they bring error. Affirmed.

The plaintiffs in error were indicted in one count of the indictment for carrying on the business of manufacturing oleomargarine without having first paid the special tax therefor in violation of section 3 of the oleomargarine act of 1886 (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2229]), as amended by section 2 of the act of May 9, 1902 (Act May 9, 1902, c. 784, 32 Stat. 194 [U. S. Comp. St. Supp. 1909, p. 864]). The statute as amended reads as follows: "Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine, and any person that sells, vends or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow, shall also be held to be a manufacturer of oleomargarine within the meaning of said act and subject to the provisions thereof."

They were also indicted in six other counts of the same indictment for having in their possession certain empty packages which had contained oleomargarine without having destroyed the stamps which denoted the payment of the tax thereon. They were convicted on each of the counts and now prosecute error.

Walter N. Davis (Horace L. Dyer, on the brief), for plaintiffs in error.

Henry W. Blodgett (Charles H. Daues, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). The government undertook to prove under the first count that the defendants were manufacturers of oleomargarine, not by testimony showing that they manufactured it out of the raw material, but that they mixed artificial coloration with the white oleomargarine to make it look like yellow butter.

These two questions of law are relied upon by defendants to secure a reversal of their conviction on this count: (1) That it should have been averred in the indictment and proved at the trial that the defendants were wholesale or retail dealers in oleomargarine; and (2) that it should have been averred and proved that the defendants actually sold, vended, or furnished the particular oleomargarine which they manufactured. The court overruled a demurrer to the count based on these grounds, and that action is assigned for error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The argument is that the words "any person," which form the subject of the second definition of a manufacturer in the amended act relate exclusively to licensed wholesale or retail dealers in oleomargarine, because such are the only persons who can lawfully sell, vend, or furnish oleomargarine for the use and consumption of others.

If such dealers were the only persons who could sell, vend, or furnish colored oleomargarine, there would be force in this argument, but most obviously such is not the case. The temptation to make the additional profit which would result by evading the payment of the tax of 10 cents a pound imposed by law upon colored oleomargarine naturally appeals more strongly to the dishonest and irresponsible than to the legitimate dealer; and the former would likely be the class Congress was most solicitous to regulate. It must be admitted that it is possible and well within the power of any and all persons to resort to the business of coloring oleomargarine to make it look like butter; and, in view of this possibility, the words "any person" under consideration were doubtless employed by Congress. They are broad and comprehensive and easily embrace any and all persons whether licensed wholesale or retail dealers or otherwise; and by a familiar rule of construction they should be given full force and effect, to the end that the legislative purpose may be subserved. We think there is no merit in this first objection to the indictment.

It is next argued that the language employed in the amended act necessarily requires, not only the adding or mixing of artificial coloration with oleomargarine, but the actual selling, vending, or furnishing of some of the colored product to constitute one "a manufacturer," and that, inasmuch as there was no proof that defendants actually sold, vended, or furnished any of the oleomargarine, which they colored, the conviction cannot stand on the first count. But we cannot give our assent to this proposition. The actual selling, vending, or furnishing of oleomargarine for the use and consumption of others is not one of the substantive and necessary components of a "manufacturer" as there contemplated. The words, "that sells, vends or furnishes oleomargarine," etc., rather qualify or limit the subject of the sentence in which they are found. It is not "any person" merely, but "any person that sells, vends or furnishes," etc., that may become a manufacturer by adding or mixing coloring matter. It is not an uncommon use of language to say that one sells or vends fruit, for instance, and to mean thereby not that he has actually made a sale, but that he is engaged in the business of selling or vending fruit.

We think such is the sense in which Congress employed the words in question, and that the true meaning of the sentence is that any person engaged in the business of selling, vending, or furnishing oleomargarine for the use and consumption of others who shall add or mix with oleomargarine any artificial coloring matter shall be held to be a manufacturer and subject to the provisions of the act.

An interpretation of the act which requires proof that one who confessedly manufactured as a part of his regular business large quantities of oleomargarine to supply the trade has actually sold or disposed of some part of that manufactured product before the process of manufacturing can be considered complete and he be held to the duties

and obligations of "a manufacturer" would not only do violence to the common understanding, but would result in the anomalous situation that one could not be a manufacturer without being, by the same token, either a wholesale or retail dealer. From this it would follow that a mere manufacturer, who is required by section 3 of the oleomargarine act to pay a special tax of \$600 as such, would also be required to pay the additional tax imposed by the same section upon either a wholesale or retail dealer, as the case might be, in the manufactured product. We cannot believe that Congress intended by the amendment in question to bring about such incongruous and ill fitting condition of things.

The defendants' next contention is that there was no evidence that they actually added to or mixed any artificial coloration with oleomargarine, and that the court erred in overruling their demurrer to the evidence offered at the close of the case. This contention in our opinion is also without merit.

The defendants were caught in flagrante delicto. They were found operating a well-equipped oleomargarine factory. In it were tubs filled with colored oleomargarine, cans of coloring matter, aprons and jackets soiled with grease and butter color, and a large number of empty tubs and caddies. Finger marks were discovered upon warm and mushy oleomargarine indicating recent manipulation and mixing, and, while there was no direct proof of the physical mixing of coloring matter with oleomargarine, the uncontradicted facts carried an unmistakable inference that the coloring process was in actual operation on the day the defendants were arrested. It is not deemed necessary to discuss the details of the evidence. It was ample to justify the verdict, notwithstanding the objection last referred to.

It is suggested that there is no evidence tending to show that defendants were engaged in the business of selling, vending, or furnishing oleomargarine for the use and consumption of others, and, for that reason, they are not brought within the contemplation of the oleomargarine act in question, even as interpreted by us. Defendants' counsel neither in their oral argument nor brief made any point of this kind, and we possibly might be excused from considering it. However that may be, the facts just recited and others of similar import are in our opinion inconsistent with the suggestion made. It cannot be well conceived that the defendants were engaged in coloring the large quantities of oleomargarine disclosed by the proof to have been in their possession merely for personal use or personal diversion. They must have had some reasonable purpose for doing it, and nothing is more reasonable than a purpose to dispose of it for the use to which it was specially adapted, namely, general consumption. Rational beings are presumed to intend the natural and reasonable consequences of their acts, and fair inferences from established facts are oftentimes more reliable and persuasive of the truth, especially when intent or purpose is involved, than oral statements concerning them.

The next assignment of error relied upon by the defendants' counsel is that there was no evidence to support the verdict of guilty on the remaining six counts of the indictment. These counts were grounded on section 13 of the original oleomargarine act of 1886 (24 Stat. 211), which reads as follows:

"That whenever any stamped package containing oleomargarine is emptied it shall be the duty of the person in whose hands the same is, to destroy utterly the stamps thereon; and any person who willfully neglects or refuses so to do shall for each such offense be fined not exceeding fifty dollars and imprisoned not less than ten days nor more than six months."

The obvious purpose of this enactment was to prevent fraudulent evasion of the tax of 10 cents per pound imposed upon colored oleomargarine and one-fourth of a cent per pound imposed upon white or uncolored oleomargarine. It should therefore be construed as far as possible to promote rather than defeat the legislative purpose. The facility with which a package could be emptied and refilled with the same or different substance and the natural inclination of the lawless to escape taxation doubtless afforded the motive for enacting this law. There are four elements of the offense charged in these counts: (1) The package must have had a stamp on it denoting the payment of a tax; (2) it must have been emptied of its tax paid contents; (3) it must have been in that emptied condition in the possession of the defendants; and (4) they must have willingly neglected or refused to destroy the stamp while the empty package was in their possession.

We have already called attention in a general way to the character and equipment of the building in which defendants carried on their business. It may now be added that they had no license either for manufacturing or selling oleomargarine at that place; that they did their work secretly, and, when discovered, attempted flight. The proof is ample that they were conducting some illegitimate business, and this included, as we have already shown, coloring of oleomargarine so as to make it resemble yellow butter, and evading the manufacturer's special tax due from them for so doing. With this background or setting in view, we will consider the evidence relied on to support the conviction on the last six counts of the indictment.

It is an uncontradicted fact that oleomargarine, artificially colored to resemble yellow butter, was found in the defendants' possession at their place of business packed in six tubs or packages each bearing a stamp denoting the payment of a tax of one-fourth cent per pound due on white or uncolored oleomargarine. This fact, taken in connection with the fact that the defendants were then actually engaged in coloring oleomargarine, so as to evade the tax, warrants the reasonable inference that the packages had once contained white or uncolored oleomargarine. They bore the stamps indicating in law that such had once been their contents.

It is also undisputed that these same packages at the time of defendants' arrest contained colored oleomargarine. This colored oleomargarine had been substituted for the uncolored which must have been there before. Not only is it reasonable to say that it could not have been so changed without emptying the original contents out of the packages, but there is undisputed evidence that one package carrying the stamp for uncolored oleomargarine found in defendants' place of business at the time of the arrest was empty, and that 60 pounds of uncolored oleomargarine were then found dumped on a printing table in their premises. It is further undisputed that the stamps which were upon these packages had never been destroyed, that those denoting the pay-

ment of a tax of one-fourth of a cent a pound were found intact upon packages containing colored oleomargarine, which was taxable at 10 cents a pound, and that all these things were discovered on premises in possession of the defendants, where they were clandestinely carrying on the illegitimate business of manufacturing oleomargarine without paying the special tax provided by law therefor.

We think these and other facts of like character unnecessary now to be mentioned with the reasonable inferences deducible from them tended almost irresistibly to establish each and every element of the offense charged against the defendants in the last six counts of the indictment, and that the jury was fully warranted in finding them guilty as charged.

This concludes the consideration of the errors assigned and relied upon by defendants' counsel, and results in an affirmance of the judgment of the District Court.

CARLAND, District Judge (dissenting). I am unable to concur in the majority opinion in so far as it holds that there was no error in the ruling of the trial court with respect to the first count of the indictment. In my opinion the count was good as a pleading, not for the reason stated by the majority, but for the reason that, under the allegation that defendants carried on the business of manufacturers of oleomargarine, evidence was admissible to show that defendants were any kind of manufacturers defined by law. In other words, the pleader was not obliged to plead evidence. I dissent from the majority opinion in so far as it holds that the defendant may be convicted under the first count merely upon evidence from which the jury might find that said defendants at a certain time and place mixed with oleomargarine artificial coloration that caused such oleomargarine to look like butter. There is no evidence in the record that the defendant Garrett ever engaged in the business of selling, vending, or furnishing oleomargarine for the use and consumption of others, or that he ever had a license so to do. There is no evidence that the defendant Vermont ever engaged in the business of selling, vending, or furnishing oleomargarine for the use and consumption of others. There is no evidence that either defendant ever sold any oleomargarine colored in the way mentioned in the statute either by themselves or any one else. It is unnecessary to determine on this record whether the words "any person" used in the statute mean a licensed dealer or not. The majority opinion concedes, and the law says, that it must be "any person that sells, vends, or furnishes."

Whether these words be construed to mean licensed dealers, or persons who are engaged in the business of selling, vending, or furnishing unlawfully without license, or whether it means the sale of oleomargarine lawfully or unlawfully by a person who has mixed artificial coloration with oleomargarine, it still remains true that there is no evidence in the record to bring the defendants within either construction. If we are to indulge in presumptions, they must be those of innocence, not of guilt. The defendants were captured in the loft of a barn, on the first floor of which colored oleomargarine was found, together with empty tubs and artificial coloration. On this showing the defendants

were convicted of being manufacturers of oleomargarine by mixing artificial coloration with uncolored oleomargarine.

In my opinion the collection of the revenue does not require nor the due administration of justice permit such a result. The judgment on the first count should be reversed, and a new trial ordered.

LEHIGH VALLEY COAL CO. v. IONIA TRANSP. CO.

(Circuit Court of Appeals, Eighth Circuit. November 29, 1900.)

No. 2,999.

1. SHIPPING (§ 173*)—DEMURRAGE—DIVERSION OF VESSEL BY CARGO OWNER.

Where a vessel is diverted from her original destination at the request of the consignor of the cargo, the latter becomes liable for all damages occasioned thereby.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 570; Dec. Dig. § 173.*]

2. SHIPPING (§ 183*)—DEMURRAGE—AMOUNT.

A charterer or cargo owner who wrongfully delays the discharge of a vessel is chargeable with demurrage for every day's delay between the time she should have been discharged and the time her discharge was actually completed, whether Sundays intervened or not.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 593; Dec. Dig. § 183.*]

3. SHIPPING (§ 177*)—DEMURRAGE—DELAY IN DISCHARGING.

Where, through the charterer's failure to discharge a vessel at her port of destination, she is obliged to proceed to another port, she cannot be held to have contracted with reference to a custom of such port that she shall await her turn to discharge, and for delay caused thereby the charterer is liable in demurrage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576-582; Dec. Dig. § 177.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the District of Minnesota.

Suit in admiralty by the Ionia Transportation Company against the Lehigh Valley Coal Company. Decree for libellant, and respondent appeals. Affirmed.

L. K. Luse (Powell & Luse, on the brief), for appellant.

H. R. Spencer, for appellee.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge. This was an appeal from a decree in admiralty awarding the appellee \$1,960.16 damages. The libel was filed by the Ionia Transportation Company, the owner of the steamer Ionia, against the Lehigh Valley Coal Company, consignor of a cargo of coal to recover demurrage for the detention of the vessel an unreasonable length of time for the discharge of its cargo.

The facts are these: On August 12, 1907, the Ionia left Buffalo car-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rying 2,357 tons of coal consigned by the appellant to M. Van Orden Company at the Port of Houghton, Mich. On August 18th the vessel arrived in due time and reported to Van Orden Company, who, for reasons unnecessary to be stated, were unable to accept or discharge the cargo. Correspondence followed between the master of the vessel and the consignor, in which the latter was advised that the cargo would be delivered at any accessible port, provided the shipper would pay all damages occasioned by lost time, additional outlay, and extra freight incident to the diversion. The consignor directed the master to sail to the Port of Superior and there discharge the cargo at its dock.

There is some controversy as to whether the consignor accepted the conditions upon which the vessel offered to make the diversion. It claims that the master agreed to transport the cargo from Houghton to Superior for a reasonable and fair rate of freight only and without any demurrage. The vessel proceeded to the Port of Superior, arriving there on August 21st, and forthwith reported its arrival and readiness to discharge its cargo to the appellant's agent at that place. There were two large steamers ahead of the Ionia for discharge, and the latter, according to the custom of the port, was thereby detained until August 28th before discharging its cargo. It is claimed by appellee that there was a detention of at least eight days more than there would have been if the vessel had been promptly discharged at Houghton, the original port of destination, for which it is entitled to recover demurrage. It is claimed by appellant that by reason of the special understanding had between it and appellee before the diversion was undertaken it became liable only for reasonable freight. It is also claimed by appellant that it was not liable for the detention, because it was occasioned by the discharge of other vessels, which, according to the custom of the port, had a prior right to be discharged, and that the appellee must be held to have undertaken the transportation in view of and subject to such possibility.

There are 24 actual assignments of error presenting the same question in about as many different ways; but there are not more than three real questions in the case. The proctors for the appellant candidly say in their brief:

"The contention of the appellant is that when the destination of the cargo was changed it was so changed upon the understanding that a reasonable and fair rate for the transportation of the coal should be paid and no more, while the contention of the appellee is that the appellant should pay all damages for loss which was sustained by reason of the consignee's refusal to receive the cargo."

Again they say:

"If the contention of the proctors for the appellant is sustained, the appellee is entitled to recover only reasonable compensation for the extra transportation of the coal from Houghton to Superior; the appellee taking its own chances as to the perils of the sea, the time of arrival at Superior, and the waiting under the custom of that port for the discharge of the vessel."

The substance of the controversy is, therefore, made to depend upon a narrow question of fact. In the effort to reach a correct conclusion of this issue, we have carefully scrutinized all the evidence, and are brought to the conclusion that the appellant's version of the matter is

not sustained. Instead of having an understanding or agreement that appellant's liability should be limited to the reasonable and fair freight for the extra transportation, we think it altogether probable that appellant accepted the master's proposition to deliver the coal at Superior on the terms of paying all damages which might accrue to the appellee on account of delay and lost time, besides the additional freight. But whether this be so or not, after finding that there was no agreement between the parties as claimed by appellant, the law fixes their rights and obligations. It is well settled that, when a diversion from the original destination is made at the request of the shipper, the latter becomes liable for any and all damages occasioned thereby. In the case of *Pioneer Fuel Co. v. McBrier*, 28 C. C. A. 466, 84 Fed. 495, Mr. Justice Brewer, speaking for this court, said:

"The steamer contracted with the owners to take their coal and deliver it to the claimant at Duluth, free of handling. It knew what conveniences the claimant had for unloading. It knew the time which would reasonably be occupied in unloading at the claimant's dock, and with that knowledge it contracted for a certain price of carriage. It had a right to expect that the owners would see that arrangement was made with the claimant for receiving and unloading the cargo, and if they failed to make such arrangement, and there was consequently a longer detention than was originally necessary for unloading at claimant's dock, it was entitled to demurrage."

See, also, to the same effect, *Cross v. Beard*, 26 N. Y. 85; *Fulton v. Blake*, 3 Biss. 371, Fed. Cas. No. 5,153; *The Dictator* (D. C.) 30 Fed. 637; *Donaldson v. McDowell*, Fed. Cas. No. 3,985.

It results that appellee was entitled to some demurrage. The only question left is as to the amount. It is contended that the District Court erred in allowing damages for the vessel's delay over one Sunday which intervened while it was awaiting discharge. The home of the ship is on the sea, and it probably costs no less, after a voyage is once begun, to continue on than it would to ride at anchor. If the *Ionia* had been promptly discharged, she might the sooner have been chartered for some other voyage, and commenced earning additional freight. It has been held, and we think properly, that the consignor who wrongly occasions delays in discharging a vessel is chargeable with demurrage for every day's delay between the time discharge should have been completed and the time it was actually completed, whether Sundays intervened or not. *Lindsay, Gracie & Co. v. Cusimano* (C. C.) 12 Fed. 504; *Baldwin v. Sullivan Timber Co.*, 142 N. Y. 279, 36 N. E. 1060.

It is lastly contended that the delay at the Port of Superior occasioned by the arrival and discharge of two other ships, which, according to the custom of the port, were first to be discharged, cannot be the subject of demurrage. This, we think, is untenable. It may be conceded that, if the original charter party had been for delivery at the Port of Superior, the custom of that port would have been within the contemplation of the parties, and they might be held by implication to have contracted in view of and subject to it. But such is not the present case. The agreement here was for delivery at the Port of Houghton. The owner of the vessel was willing to undertake the carriage for delivery at that port. Its other engagements doubtless per-

mitted it to do so profitably, while they might not have permitted it to undertake the carriage and delivery to a more distant port, attended possibly with more inconveniences and difficulties. Certain it is it never agreed to do so.

Appellant's breach of contract in failing to give the vessel dispatch at Houghton was the wrongful act which resulted in damages to appellee. That failure necessitated some other disposition of the cargo, and all delays incident thereto resulted proximately from the breach. In the absence of an understanding or agreement fixing the terms for the further transportation of the cargo, no implication arises that the vessel agreed to sustain the loss resulting from delays in the final discharge whether from the custom of the port where made, or otherwise. Cases *supra*.

The case of *Empire Transportation Co. v. Philadelphia & R. Coal & Iron Co.*, 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623, relied upon by the proctors for appellant, has no pertinency to the peculiar facts of this case. The "custom of the port" there under consideration had relation to the reasonableness of the time the vessel took to make discharge of its cargo at the port of original destination; and, even there, it is said to afford no absolute rule, but to constitute one of the facts and circumstances determinative of the question at issue whether the discharge was accomplished within a reasonable time.

Some rulings on the admission of evidence and on other phases of the case are complained of by appellant; but, after a patient consideration of them all, nothing is discovered prejudicially affecting the rights of the appellant.

The decree is, accordingly, affirmed.

METROPOLITAN LIFE INS. CO. v. HARTMAN.

(Circuit Court of Appeals, Eighth Circuit. December 1, 1909.)

No. 2,977.

1. LANDLORD AND TENANT (§ 169*)—INJURIES TO OCCUPANT—ACTION—VARIANCE.

Under the rule that a plaintiff can only recover on the cause of action pleaded, in an action to recover for a personal injury to plaintiff by slipping and falling on the hard wood floor of a room in defendant's office building which had been recently treated with a dressing containing oil, where the only negligence of defendant alleged in the complaint was that the floor was dressed at such a time as would not permit the absorption of the oil before the tenants would have occasion to enter their rooms, plaintiff was not entitled to recover on proof that the floor had been so often treated that it would not absorb oil, and that the workman who dressed it was negligent in using oil in the dressing and failing to rub it off until the floor was dry before leaving it, and that such negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 169.*]

2. APPEAL AND ERROR (§ 729*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

A general assignment of error that the court erred in overruling a motion for a directed verdict, made at the close of all the evidence, is suf-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 174 F.—51

ficient, where the motion was on the ground that there was no substantial evidence to sustain the cause of action alleged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2998, 8013; Dec. Dig. § 729.*]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Gertrude C. Hartman against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Morton Barrows, for plaintiff in error.

Francis B. Hart, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge. This suit was brought by Gertrude C. Hartman to recover damages from the Metropolitan Life Insurance Company for injuries sustained by a fall while walking over a hard wood floor covered by a rug in one of the rooms in which she was employed as a stenographer, in a large office building owned and controlled by the defendant. The rug failed to cover the floor by about eight inches along its outer border, leaving that width of uncovered hard wood extending around the four sides of the room. Plaintiff alleged in her complaint that on December 23, 1907, as she was going out of the room just described into her own working room adjoining, she stepped upon this uncovered border, slipped, fell, and received a severe injury.

She specified, as the acts of negligence which caused her injury, that prior to December 23, 1907, the uncovered border had been safe to walk upon without hazard or accident; but the defendant on that day—

"dressed the exposed border of the floor * * * with a coat of oil or preparation in which oil or other equally fluid, slippery, and inadhesive substance was the principal ingredient, the natural, necessary, and direct effect of which was to render and make said floor slippery, dangerous, and unsafe to pass over or walk upon until sufficient time had elapsed after such redressing for the absorption of such oily substance into the paint and wood work of said floors, all of which facts were within the knowledge of defendant and its employes doing said work, and they also knew that several hours would be required for such absorption after such redressing of said floors had been done with said material. * * * Plaintiff now alleges that the oily redressing of said floor when it was done, and with the material used, rendered such floor within the knowledge of the defendant, its officers, agents, and employes, doing said work, utterly unsafe and dangerous to walk over and upon both at the time of the doing and for several hours thereafter. * * * Plaintiff alleges that the defendant was guilty of gross negligence in doing said work or in suffering the same to be done at a time when it well knew that the lessee of said office and his employes and clients would soon be present to use and occupy the same, and that they would so use and occupy the same. Defendant was guilty of gross negligence in not doing said work at the close of some business day when sufficient time would elapse for the absorption of the material placed upon the said floors before they would be again required for use. Defendant was guilty of gross negligence in not warning plaintiff and others about to frequent said office of the dangerous and unsafe condition of said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

floor, and plaintiff alleges that no warning whatever was given, nor had she any knowledge or notice that said work had been done, or that said floor had been made dangerous and unsafe."

The answer admitted certain allegations of the complaint, but denied the alleged negligence.

From the foregoing it is manifest the gist of plaintiff's complaint was that the defendant did the work of dressing the floor at such a time as would not permit the absorption of the oil before the tenants would have occasion to enter their rooms. The use of oil as a dressing substance or the method of its application was not complained of as an act of negligence. The plain implication if not language of the complaint was that the material and method employed were suitable enough, provided the work had been done in the evening, or at some other time sufficiently long to permit the absorption of the oil, before the tenants required the use of their offices in the morning.

A patient examination of the evidence discloses a conspicuous failure to prove any of the allegations of negligence as made. Most of the proof went to establish other facts conceived at the time of the trial to be culpable on the part of the defendant. Plaintiff was allowed to show, over defendant's objection, by expert testimony, that the floor margin or border in question had become so glazed over by repeated applications of shellac or stain that no oil could be absorbed, and that any application of oil would lie on the surface and form a slippery and dangerous condition for 36 hours, or so until it would dry into a gummy substance. This evidence tended to prove the defendant was negligent, if at all, in using oil of any kind, or in any way or manner, upon the floor in its then present condition, and had no tendency to prove any of the acts of negligence charged in the complaint. It was proof, not of the issue tendered, but of some other possible issue.

This was the condition of things at the close of plaintiff's case, when defendant requested an instructed verdict on the ground the plaintiff had not established a *prima facie* case under the pleadings. The request having been denied, the defendant introduced evidence, but it did not supplement plaintiff's deficient proof.

In the examination and cross-examination of its witnesses, testimony was elicited tending to show that the janitor whose duty it was to dress the floor had generally done his work by applying a mixture of five parts of benzine and one of oil and that his method had been to apply a small quantity of the mixture to a surface desired to be dressed with a cloth, and simultaneously, or practically so, to rub it off with a piece of cheese cloth, till the oil had disappeared and the surface made dry; that on the morning in question after he had applied the mixture to the floor in the usual way, and before he had time to rub it dry, he was called by one of the plaintiff's employers to dress a table, and proceeded forthwith to do so; that in the meantime, while he was so engaged, the plaintiff, in passing from her employer's room to her own, stepped upon the slippery border of the floor and fell.

At the close of the evidence the defendant renewed its motion for a directed verdict in favor of the defendant, claiming that plaintiff had not made out a *prima facie* case under the pleadings, and that it conclusively appeared as a matter of law that the plaintiff assumed the

risk incident to the conditions and circumstances in which she received her injury. The court denied the motion, the defendant duly excepted, and properly assigns the denial as error.

Counsel for plaintiff now insists and devotes much argument to the claim that the action of the janitor in temporarily leaving the border of the floor besmeared with the oily mixture before he had rubbed it dry was an act of negligence imputable to his master, and that it was the proximate cause of plaintiff's injury. To this we are unable to give our assent. The janitor's failure to rub off the oil before he left to do something else was not remotely suggested in the complaint as an act of negligence upon which recovery was sought. Nothing is more conducive to the orderly and efficient administration of justice than strict adherence to the rule of pleading and practice which requires a plaintiff to tender a single, certain, and definite issue of fact, and, if there be joinder therein by defendant, to produce proof of the affirmative of that issue. Any substantial departure from this rule introduces uncertainty and looseness in practice, occasions perilous surprises to the defendant, and tends to defeat that exact and equal justice which is the boast of our jurisprudence.

It is elementary that a plaintiff cannot bring a suit on one cause of action and recover on another, and that allegations without proof are unavailing.

Counsel for plaintiff contends that there is no assignment of error fairly presenting the question we have considered for review. This is a mistake. It is true most of the assignments are too general, but the third is quite sufficient. It is:

"The court erred in denying the motion of the defendant, made at the close of all the testimony, that the court direct a verdict in favor of the defendant and against the plaintiff."

That motion, according to well-established practice, presented a question of law to the trial court, whether, giving full force and effect to all the evidence and all the reasonable inferences deducible from it, there was substantial proof of plaintiff's cause of action. If there was no such proof, it was the duty of the court, as a matter of law, to say so, and direct a verdict as requested. In view of the proof which we have pointed out, the court committed an error of law in not giving that instruction.

It is also argued that the third assignment is bad because it fails to clearly point out the error relied upon. In our opinion there is no ground for this criticism. The trial court was asked to direct a verdict for defendant, because, among other reasons assigned, the plaintiff had not made out a case "under the pleadings." The court's attention was thereby directly pointed to the pleadings as the test of the legal sufficiency of the proof. The assignment was based on an exception duly saved to a refusal to direct a verdict, as so requested, and was clearly sufficient.

The testimony tended to show that defendant had for about 15 years owned and been engaged in renting offices in a 12-story building in Minneapolis, Minn.; that there were about 500 rooms in the building frequented daily by about 15,000 persons; that the rooms

were cared for by janitors in the employ of the defendant, whose duty it was from time to time to dress and polish the furniture and floors; that the defendant originally adopted and continuously followed the practice of using a mixture composed of five parts of benzine and one of oil for doing the dressing and polishing work; that the mixture had been continuously applied in the way and manner hereinbefore pointed out by the janitors; that plaintiff had been for some years while working in the building familiar with the facts just stated; that on the morning in question she had three times passed over the slippery border before she stepped upon it. In view of this and other testimony, it was argued that the injury resulted from an accident which could not have been foreseen or reasonably anticipated, within the rule announced in *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, by the defendant when it adopted its method of dressing the floors and furniture, and that the plaintiff assumed the risks incident to working in a building employed and cared for as just stated.

It is unnecessary to consider these and some other questions presented by defendant's counsel at the present time.

The judgment must be reversed, and the cause remanded to the Circuit Court for a new trial.

CHILBERG v. SMITH.

In re AMERICAN MACH. WORKS.

(Circuit Court of Appeals, Ninth Circuit. December 6, 1909.)

No. 1,748.

1. SALES (§ 465*)—CONDITIONAL SALE—EFFECT OF FAILURE TO RECORD—WASHINGTON STATUTE.

Ballinger's Ann. Codes & St. Wash. § 4585 (Pierce's Code, § 6547), which provides that all conditional sales of personal property shall be absolute as to purchasers, incumbancers, and subsequent creditors in good faith unless within 10 days after the property is placed in the possession of the vendee a memorandum of such sale stating its terms and conditions shall be recorded, declares a public policy of the state, and is to be strictly construed, and after a conditional sale has become absolute under its terms the recording of the contract does not again make it conditional nor charge subsequent creditors of the vendee with notice.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 465.*]

2. BANKRUPTCY (§ 184*)—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD UNDER CONDITIONAL SALE.

Under Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), the interest which passes to the trustee in personal property, sold to the bankrupt on condition, depends on the law of the state, and, where the bankrupt is in possession under a conditional sale which under such law has become absolute as to subsequent creditors for want of record, both possession and title pass to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

Petition for Revision of an Order and Decree of the District Court of the United States for the Northern Division of the Western District of Washington.

In the matter of the American Machine Works, bankrupt. On petition by A. Chilberg to review order of District Court. Dismissed.

The petitioner filed in this court his petition for the review of a final order and decree in bankruptcy, alleging, in substance: That on March 13, 1907, the Seattle Hardware Company made a conditional sale of certain "channel iron" to the American Machine Works, and on said date delivered the same to the said vendee; that the conditional sale was evidenced by a memorandum in writing, which was recorded on July 17, 1907, some four months after the date of the sale; that on December 18, 1907, the Seattle Hardware Company sold and assigned to the petitioner all its right, title, and interest in and to the said property; that the said property has not been paid for; that on August 1, 1908, the American Machine Works was adjudged a bankrupt, and the respondent was thereafter elected its trustee in bankruptcy, and took possession of all the assets of said bankrupt, together with the said channel iron, and has denied the possession thereof to the petitioner; that "none of the present general creditors of the said American Machine Works, bankrupt, were such creditors prior to the time of the filing of said conditional bill of sale; but that all the general indebtedness of said bankrupt was incurred subsequent to said date;" that the facts in regard to the said sale were embodied in a petition to the District Court, to which petition the trustee filed a demurrer, and upon the hearing the demurrer was sustained, and the petition dismissed, to which said petitioner duly excepted.

Frank E. Hammond and A. J. Tennant, for petitioner.

Daniel Landon, for respondent.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The question presented on the petition is the construction to be placed upon section 4585, Ballinger's Ann. Codes & St. Wash. (section 6547, Pierce's Code), which provides that:

"All conditional sales of personal property or leases thereof containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, incumbrancers, and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions, and signed by the vendor and vendee, shall be filed in the auditor's office of the county wherein, at the date of the vendee's taking possession of the property, the vendee resides."

The petitioner contends that the purpose of the statute is to give notice to persons who might become creditors of the vendee, and that, inasmuch as the memorandum of the conditional sale was recorded prior to the time when any of the creditors of the bankrupt extended credit, they are charged with constructive notice of the rights of the vendor, and were therefore not subsequent creditors in good faith, within the terms of the statute.

Ordinarily, certain instruments, such as deeds and mortgages, may be recorded at any time after their execution, and the record will be effective as against all claims attaching subsequently, unless there have been such circumstances and unreasonable delay as to constitute laches, and ordinarily statutes in regard to the registration of such instruments, while requiring that they be filed within a certain time, are not to be so construed as to render them void as to subsequent lienors with notice if not so recorded. But the statute of Washington, in regard to

the registration of conditional sales, declares the policy of the state in regard to agreements, whereby a vendee of personal property so sold is placed in the possession thereof with all the apparent indicia of ownership, and it clearly provides that, unless the instrument be recorded within 10 days from the delivery of the property to the vendee, the sale shall be absolute as to subsequent creditors in good faith. The period of 10 days thus provided is the limit of the time within which the right to continue to hold, as conditional as to all the world the sale of personal property, may be exercised. At the end of that time, it no longer exists, and subsequent creditors are not required to examine the records to ascertain whether the vendor retains the title to the property. The statute was evidently enacted in view of the common-law rule that the title to property passes by delivery of possession, and possession is evidence of ownership, and the intention of the Legislature is clearly expressed, that all conditional sales of personalty shall be absolute as to subsequent creditors and lienors unless the provisions of the act are strictly complied with.

Cases in point are *Bugbee v. Stevens*, 53 Vt. 389, and *In re Bosch* (D. C.) 121 Fed. 602. The petitioner cites *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022, as affording a construction of a similar statute of the state. In that case the court said that the failure to record the bill of sale within 10 days would protect only such parties as had obtained intervening rights after its execution, and before it was filed for record, but the language of the court in that case had reference to the failure to record an absolute bill of sale, in a case where the property sold remained in the possession of the vendor, and the construction to be given to a section of the statute which declared that no bill of sale for the transfer of personal property should be valid as against existing creditors or innocent purchasers when the property was left in the possession of the vendor, unless the bill of sale be recorded within 10 days after the date thereof. The decision casts no appreciable light on the question of the construction of the statute which is involved in the present case.

The petitioner contends that since, in any view of the effect of the statute, title upon a conditional sale does not pass as between the vendor and the vendee, the trustee acquires no greater interest in the property than the vendee had. But the trustee in bankruptcy is not in the attitude of a mere assignee of property for the benefit of creditors; who takes only the title of his assignor, and is not affected by statutes requiring registration of conditional sales, as is held in such cases as *Peet v. Spencer*, 90 Mo. 384, 2 S. W. 434; *Tufts v. Thompson*, 22 Mo. App. 564; *Thomas Mfg. Co. v. Huff*, 62 Mo. App. 124; *Adams v. Lee*, 64 N. H. 421, 13 Atl. 786; *Warner v. Jameson*, 52 Iowa, 70, 2 N. W. 951; and other cases. Under the bankruptcy law, the interest which passes to the trustee in personal property sold to the bankrupt upon condition depends upon the law of the state. In jurisdictions where the statute makes such an unrecorded conditional sale absolute as to subsequent purchasers, pledgees or mortgagees in good faith, and to no others, the failure to record does not affect the title of the vendor as against the vendee's trustee. *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. But, if, as

in the state of Washington, the bankrupt is in possession under a conditional sale which becomes absolute as to subsequent creditors for want of the registration required by law, both the possession and the title pass to the trustee, for in such a case the property, while in the possession of the vendee before bankruptcy, might have been levied upon and sold by creditors. Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) § 67a; *In re Leigh Bros.* (D. C.) 96 Fed. 806; *In re Fraizer* (D. C.) 117 Fed. 746; *Chesapeake Shoe Co. v. Seldner*, 122 Fed. 593, 58 C. C. A. 261; *In re Smith & Shuck* (D. C.) 132 Fed. 301; *In re Franklin Lumber Co.* (D. C.) 143 Fed. 852; *Hanson v. W. L. Blake & Co.* (D. C.) 155 Fed. 342.

The petition must be dismissed.

DICKINSON v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. December 13, 1909.)

No. 681.

COURTS (§ 384*)—DETERMINATION BY CIRCUIT COURT OF APPEALS—CERTIFICATION TO SUPREME COURT.

Judiciary Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), establishing the Circuit Court of Appeals, provides that such court at any time may certify to the Supreme Court "any questions and propositions of law concerning which it desires the instruction of that court for its proper decision." *Held*, that such certification is not authorized for the benefit of the parties, but only at the desire of the court, in its discretion, prior to its determination of the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1021; Dec. Dig. § 384.*]

In Error to the District Court of the United States for the District of Massachusetts.

On petition by defendant in error for certification of the cause to the Supreme Court. Denied.

Powers & Hall and Henry W. Dunn, for plaintiff in error.

Asa P. French, U. S. Atty.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This is the same case reported in 159 Fed. 801, 86 C. C. A. 625, and 213 U. S. 92, 29 Sup. Ct. 485, 53 L. Ed. 711. The judgment in favor of Dickinson was entered in this court on February 12, 1908. On a suggestion that the United States intended to apply to the Supreme Court for a writ of certiorari, the case was held under the control of this court by an order staying the mandate. The writ of certiorari was received on May 9, 1908. On May 20, 1909, mandate was received from the Supreme Court dismissing the writ. On the same day the United States filed their petition to this court to certify the case to the Supreme Court under the sixth section of the Judiciary Act of March 3, 1891 (26 Stat. 828,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

c. 517 [U. S. Comp. St. 1901, p. 549]), establishing this court, pursuant to the following provision, namely:

"Excepting that in every such subject within such appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions and propositions of law concerning which it desires the instruction of that court for its proper decision."

Passing by the question whether the case is so far under our hands that we can now order a certificate in accordance with the provision of law which we have quoted, we are compelled to ask particular attention to two expressions, namely, first, "concerning which it desires the instruction," and, second, "for its proper decision." It is plain from these expressions that the matter is not a matter at all within the control of the parties to the proceeding, and that this court is not authorized to certify a case under the provision of law cited unless the court itself desires instructions. To certify, except in connection with such desire, would be impertinent and unlawful. Moreover, this must be a desire for instructions for a "proper decision." How can there be such a desire, within the purview of the statute, after the case has been decided? We have refused to certify under circumstances like those at bar; and our refusal so to do seems justified, and perhaps required, by the expressions in *Columbus Watch Company v. Robbins*, 148 U. S. 266, 269, 270, 13 Sup. Ct. 594, 37 L. Ed. 445.

The petition of the United States, filed May 20, 1909, for certification to the Supreme Court, is dismissed.

ALDRICH, District Judge. As the judges were not agreed in respect to the original decision of this case, and as I deemed the question as to jury waiver one of grave importance, both in the constitutional and the practical administrative sense, I strongly felt, before decision in this court, that the question should be certified to the Supreme Court; but I agree that the case in its present stage is not one to be certified.

In re GHAZAL.

(Circuit Court of Appeals, Second Circuit. December 7, 1909.)

No. 66.

1. CUSTOMS DUTIES (§ 136*)—SMUGGLING—INFORMATION LEADING TO PROSECUTION—REWARDS—INTEREST OF INFORMANT.

Under Act Cong., June 22, 1874, c. 391, § 4, 18 Stat. 186 (U. S. Comp. St. 1901, p. 2019), authorizing the allowance of rewards by the Secretary of the Treasury for information leading to the seizure of smuggled goods and the prosecution of smugglers, the Secretary of the Treasury is the sole judge as to whether there is an informer who is entitled to a reward, so that until the Secretary acts the informer has merely an expectancy of reward.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 136.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

2. **BANKRUPTCY (§ 143*)—ASSIGNMENTS—REWARDS—CLAIM AGAINST INFORMANT.**

Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), providing that the bankrupt's trustee shall be vested by operation of law with the title of the bankrupt, as of the date of the adjudication, of all property which, prior to the filing of the petition, the bankrupt could have transferred, etc. *Held*, that since, under Rev. St. § 3477 (U. S. Comp. St. 1901, p. 2320), prohibiting the assignment of claims against the United States prior to allowance and ascertainment of the amount due, a bankrupt could not have assigned an expectancy of reward for information concerning smugglers prior to the allowance of the reward by the Secretary of the Treasury, which did not occur until after the bankruptcy adjudication, the reward subsequently awarded passed to the bankrupt, and not to his trustee for the benefit of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.*]

3. **BANKRUPTCY (§ 143*)—ESTOPPEL OF BANKRUPT.**

That a bankrupt did not oppose adjudication sought for on the ground that certain void assignments of a government reward by the bankrupt constituted a preference, such fact did not estop the bankrupt from insisting that the reward was not acquired until after the adjudication, and was, therefore, property which did not pass to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.*]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of New York.

In the matter of Selim Elias Ghazal, bankrupt. On petition of the bankrupt to review an order of the District Court for the Eastern District of New York, denying his application for an order directing the trustee in bankruptcy to pay to him \$428.93, paid to the trustee by the collector of the port of New York for information given by the bankrupt concerning smugglers. *Reversed*.

For opinions below, see 163 Fed. 602; 169 Fed. 147.

London, Davis & Medale (Monte London, of counsel), for petitioner. Conrad Milliken, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The sum in question was awarded to Ghazal by the Treasury Department on May 6, 1908, as a reward for information given by him against smugglers, which information resulted in the discovery and confiscation by the United States government of certain smuggled property. The award was made under authority of Act June 22, 1874, c. 391, § 4, 18 Stat. 186 (U. S. Comp. St. 1901, p. 2019), which provides:

"That whenever any officer of the customs or other person shall detect and seize goods, wares, or merchandise, in the act of being smuggled, or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award not exceeding in amount one-half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs, and charges connected therewith: provided, that for the purpose of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination. And whenever any person not an officer of the United States shall furnish to a district attorney, or to any chief,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

officer of the customs, original information concerning any fraud upon the customs-revenue, perpetuated or contemplated, which shall lead to the recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred, whether by importers or their agents, or by any officer or person employed in the customs service, such compensation may, on such recovery, be paid to such person so furnishing information as shall be just and reasonable, not exceeding in any case the sum of five thousand dollars; which compensation shall be paid, under the direction of the Secretary of the Treasury out of any money appropriated for that purpose."

It is clear that the statute makes the Secretary of the Treasury the sole judge as to whether there is an informer who is entitled to a share under this section. Until he acts the informer has merely an expectation of reward. *Ramsey v. U. S.*, 14 Ct. Cl. 367. The trustee does not question the accuracy of this proposition.

Section 3477, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2320), provides:

"All transfers and assignments made of any claim upon the United States or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, such transfers, assignment, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

It is therefore apparent that, before the allowance to him of the \$428.93, Ghazal could not have transferred the same, because any such attempted transfer would be null and void, and certainly a hoped-for award, not yet made, could not have been levied upon and sold in judicial process against him.

The relevant provision of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) is:

"Sec. 70. That the trustee * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt * * * to all * * * property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The petition in bankruptcy was filed on April 29, 1908, but the award was not made by the Secretary of the Treasury until May 6, 1909. Under the provisions of statute above cited, therefore the trustee did not take title to this sum of \$428.93.

It is contended, and the District Judge reached the conclusion, that the bankrupt was estopped from insisting that title to this sum never passed to the trustee. Before petition was filed Ghazal had made assignments to some of his creditors of certain sums, out of moneys to be paid him by the government, all of which assignments were of course "null and void." It was on the theory that these were preferential that proceedings in involuntary bankruptcy were instituted. Ghazal at first disputed the allegation of the petition, but subsequently

withdrew his answer and consented to an adjudication. The proposition contended for is that:

"When the bankrupt voluntarily receded from his position and endeavored to accept what now appears to be the benefits of the bankruptcy statute in this case, in the way of applying for a discharge from his debts, and at the same time to keep out of the estate in bankruptcy the only property about which the creditors could have attempted to maintain their position * * * the bankrupt is estopped from insisting that upon the 29th of April he could not have transferred his claim against the United States."

We do not find, in the circumstance that he has not chosen to oppose adjudication, sufficient ground for holding him to be estopped from insisting that after-acquired property shall not go to the trustee. No injury has resulted therefrom, and no one has been misled thereby. Nor can we see that the circumstance that he had no property at the time of adjudication is any reason why he should be required to give up after-acquired property, which the bankrupt act did not transfer to his trustee.

The order is reversed.

BROWN et al. v. BEACOM.

(Circuit Court of Appeals, Fourth Circuit, November 4, 1909.)

No. 819.

COURTS (§ 312*)—FEDERAL COURTS—JURISDICTION—"CHOSE IN ACTION"—ASSIGNMENT.

Judiciary Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), declares that the federal courts shall not have cognizance of any suit, except on foreign bills of exchange, to recover the contents of any promissory note or other "chose in action" in favor of any assignee or any subsequent holder, if such instrument be payable to bearer, or be not made by any corporation, unless such suit might have been prosecuted in such court to recover the contents if no assignment or transfer had been made. Complainant B. B., a citizen of West Virginia, entered a partnership with defendant and G., both residents of New York, for the exploitation of gas land and the construction and operation of a carbon plant; G. agreeing to drive the gas well on the land of complainant B. B., defendant to construct and operate the plant, the proceeds to be divided, one-third to complainant B. B., one-half to defendant, and one-sixth to G. G. thereafter assigned his interest to complainant J. B., a citizen of West Virginia, whereupon complainants sued defendant in the federal court for dissolution of the partnership and for an accounting. *Held*, the term "chose in action" was sufficiently broad to cover the right of complainant J. B., whether by his purchase he became a partner, or whether his right of action was limited to compensation for drilling a well out of profits earned by defendant; and hence, since G. could not have maintained an action against defendant in the federal court for such relief, such court had no jurisdiction of the joint action by G.'s assignee and his co-complainant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865-875; Dec. Dig. § 312.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1144-1148; vol. 8, p. 7602.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg.

Action by John W. Brown and another against Johnson W. Beacom. Decree for defendant, and complainants appeal. Reversed and remanded, for want of jurisdiction.

John Bassel, for appellants.

Melvin G. Sperry (Sperry & Sperry, on the brief), for appellee.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

McDOWELL, District Judge. The appellants were the complainants below. The bill here was filed for the dissolution of an alleged partnership between Jno. W. Brown, Buena W. Brown, and the defendant, Beacom, and for an accounting. In part the bill reads as follows:

"To the Judges of the Circuit Court of the United States for the Northern District of West Virginia:

"John W. Brown and Buena W. Brown, his wife, residents of the city of Clarksburg and citizens of the state of West Virginia, bring this their bill against Johnson W. Beacom, a citizen of the state of New York, but having a place of business in the state of West Virginia, in the Northern district thereof.

"The plaintiffs complain and say that heretofore, to wit, on the 12th day of January, 1904, they entered into an agreement with said defendant, Beacom, and one George E. De Golia, who was then and still is a citizen of the state of New York, which agreement was reduced to writing, whereby it was agreed among other things, that the said De Golia, in consideration of the sum of twenty-five hundred dollars to be paid him by the plaintiffs, was to drill a well for the production of natural gas upon a tract of land containing about three hundred acres belonging in fee simple to the plaintiff Buena W. Brown, lying at or near the village of Wilsonburg, in the county of Harrison, state of West Virginia; that the defendant, Beacom, upon his part agreed to build, erect, and furnish upon said land, or upon a small parcel of land near thereto, a building or buildings and all necessary machinery, including boiler and engine, carbon plates, pipe, and fittings, packing houses, and all other necessary machinery and buildings for the equipment of a first-class carbon black manufactory plant complete, at his own expense and cost, which plant was to be built of a sufficient size and to embrace sufficient land or space to produce fifty barrels of carbon black per day, and was to be finished and equipped at the beginning of operations to have at least a capacity of fifteen barrels of carbon per day, and was to be increased, as it became the interest of all parties to said agreement, to said full capacity of fifty barrels of carbon black per day, provided that a sufficient quantity of gas should be furnished the said Beacom by plaintiffs and said De Golia to warrant the increase per day, and said gas was at all times to be furnished to the said Beacom free of cost at the plant or factory by the plaintiffs and said De Golia so long as it could be produced from said tract of land by reasonable drilling. It was further agreed that the title and ownership of the factory or plant was to remain in the said Beacom, and that he was to have the right to remove the same at any time, should gas not be produced in sufficient quantities to justify running said plant. It was further agreed that said De Golia should drill a well to completion with all due diligence until completed for the production of gas, and was to furnish at his own expense all four-inch pipe necessary for tubing said well, and all pipe necessary to equip or furnish four-inch lines for conveying gas from such well to said plant or factory, including fittings, gates, packers, regulators, and cost of laying line and tubing well, and it was further agreed that the cost of furnishing said tubing and lines and laying the same, together with cost of fitting gates, packers,

and regulators, was to be advanced by said defendant, Beacom, and the title to such pipe, fittings, etc., was to remain in him until he was fully reimbursed for the amount so expended out of the proceeds derived from operating said plant or factory, and the same was to be deducted from the share or portion of the proceeds of said plant belonging to said De Golia.

"II. It was further agreed in said contract that of the proceeds derived from said business, after all expenses were paid, including all materials for marketing the carbon black, labor, oil, stationery, etc., the plaintiff Buena W. Brown should have two-sixths ($\frac{2}{6}$) or one-third ($\frac{1}{3}$), defendant, Beacom, three-sixths ($\frac{3}{6}$) or one-half ($\frac{1}{2}$), and the said De Golia one-sixth ($\frac{1}{6}$), and it was further agreed that all sale bills, freight bills, correspondence, and books of account used in connection with the manufacture of said carbon black and all other business pertaining thereto should be open to the inspection of all parties to said agreement, and that all parties thereto should be consulted and advised upon all matters of importance relating to said business. Copy of said agreement is herewith filed as 'Exhibit A,' and is prayed to be taken and read as part of this bill.

"III. Plaintiffs further say that plaintiff John W. Brown, on or about the 11th day of November, 1904, by deed of that date from one Harriet B. Stone, assignee or grantee of said De Golia, purchased the entire interest of said De Golia under said contract in said plant, and the plaintiffs and defendant, Beacom, are the sole and only parties now interested under said contract and in said plant, and plaintiffs are therefore entitled to receive one-half of the receipts of said plant, after paying expenses, as aforesaid. Certified copy of said deed is herewith filed as 'Exhibit B.'"

The theory of counsel for complainants is that John W. Brown became a partner by reason of his purchase of the De Golia interest and the consent of Mrs. Brown and Beacom.

We have not considered this case on the merits. In the Judiciary act of 1875 (Act March 3, 1875, c. 137, § 1, 18 Stat. 470), as amended (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, U. S. Comp. St. 1901, p. 508, 4 Fed. Stat. Ann. p. 266), is the following:

"* * * Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer has been made."

In the bill it is alleged that De Golia and Beacom are citizens of New York. John W. Brown is the remote assignee of De Golia of all the rights of which he is alleged to be possessed. Not only is John W. Brown a party complainant, but his interests and alleged right to relief are as entirely antagonistic to the interests of Beacom as are those of Mrs. Brown. While the clause of the statute above quoted is confusingly worded, we are of opinion that under the construction which has been put upon it (see *Mexican R. Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672), there is in the case before us room for discussion only as to the meaning of the term "chose in action" as used in the statute. This language is comprehensive, and seems broad enough to cover the right of John W. Brown under any aspect of this case. If he is a partner, his right of action arises *ex contractu*. If he is not a partner, and if his right is only to receive payment for drilling the well out of the profits earned by Beacom, still his right of action, if any, arises from an alleged breach of contract. The decisions seem to establish that such a right of action is a "chose in action" within the

meaning of the statute. See *Bradley v. Rhines*, 3 Wall. 393, 19 L. Ed. 467; *Plant v. R. Co.*, 152 U. S. 71, 14 Sup. Ct. 483, 38 L. Ed. 358; *New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; *R. Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672; *Glass v. Concordia*, 176 U. S. 207, 20 Sup. Ct. 346, 44 L. Ed. 436; *North American Co. v. Morrison*, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. Ed. 1061. The trial court would have had no jurisdiction of a bill by De Golia and Mrs. Brown against Beacom, and hence had no jurisdiction of the suit by Mrs. Brown and De Golia's assignee against Beacom.

It follows that the cause must be remanded, with directions to the court below to dismiss for want of jurisdiction, with authority to make such order as to the costs below as shall seem to said court to be just. The costs in this court are adjudged against the appellants. *Railroad Co. v. Swan*, 111 U. S. 379, 388, 4 Sup. Ct. 510, 28 L. Ed. 462.

Reversed.

JOHN DEERE PLOW CO. v. ANDERSON.

(Circuit Court of Appeals, Fifth Circuit. December 14, 1909.)

No. 1,959.

1. SALES (§ 474*)—CONDITIONAL SALE—RECORD—"THIRD PARTIES."

Civ. Code Ga. 1895, § 2776, provides that when property is sold by a conditional sale, in order for the reservation of title to be valid as against "third parties," it shall be evidenced in writing and not otherwise, and the written contract shall be executed and attested in the same manner as mortgages on personal property, but, as between the parties themselves, the contract as made shall be valid and may be enforced whether evidenced in writing or not, and section 2777 declares that conditional bills of sale must be recorded within 30 days after their date, and in other respects must be governed by the laws regulating the registration of mortgages. *Held*, that the term "third parties," as used in section 2776, and in accordance with the general law, meant creditors having a lien on the property conditionally sold, and not ordinary creditors, and that, as to the latter, the conditional sale contract was valid though not recorded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1397; Dec. Dig. § 474.*]

For other definitions, see Words and Phrases, vol. 8, p. 7815.]

2. BANKRUPTCY (§ 140*)—ADJUDICATION—TITLE OF TRUSTEE—LIEN.

A bankruptcy adjudication, though vesting title to the bankrupt's property in the trustee, does not create a judicial lien in favor of ordinary creditors, and hence the trustee has no greater right in property sold under a conditional sale than had the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 199; Dec. Dig. § 140.*]

3. COURTS (§ 107*)—PREVIOUS DECISIONS AS PRECEDENTS—DISPOSITION OF CAUSE ON APPEAL—AFFIRMANCE—PER CURIAM OPINION.

A per curiam affirmance of a decree on appeal, reciting: "We find no error in the disposition of this case in the Circuit Court, and the judgment is therefore affirmed"—means only that the decree on the facts proved in the record is correct, and nothing else is affirmed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 360; Dec. Dig. § 107.*]

Petition to Superintend and Revise Proceedings in the District Court of the United States for the Southern District of Georgia, in Bankruptcy.

Application by the John Deere Plow Company for an order directing A. S. Anderson, trustee, to surrender possession of certain property sold to the bankrupt under a conditional contract of sale. An order disallowing petitioner's claim was affirmed by the District Court, and petitioner brings a petition to superintend and revise. Reversed.

Fred T. Saussy, for petitioner.

A. S. Anderson, for respondent.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. In this matter it appears that one V. L. Burke purchased certain merchandise from the John Deere Plow Company under a written contract of sale, which contained, among others, the following stipulation:

"(7) It is also agreed that the title to and ownership of, and the right to immediate and exclusive possession upon demand, either oral or written, to all goods which may be shipped as herein provided or during the current season, shall remain in and their proceeds in case of sale shall be the property of the John Deere Plow Company, and subject to their order until full payment shall have been made for the same by the undersigned (V. L. Burke) from making payments as herein agreed."

Subsequently Burke was adjudicated a bankrupt, and the plow company intervened in the proceedings and claimed so much of the merchandise as still remained in his possession, and alleged it was worth less than the amount due under the contract of sale. The referee declined to allow the plow company's claim, and on appeal to the District Court his finding was affirmed.

The law of Georgia (Civ. Code Ga. 1895) provides as follows:

Sec. 2776. "Whenever personal property is sold and delivered with the condition affixed to the sale, that the title thereto is to remain in the vendor of such personal property until the purchase price shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract as made by them shall be valid, and may be enforced whether evidenced in writing or not."

Sec. 2777. "Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to the registration of mortgages."

The contract in this case was not recorded. It will be observed that by the law of Georgia, cited above, a conditional sale, not recorded, is good as between the parties, but is not valid as against third parties. We are not referred to any decision of the Supreme Court of Georgia holding that ordinary, unsecured creditors are to be deemed third parties within the meaning of the statute. The contrary view seems to have been held in the case of Rhode Island Locomotive Works v. Empire Lumber Company, 91 Ga. 639, 17 S. E. 1012, where the possession of two locomotives was awarded the vendor in a con-

ditional sale as against the receiver of the lumber company. We therefore hold that third parties, within the meaning of the law of Georgia, as well as under the general law, are such creditors as have, in some manner, secured a lien on the property conditionally sold, and not mere ordinary creditors.

It is true the adjudication vests the title of the bankrupt's property in the trustee; but it does not operate as a judicial seizure to create a lien in favor of the ordinary creditors. The trustee has no greater right in property sold under a conditional sale contract than the bankrupt had. See *York Manufacturing Company v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Bryant v. Swofford Brothers*, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997.

In this case the sale was undoubtedly valid as between the parties, and the plow company was therefore entitled to the property as against the trustee. In *General Fire Extinguisher Company v. Lamar*, affirmed in this court by per curiam opinion, saying, "We find no error in the disposition of this case in the Circuit Court, and the judgment is therefore affirmed" (see 141 Fed. 353, 72 C. C. A. 501), cited in the court below, it is to be noticed that the appellant in that case asserted a reserved lien, and that the property alleged to have been sold had been merged in and become part of the building and factory which had been sold under prior liens; the proceeds being in court for distribution. A per curiam affirmance of a decree on appeal, in the above-quoted words, means no more than that the decree on the facts proved in the record is correct, and nothing else is affirmed.

The petition for revision is allowed, and the decree of the District Court in favor of the trustee against the John Deere Plow Company, rendered in the bankruptcy of V. L. Burke, is reversed, and the District Court is instructed to render judgment in accordance with the views herein expressed; the trustee to pay the costs hereof in due course of his administration.

NORTHERN UNION GAS CO. v. MAYER, Atty. Gen., et al.

(Circuit Court of Appeals, Second Circuit. October 19, 1909.)

No. 172.

1. APPEAL AND ERROR (§ 150*)—RIGHT OF REVIEW—INTEREST IN SUBJECT-MATTER.

Where a preliminary injunction was granted restraining the enforcement of a state law requiring a gas company to supply the city of New York and other consumers at reduced rates, on condition that the excess collected above such rates should be paid to a master to await the final determination of the case, and, on dissolution of the injunction, the city received back the excess it had paid, it had no further interest in the remainder of the fund and no standing to appeal from an order disposing of it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934-946; Dec. Dig. § 150.*]

2. LIMITATION OF ACTIONS (§ 12*)—PERSONS WHO MAY RELY ON LIMITATION.

A balance of such fund received from private consumers having remained unclaimed was ordered returned to the gas company on its giv-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 174 F.—52

ing a bond to pay over any part of it which should afterward be claimed by such consumers or their assigns. *Held* that, having no legal right or title to the money, it could not insist on a provision that claims of such consumers or their assignee should be subject to the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 12.*] Holt, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Northern Union Gas Company against Julius M. Mayer, Attorney General, and others. From an order made by the Circuit Court, complainant and the City of New York appeal. Modified and affirmed.

For opinion below, see 173 Fed. 628, and see, also, 171 Fed. 602.

Cortland Betts (John A. Garver, of counsel), for appellant Northern Union Gas Co.

William D. Marks, for appellant City of New York.

Before COXE and WARD, Circuit Judges, and HOLT, District Judge.

COXE, Circuit Judge. A preliminary injunction was granted in this case restraining the defendants from enforcing the law of the state of New York requiring gas companies to supply the city with gas at 75 cents and the public at 80 cents per 1000 cubic feet. The order provided that the complainant might continue to render bills as it had theretofore done, provided it deposit a sum equal to the excess over the rate fixed by law to the credit of a special master appointed to distribute the same in accordance with the final disposition of the cause. Thereafter the complainant billed its ordinary consumers as theretofore at the rate of \$1.00. They were not parties to the cause and were of course at liberty to pay or to pay under protest or to refuse to pay, as they might be advised. The order was intended to secure their right to recover in case the complainant were ultimately defeated even if their payments were voluntary. In other words, to require the complainant to give satisfactory security that it would then repay the sums which it had collected under a claim of right.

A decree of the Circuit Court in favor of the Consolidated Gas Company involving the same questions, having been reversed by the Supreme Court of the United States, the special master has paid over the fund so deposited in this suit to the consumers or their assignees except to the extent of some \$18,000, as to which no claims have been presented and it has been impossible to find the original consumers. The court has ordered the special master to pay this sum to the complainant upon its giving a bond conditioned to repay the consumers at any time hereafter or their assignees at any time within the period fixed by the statute of limitations of the state of New York.

The complainant and the defendant, the city of New York, have appealed from this order. The complainant appeals on the ground that no bond should have been required and that the statute of limi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tations should apply to the claims of original consumers as well as to their assignees. The city of New York appeals on the ground that the fund should not be disturbed at all and that so much of it as shall remain unclaimed after ten years from the time of deposit should be transferred to a designated depository to the credit of the United States.

Considering first the appeal of the city of New York, it has no grievance of its own and we think it has no standing to represent other consumers.

The money was paid into a bank to the credit of the special master. It is not now and never has been in the registry of the court.

No one who has the slightest interest in the result has appeared in opposition to the affirmance of the order. It was conceded at the argument that no matter what ultimately became of the fund no part thereof can ever go to the city of New York. The unpaid consumers have not appeared and the moment they do so their claims will be satisfied. If the present status of the fund continue the unpaid balance will remain indefinitely in the bank. If the special master be not discharged it will be necessary for him to maintain a large clerical force to administer the fund in the future, the expenses of which will greatly deplete it. A balance will undoubtedly remain with no claimants which will enure to the benefit of the bank. If after every opportunity to claim it has been given to the consumers, their legal representatives and assigns, they decline or neglect to receive it, it is the duty of the court to provide some intelligent disposition for the future. This we think has been done. The order of the Circuit Court makes the most careful provision for safeguarding the interests of the consumers and their assignees. There can be no doubt that with the bond which the complainant is required to give every valid claim will be promptly paid.

The complainant's objections to the order are not well taken. If the fund be allowed to remain in the bank under the direction of the special master, it is manifest that the consumers and their assignees can collect their claims at any time in the future. As the complainant is asking a favor of the court in requesting that the uncalled-for balance be returned to it, we see no reason why the complainant should be permitted to plead the statute of limitations to any of the claims, whether held by an assignee or not. If the assignments are proved to be fraudulent that will be a sufficient defense. If the assignments be valid the assignees are entitled to the same consideration as the original claimants. We think, however, that the complainant should not be required to give a bond extending over an indefinite period and that a bond covering a period of six years should be sufficient. We are also of the opinion that permission should be given to the complainant to apply to the court for leave to reduce the penalty of the bond from time to time as the amount is reduced by payments.

As so modified, the order is affirmed.

HOLT, District Judge, dissents.

In re McCORD.

(Circuit Court of Appeals, Second Circuit. November 9, 1909.)

No. 21.

BANKRUPTCY (§ 186*)—ASSETS—LIENS.

Decedent, the bankrupt's father, subscribed for certain corporate stock, and, having died before payment, the bankrupt advanced \$3,600 out of his own funds to complete the payment and charged the amount to his father's estate, and took the stock certificate in his own name. Thereafter the bankrupt borrowed \$1,200 on the stock as collateral from A., having previously assigned all his claim against his father's estate to a bank. *Held*, that if, at the date of the assignment to the bank, decedent's estate was indebted to the bankrupt to the amount of \$2,400 as found, the bank could recover that amount from the estate, and the referee's order compelling the bank to pay the same sum to the trustee in bankruptcy in order to obtain the stock in the hands of A. was erroneous, but, if there was no indebtedness of decedent's estate to the bankrupt, then the estate was entitled to the certificate on payment of the indebtedness to A; the bank being entitled to assert against decedent's estate whatever rights it acquired by the assignment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 186.*]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

In the matter of William M. McCord, bankrupt. Petition to review an order confirming the report of a referee finding that certain corporate stock standing in the bankrupt's name was the property of the estate of the bankrupt's father, subject to a lien in favor of the bankrupt. Reversed.

See, also, 174 Fed. 72.

Almet Reed Latson (W. W. Pickard, of counsel), for petitioner.

Garvin & Armstrong (J. S. Keith, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a petition to revise an order of the District Court confirming the report of a referee finding that 30 shares of corporate stock standing in the name of William M. McCord, the bankrupt, and now in possession of one Armstrong as collateral for a loan of \$1,200, are the property of the estate of Henry D. McCord, subject to Armstrong's lien and to a lien of \$2,400 in favor of the bankrupt.

The referee found that Henry D. McCord, the bankrupt's father, subscribed for the stock in question, but died before paying his subscription in full; that April 27, 1903, the bankrupt, William M. McCord, who was his father's executor, advanced \$3,600 out of his own funds to complete the payment, charged the same to his father's estate and took out the certificate of the stock in his own name; that November 12, 1907, William M. McCord borrowed \$1,200 on the stock as collateral from Armstrong. He also found, and we agree with him, that William M. McCord took the certificate in his own name for the purpose of preserving a lien upon it for the amount of his advances

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to his father's estate and that if the transaction were voidable because he was individually dealing with himself as executor no steps have been taken to avoid it, and it appears to have been ratified by the estate.

But we think the referee did not give sufficient consideration to two assignments in evidence, viz., March 26, 1907, William M. McCord individually, and March 28, 1907, William M. McCord, trading as Henry D. McCord & Sons, of all his claim against his father's estate, to the Mechanics' National Bank without specifying the particulars or amount of same, though the bankrupt testified that it was about \$44,000.

Counsel for the bank produced these assignments before the referee, but declined to let the bank become a party to the proceedings. The record does not show on whose behalf they were offered in evidence.

All the referee says on the subject is:

"Whether the Mechanics' National Bank has any claim upon the stock cannot be decided in this proceeding for the reason that the Mechanics' National Bank was not a party to this motion and its counsel on the hearing declined to become such."

This is quite true, but, if at the date of these assignments the estate of Henry D. McCord was indebted to William M. McCord to the extent of \$2,400, then by virtue of the assignments the bank can recover this amount from the estate and the order compelling it to pay the same sum to the trustee in bankruptcy to get its own property exposes it to a double payment. On the other hand, if there were then no indebtedness of the estate of Henry D. McCord to William M. McCord, it was entitled to the certificate on payment of \$1,200 only, viz., the loan of Armstrong, in whose possession the certificate was. The bank may assert against the estate of Henry D. McCord whatever rights it has acquired by assignment from William M. McCord.

The order is reversed.

DE FOREST v. COLLINS WIRELESS TELEPHONE CO.

(Circuit Court, D. New Jersey. December 10, 1909.)

1. PATENTS (§ 286*)—LICENSES—INFRINGEMENT—RIGHT TO SUE.

An allegation that a patentee assigned to complainant the exclusive right to make, use, and sell for use within the United States and its territories and foreign possessions, "in connection with wireless telephone work and wireless telephonic communication only, apparatus and equipment embodying said methods and apparatus under the patents hereinabove mentioned, or any other patent or patents now or hereafter owned or controlled" by the assignor or his assignee, did not show a conveyance to the assignee of the entire monopoly granted by the government to the patentee, but a mere license; and hence the licensee had no capacity to sue in his own name to restrain infringers.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 454, 455; Dec. Dig. § 286.*

Sublicenses and assignments of licenses for use or sale of patents, see note to National Phonograph Co. v. Schlegel, 64 C. C. A. 596.]

2. PATENTS (§ 286*)—INFRINGEMENT—INJUNCTION—RIGHT TO SUE.

A license authorizing the licensee to sue for and collect damages and royalties, past or future, for the infringement of the patents, did not authorize a suit by injunction to restrain infringers.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 454, 455; Dec. Dig. § 286.*]

3. PATENTS (§ 280*)—INFRINGEMENT—DAMAGES—ROYALTY—ACTION.

An action to recover damages and royalty for the infringement of a patent can only be maintained at law.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 439; Dec. Dig. § 280.*]

4. PATENTS (§ 286*)—RIGHT TO SUE—CONTRACT.

The right to sue on a patent is not a matter of contract, but is the creature of, and can exist only as authorized by, statute.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 453-456; Dec. Dig. § 286.*]

In Equity. Suit by Lee De Forest against the Collins Wireless Telephone Company for patent infringement. On demurrer to bill. Sustained.

Samuel E. Darby, for complainant.
Prindle & Wright, for defendant.

RELLSTAB, District Judge. The demurrer must be sustained on the first ground assigned, viz.:

"That it does not appear from said bill of complaint that the complainant herein has such title or interest in or under the letters patent herein sued upon as to enable him to maintain suit against this defendant."

The allegation of the bill in this behalf is:

"The said John Stone Stone did by direct and mesne assignment and license in writing, said assignment and license in writing being duly executed and delivered and for valuable consideration, sell, assign, transfer, and set over unto your orator, his heirs or assigns, the exclusive right to make, use, and sell for use within the United States and territories and foreign possessions thereof, in connection with wireless telephone work and wireless telephonic communication only, apparatus and equipment embodying said methods and apparatus under the patents hereinabove mentioned, or any other patent or patents now or hereafter owned or controlled by the said Stone or his assignee, together with the right to sue for and collect damages and royalty, past or future, for the infringement of said patents or any of them by reason of the infringing use by others of 'continuous trains of waves' or 'loose coupling' in wireless telephone work or wireless telephonic communication."

The patents relate to space or wireless communication by means of telegraph or telephone, and it is to be noted that the conveyance is not for the entire monopoly granted to the patentee. The conveyance relates to the inventions "in connection with wireless telephone work and wireless telephonic communication only," and the "apparatus and equipment embodying said methods and apparatus under the patents." The case at bar is controlled by *Pope Manufacturing Co. v. Gormully Manufacturing Co.*, 144 U. S. 248, 12 Sup. Ct. 641, 36 L. Ed. 423. In this case Mr. Justice Brown discusses *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504 (the leading case upon this subject), and *Waterman*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923, and in reaffirming the principle of law therein enunciated, held as follows:

"The monopoly granted by law to a patentee is for one entire thing, and, in order to enable an assignee to sue for an infringement, the assignment must convey to him the entire and unqualified monopoly which the patentee holds in the territory specified."

In that case the complainant claimed title from the patentee under an instrument using as apt terms of sale and assignment as those used in the case at bar; but, as was said by Justice Gray in *Waterman v. Mackenzie*, supra (page 256 of 138 U. S., page 335 of 11 Sup. Ct. [34 L. Ed. 923]):

"Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions."

In the case cited as controlling, the conveyance did not embrace the entire monopoly, but was limited to so much of the patent as related to or covered the adjustable hammock seat or saddle. It was held that this limitation made the conveyance a mere license. This limitation and its legal effect are indistinguishable from those found in the case at bar, in which the complainant did not obtain the patentee's invention in connection with wireless telegraph work, but only that which related to telephone work and communication. By this limitation the complainant is but a licensee.

The complainant, being a licensee, and not an assignee, cannot maintain an injunction bill in his own name, unless (as is contended in his behalf) the authority contained in the license, viz., "together with the right to sue for and collect damages and royalty, past or future, for the infringement of said patents," etc., gives him the right so to sue. Assuming for argument's sake that the capacity to sue is a matter of contract, it is to be noted that this clause does not expressly authorize the bringing of suit to enjoin infringements. By its own terms it is limited to bringing suit for damages and royalty, and this can be done only in an action at law. But the right to sue on a patent is not a matter of contract. A patent right is the creature of the federal law, and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes. *Gayler v. Wilder* and *Waterman v. Mackenzie*, supra.

Section 4898, Rev. St., 3 U. S. Comp. St. 1901, p. 3387, 5 Fed. St. Ann. 531, provides that:

"Every patent or any interest therein shall be assignable in law by an instrument in writing, and the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States."

By section 4919, Rev. St., 3 U. S. Comp. St. 1901, p. 3394, 5 Fed. St. Ann. 552:

"Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee or grantee."

"Grants, as well as assignments, must be in writing, and they must convey the exclusive right, under the patent, to make and use, and vend to others to be used, the thing patented, within and throughout some specified district

or portion of the United States, and such right must be exclusive of the patentee, as well as of all others except the grantee." *Moore v. Marsh*, 7 Wall. 515, at 521, 19 L. Ed. 37.

The cases referred to have been frequently cited and followed, and the law may be considered as settled that, while the patentee may split up his rights under the patent in respect to both monopoly and territory covered by the patent, yet the grantee who has only a part of the monopoly, regardless of the extent of the territory, is a mere licensee, and may not sue in his own name to enjoin infringers; an exception existing, of necessity, where the patentee is the infringer. *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577.

This lack of capacity to sue is not merely to prevent persons who have a right to only a part of the monopoly from putting the whole in jeopardy by litigation, but also to protect innocent purchasers of the use of the improvement from fraudulent impositions and against being harassed by a multiplicity of suits; for, as was said by Chief Justice Taney in *Gayler v. Wilder*, supra, 10 How. 494 (13 L. Ed. 504):

"It was obviously not the intention of the Legislature to permit several monopolies to be made out of one, and divided among different persons within the same limits. Such a division would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits, instead of one, and to successive recoveries of damages by different persons holding different portions of the patent right in the same place. Unquestionably a contract for the purchase of any portion of the patent right may be good as between the parties as a license, and enforced as such in the courts of justice. But the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it."

Demurrer sustained.

In re LATTIMER et al.

(District Court, E. D. Pennsylvania. December 8, 1909.)

No. 2,217.

1. BANKRUPTCY (§ 149*)—PARTNERSHIP—INDIVIDUAL ESTATE.

Adjudication of a partnership as a bankrupt draws to the court of bankruptcy for administration the individual estate of the partners, though they are not adjudicated bankrupts individually, and the court may compel a partner to transfer his individual property to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. § 149.*]

2. BANKRUPTCY (§ 136*)—PARTNERSHIP—INDIVIDUAL PROPERTY—TRANSFER TO TRUSTEE—NECESSITY.

Where, in bankruptcy proceedings against a firm, it had been determined by the referee and District Court that F. was a partner, and, pending appeal for the determination of such question to the Circuit Court of Appeals, mortgage foreclosure proceedings were instituted in the state court for the sale of certain individual real estate belonging to F., in which he had an estimated equity of \$17,500, it was proper for the bankruptcy court to compel a transfer of such property to the trustee, with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

power to sell the same at any time prior to the date fixed for the sale in the state courts, that such equity might be conserved.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

3. BANKRUPTCY (§ 217*)—PROCEEDINGS IN STATE COURT—INTERFERENCE.

Where, pending bankruptcy proceedings against a firm, mortgage foreclosure proceedings were instituted in the state court against property of one of the partners, the bankruptcy court had no power to interfere therewith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 340; Dec. Dig. § 217.*]

In the matter of William H. Lattimer and others, under their several aliases, individually and trading as the Provident Investment Bureau, alleged bankrupts. On rule to compel a transfer of certain property of Stanley Francis to the trustee in bankruptcy. Granted. See, also, 141 Fed. 665.

Edgar J. Pershing and George Wharton Pepper, for trustee.
Henry J. Scott, for Stanley Francis.

HOLLAND, District Judge. The question here is whether or not the court has power to require Stanley Francis, who is one of the individuals trading under the firm name of Provident Investment Bureau, which has been declared a bankrupt, or Henry J. Scott, his stakeholder, to transfer the individual property of Francis to the trustee of the bankrupt partnership. By an agreement, dated April 17, 1906, between counsel for the bankrupt firm and the attorney for Mr. Francis, all the property, real and personal, was placed in the possession of Henry J. Scott, Esq., until the determination of certain questions then under consideration in the courts. Mr. Scott still has possession of this real estate and the rents collected by him since the time the property came under his control. This real estate, consisting of a lot about 57 feet 8 inches by 120 feet, with the building thereon erected, situate on the south side of Sansom street, a distance of 100 feet 4½ inches eastward from the east side of Fifth street, in the city of Philadelphia, is incumbered to the extent of about \$62,500, and the depositions show that an estimated value of the same is about \$80,000, showing a probable equity of about \$17,500.

We learn from the petition that it is the trustee's desire that Mr. Scott be required to state an account and to deliver into the possession of the trustee the above-mentioned real estate and the balance of personal property in his hands, and that an order of sale of the real estate be made for the purpose of marshaling the said proceeds under the direction of this court and applying them to the payment of the debts which are by law chargeable against the same. It has not been finally determined by the Circuit Court of Appeals that Stanley Francis is one of the partners who was trading in the firm name of the bankrupt; but the referee and the District Court have held that he is such a partner, and there seems to be good grounds, as a matter of fact, why this order should be made at this time requiring the transfer of this real estate. So far as the record shows there is no especial reason assigned

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

why there should be such an order made at this time; but at the argument of the case counsel for the petition urged that it was necessary that the transfer of the property should be made at once, as foreclosure proceedings have been instituted upon a mortgage on this real estate, and the sale is advertised for June 10, 1910, and that possession of the property by the trustee of the bankrupt firm is necessary to protect the equity which it is claimed exists. Counsel for Mr. Francis conceded the existence of these facts, but denied that they created any necessity for a transfer. In this we think the petitioner's counsel right, and that it would be for the best interest of all parties concerned to put the trustee in bankruptcy in such position as would enable him to save whatever equity might exist; so that as to the real estate, at least, such an order should be made, if this court has the power to do so.

The questions as to whether the adjudication of a partnership as a bankrupt draws to the court of bankruptcy for administration the individual estate of the partners, and whether a summary order can be made to assign such property to the trustee of the partnership, has been considered in this and other circuits. In *Re Meyer*, 98 Fed. 976, 39 C. C. A. 368, the Circuit Court of Appeals of the Second Circuit holds the affirmative view; and in the Eighth Circuit, the Appellate Tribunal in the *Bertenshaw Case*, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 19 Am. Bankr. Rep. 577, recently decided, holds the opposite view, and denies the right of the court in bankruptcy to make such an order. In this district, however, we do not think the questions are open for discussion, as Judge McPherson, in *Re Stokes* (D. C.) 106 Fed. 312, following the decision of the Circuit Court of Appeals in the Second Circuit in *Re Meyer*, supra, decided that:

"The adjudication of a partnership as a bankrupt draws to the court of bankruptcy for administration the individual estate of the partners, though they are not adjudicated bankrupts individually, * * * and the court may, by summary order, compel a partner to transfer his individual property to the trustee."

This view, taken by Judge McPherson in that case, we think should be followed in this district so long as it has not been overruled or modified by our Court of Appeals; and we hold, upon the authority of the *Stokes Case*, that the power to make such an order is vested in the District Court. See, also, *Collier on Bankruptcy* (9th Ed.) pp. 116, 125.

We are not convinced that there is any necessity for the transfer of all the individual property of Francis; but we do think that the pleadings, together with the admissions made at the argument, show that there is a substantial reason why the real estate should be put in the possession of the trustee of the bankrupt firm, with power to sell the same at any time prior to the date fixed for the public sale in the state courts, as we do not think we have any power to interfere with that.

The question as to what claims or costs can be taken out of any sum arising from this real estate, and the question as to whom the fund shall eventually be paid, can be hereafter determined. The important

matter now is the possession of the real estate by the trustee to enable him to protect the alleged existing equity for distribution to whatever claims or parties it may eventually be determined shall be entitled thereto.

A decree may be drawn accordingly and submitted to this court.

STATE NAT. BANK OF DENISON v. EUREKA SPRINGS WATER CO. et al.

(Circuit Court, W. D. Arkansas, Harrison Division. November 5, 1909.)

1. COURTS (§ 312*)—FEDERAL COURTS—JURISDICTION—NOTES—INDORSEMENT.

Act Cong. 1888 (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 434 [U. S. Comp. St. 1901, p. 508]) declares that the federal courts shall not have cognizance of any suit, except on foreign bills of sale, to recover the contents of any note in favor of an assignee, if the instrument is payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the contents, if no assignment or transfer had been made. *Held* that, where there was no diversity of citizenship between the maker and payee of certain notes payable to the payee's order, suit could not be brought thereon by an indorsee, whose citizenship was diverse, in the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865-875; Dec. Dig. § 312.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. COURTS (§ 312*)—FEDERAL COURTS—CAUSE OF ACTION—TRANSFER—NOTES PAYABLE TO BEARER.

Where a note between parties of the same citizenship is made by a corporation payable to bearer, a suit thereon brought by the holder of different citizenship than the maker against it is maintainable in the federal courts, since the paper passes by delivery and requires no assignment within Act Cong. Aug. 13, 1888, c. 866, § 1, 25 Stat. 434 (U. S. Comp. St. 1901, p. 508), regulating federal jurisdiction of suits on assigned claims.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 312.*]

3. COURTS (§ 314*)—JURISDICTION—FEDERAL QUESTION.

A federal question is not raised in a suit on a note by reason of the fact that the complainant is a national bank.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 314.*]

Jurisdiction of federal courts in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purch. Co. v. Boston & M. C. C. & S. Min. Co.*, 35 C. C. A. 7.]

In Equity. Action by the State National Bank of Denison against the Eureka Springs Water Company and others. On demurrer for want of jurisdiction. Sustained. Bill dismissed.

John T. Suggs, for complainant.

James & Fuller, for defendants.

ROGERS, District Judge. The State National Bank of Denison, Tex., a corporation organized under the banking laws of the United States, and a citizen of Texas, as complainant brought this suit against the Eureka Springs Water Company, a corporation organized under

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the laws of Arkansas, W. M. Duncan, and C. C. McCarty, citizens of Arkansas, residing in the Harrison Division of the Western Judicial District. The material facts are these: The Eureka Springs Water Company executed its two several promissory notes, made payable to the order of W. M. Duncan, each for the sum of \$5,000. Duncan, the payee, who was also the president of the water company, assigned the notes to the State National Bank of Denison, Tex., and obtained a loan thereon for the water company of \$10,000, evidenced by the notes referred to. To secure that loan he delivered to the complainant 20 bonds of the Syndicate Company of Eureka Springs, Ark., secured by a certain mortgage of record in Carroll county, Ark., and later the Eureka Springs Water Company mortgaged its property to C. C. McCarty, as trustee, to secure its indebtedness, amounting to something like \$100,000, including the notes assigned by Duncan to the complainant. The complainant brought suit on the equity side of this court, first, to recover judgment on the two notes against the water company and Duncan; second, to foreclose the bonds hypothecated with it as collateral security for the notes; third, by injunctive process to compel McCarty to sell the property in conformity with the terms of the deed of trust and distribute the proceeds *pro rata* among the creditors. To this bill the Eureka Springs Water Company and W. M. Duncan interposed a demurrer, general and special, which was heretofore argued and submitted and taken under advisement by the court.

By the latter part of the first section of the act of August 13, 1888 (25 Stat. 434, c. 866 [U. S. Comp. St. 1901, p. 508]), it is provided:

"Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

This provision of the statute was first construed, so far as investigation has disclosed, in the case of *Newgass v. City of New Orleans* (C. C.) 33 Fed. 196, in which the court said:

"The construction of the restriction may also be stated thus:

"The Circuit Court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees, except over:

"First. Suits upon foreign bills of exchange.

"Second. Suits that might have been prosecuted in such courts to recover said contents if no assignment or transfer had been made.

"Third. Suits upon choses in action payable to bearer and made by a corporation. It follows that in the first and second cases, since the obligations were of such a nature as to require assignment, and the assignor could not have maintained an action in this court before assignment, the plaintiff, the assignee, cannot."

In the case at bar both the maker and payee were citizens of Arkansas, and therefore this court could not acquire jurisdiction by reason of the diversity of citizenship as between the maker and payee. The notes themselves were made payable to the order of Duncan, and could not pass to the complainant in this suit except by indorsement; but the statute, as has been seen, provides that, unless Duncan could have orig-

inally maintained the suit in the Circuit Court of the United States upon the notes sued on, his assignee could not do so. This case has been followed by an unbroken line of decisions, among which are the following cases: *Wilson v. Knox County* (C. C.) 43 Fed. 481; *New Orleans v. Quinlan*, 173 U. S. 191, 19 Sup. Ct. 329, 43 L. Ed. 664; *Quinlan v. City of New Orleans* (C. C.) 92 Fed. 695; *Skinner v. Barr* (C. C.) 77 Fed. 816. The restriction in this section, as amended in the text, applicable to original suits in the Circuit Court by indorsees and assignees, is alike applicable to cases brought originally in the state courts and attempted to be removed to the federal court. *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672. The rule is different where the paper is made by a corporation payable to bearer, because in that event the paper passed by delivery, and requires no assignment. In the case at bar, however, as stated, the notes sued on are made payable to the order of Duncan, as affirmatively appears by the allegations of the bill. This court, therefore, is clearly without jurisdiction to entertain cognizance of a suit based upon the notes in controversy; and, if the notes on which this suit is based be eliminated, all the equities sought to be enforced fall with them. Nor is there any federal question raised by reason of the fact that the complainant is organized under the national banking laws. *Wichita National Bank of Wichita et al. v. Smith*, 72 Fed. 568, 19 C. C. A. 42.

The court, therefore, is without jurisdiction in this case, and the demurrer thereto must be sustained, and the bill dismissed without prejudice.

BILLIKEN CO. v. BAKER & BENNET CO.

(Circuit Court, S. D. New York. December 22, 1909.)

1. TRADE-MARKS AND TRADE-NAMES (§ 88*)—UNLAWFUL COMPETITION—ACTION—RIGHT TO SUE.

Where complainant employed the H. Co. to manufacture and sell for it a Billiken doll, in the sale of which it was claimed defendant was guilty of unlawful competition, the business of the H. Co. was complainant's business, and complainant was therefore the proper party to ask for protection.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 98; Dec. Dig. § 88.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 88*)—UNLAWFUL COMPETITION—ACTION—RIGHT TO SUE.

Where complainant sued for unlawful competition in the sale of Billiken dolls claimed to be manufactured for the H. Co. by a doll and toy company, a royalty being paid by the H. Co. to complainant, the business to be protected was that of the H. Co., and it was therefore the proper party complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 88.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 75*)—UNLAWFUL COMPETITION—BILLIKEN DOLL.

Complainant conceived and sold a grotesque doll, made of fluffy, white material, with a large head, wearing a broad, Buddhistic smile, in a sitting position. It was sold in a carton, one side of which dropped down

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

when the cover was off, displaying the doll. On the cover was the doll's picture, with a rhyme, signed "Billiken," and on the other side a similar picture and rhyme, etc. Defendant sold a doll of similar design, called "Killiblues," put up in a similar carton. *Held* sufficient to warrant an inference that defendant's doll was intended to deceive ordinary purchasers intending to buy plaintiff's doll, and hence plaintiff established a case of unlawful competition against the manufacturer, and against sellers of the "Killiblues" doll with the expectation that purchasers would buy them for "Billikens."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. § 75.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 98*)—UNLAWFUL COMPETITION—DAMAGES—PROFITS.

Where, in a suit for unlawful competition in the sale of certain dolls, defendant's claim that it was not the manufacturer of the dolls, but purchased and sold them without knowledge that complainant claimed an exclusive right to place the dolls, packed in a particular carton, on the market, and that the suit was begun without previous notice, after which it immediately began to sell its dolls in plain boxes, defendant was not liable on such facts for damages or profits.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 95*)—UNLAWFUL COMPETITION—INJUNCTION.

Where, in a suit for unlawful competition, it was doubtful whether complainant was the proper party to sue, and defendant claims that immediately on commencement of the suit it stopped selling the article in controversy in competition with complainant's product, a preliminary injunction will be denied.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

In Equity. Bill by the Billiken Company against the Baker & Bennett Company. Preliminary injunction denied.

Briesen & Knauth, for complainant.

Robert W. Hardie, for defendant.

WARD, Circuit Judge. The bill alleges that the complainant has derived from Florence Pretz, the original artist, without saying how, the right to use the figure called by her "Billiken," and that with this name as a trade-mark it has built up a business in various articles of that design. There seems to me to be no question of trade-mark in the case, because the articles complained of are sold under the entirely different name of "Killiblues," and, if the complainant is entitled to protection, it is protection against unfair trade. It is stated on the box that the Billiken design is copyrighted; but no proof is made of this, and technical trade-mark is not relied on.

The affidavits of the complainant state that it employs the E. I. Horsman Company to manufacture and sell for it the Billiken doll. If this is true, the business carried on by Horsman & Co. is its business, and it is the proper party to ask for protection. On the other hand, the defendant's affidavit says, and this is not denied in any replying affidavit, that the Billiken dolls are manufactured for the E. I. Horsman Company by the Ætna Doll & Toy Company, and that the Horsman Company pays to the complainant a royalty of \$1.50 a dozen.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

If this is so, the business to be protected is that of the Horsman Company, and it is the proper party complainant.

The article in question has become very popular on the market. It is a grotesque doll, made of a fluffy, white material, with a large head, wearing a broad, Buddhistic smile, put up in a sitting position in a carton box, one side of which drops down when the cover is taken off, displaying the doll with its bandy legs and feet turned in. On the cover is a picture of the doll, with a rhyme signed "Billiken," and on the side which falls down a picture of the doll and another rhyme signed "Billiken."

The defendant has sold on the market a doll called "Killiblues," of a similar design, in a similar position in a carton box of a similar form, size, and color, with a picture of the Killiblues doll, and a rhyme signed "Killiblues" on the cover, and a picture of the doll and a rhyme signed "Killiblues" on the side which drops down. Admitting that a manufacturer may use every one of the above features of the complainant's collocation separately, the use of the whole collocation compels the inference of an intent to palm off Killiblues for Billikens, and the affidavits show that the ordinary purchaser is likely to be deceived. Apparently against the manufacturer a fair case would be made out. *National Biscuit Co. v. Ohio Baking Co.* (C. C.) 127 Fed. 160; *Allen B. W. Risley Co. v. Iowa Soap Co.*, 122 Fed. 796, 59 C. C. A. 54; *N. K. Fairbanks Co. v. Windsor*, 124 Fed. 200, 61 C. C. A. 233.

If the defendant, though not a manufacturer, sold the Killiblues with the expectation and intention that the ordinary purchaser would buy them for Billikens, the complainant would be entitled to protection. *N. K. Fairbanks Co. v. Dunn* (C. C.) 126 Fed. 227. But the defendant avers that it is not a manufacturer of the dolls; that it purchased them from the manufacturer and sold them without knowledge that the complainant claimed the exclusive right to place such dolls so packed on the market; that this suit was begun without any previous notice requiring it to stop the sale, and that as soon as the suit was begun it began to sell its dolls in plain boxes of ordinary construction, such as are used by the trade for general purposes. If this is the case, there could be no decree against it for damages or profits, and in view of the fact that it has stopped selling, and of the doubt as to the proper party complainant, the motion for preliminary injunction is denied.

PARK & TILFORD V. UNITED STATES.

(Circuit Court, S. D. New York. November 9, 1909.)

No. 5,341.

1. CUSTOMS DUTIES (§ 17*)—CLASSIFICATION—BOTTLES WITH CUT GLASS STOPPERS—ENTIRETIES.

Filled bottles, with cut glass stoppers, the bottle neck and the stopper being ground to fit each other and the stopper not being capable of use in any other bottle, are dutiable as entireties, rather than separately from the stoppers.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 17.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CUSTOMS DUTIES (§ 25*)—CLASSIFICATION—GLASSWARE.

Glass bottles, fitted with cut glass stoppers that constitute the element of chief value in the whole article, are dutiable as articles in chief value of cut glass, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 (U. S. Comp. St. 1901, p. 1633).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 43-47; Dec. Dig. § 25.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below is reported as G. A. 6,794 (T. D. 29,192).

B. A. Levett, for importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen., for the United States.

MARTIN, District Judge. The articles in question consist of filled bottles with cut glass stoppers. They were assessed for duty under paragraph 100, Tariff Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 (U. S. Comp. St. 1901, p. 1633), relating to articles of cut glass. The importers protested, claiming that only the stoppers should have been so assessed, and that the bottles are properly dutiable under paragraph 99 of said act, relating to bottles of molded glass. The Board of Appraisers held that the bottle and the stopper should be regarded as an entirety for tariff purposes.

The bottle is blown glass and the stopper cut glass. The neck of the bottle and the stopper are ground to fit each other. The stopper to this bottle cannot be used in any other bottle. The stopper, being of cut glass, is the component of chief value in the entire article. The real question is as to the entirety of the article. It was the same question that was before the court in the Utard Case, 128 Fed. 422, 63 C. C. A. 164, T. D. 25,115. I regard that decision as controlling in the present case.

The decision of the Board is affirmed.

BALABAN v. UNITED STATES.

(Circuit Court, S. D. New York. November 8, 1909.)

No. 5,424.

CUSTOMS DUTIES (§ 85*)—APPEAL—FINDINGS OF GENERAL APPRAISERS.

On appeal from the Board of General Appraisers the Circuit Court should not disturb the Board's findings on doubtful questions of fact, especially as to questions which turn upon the intelligence and credibility of witnesses produced before the Board.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 201-206; Dec. Dig. § 85.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Brown & Gerry (James L. Gerry, of counsel), for importer.

D. Frank Lloyd, Deputy Asst. Atty. Gen., for the United States.

PLATT, District Judge. The merchandise in question consists of olive oil. Duty was assessed thereon at 40 cents per gallon under paragraph 40, Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 153 (U. S. Comp. St. 1901, p. 1629). The importer duly protested against such assessment of duty, claiming free entry under paragraph 626 of said act, relating to olive oil fit only for mechanical or manufacturing purposes.

The Board of General Appraisers have found upon conflicting evidence that this olive oil was fit for other than mechanical or manufacturing purposes. "The Circuit Court should not disturb the findings of the Board upon doubtful questions of fact, and especially as to questions which turn upon the intelligence and credibility of witnesses who have been produced before the Board." In *re Van Blankensteyn et al.*, 56 Fed. 474, 5 C. C. A. 579. And see, also, *Apgar v. United States*, 78 Fed. 332, 24 C. C. A. 113, and *Vandiver v. United States*, 156 Fed. 961, 84 C. C. A. 522; T. D. 28,521. Indeed, I am inclined to think that, had the case been before me in the first instance for decision upon the evidence, I should have reached the same conclusion as the Board. Some of the importer's witnesses admit that the article might be used as a food by a certain portion of our population, and a government witness, Dr. Doolittle, states that it is a very fair sample of edible olive oil. I congratulate the Board upon the decision it arrived at in this case.

Decision affirmed.

NORDLINGER v. UNITED STATES.

(Circuit Court, S. D. New York. July 27, 1900.)

No. 93.

CUSTOMS DUTIES (§ 85*)—APPEAL—TAKING TESTIMONY BEYOND JURISDICTION OF COURT.

Where a referee has been appointed by the Circuit Court to take further testimony on appeal from the Board of General Appraisers, under Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138, the court is without authority to direct the referee to take testimony beyond its territorial limits, irrespective of the referee's willingness to go.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 85.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

See *Bartram v. U. S.* (C. C.) 106 Fed. 878.

On motion in behalf of the government.

Comstock & Brown (Albert Comstock, of counsel), for importer.

D. Frank Lloyd, Asst. U. S. Atty.

LACOMBE, Circuit Judge. In this case an appeal was taken from the decision of the Board of General Appraisers, and under section 15 of the customs administrative act of June 10, 1890 (26 Stat. 138, c. 407), "such further evidence as may be offered" is being taken

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 174 F.—53

before "one of the said General Appraisers as an officer of the court." The appellee offers to produce certain witnesses in New Orleans, La., and asks for an order that such testimony may be taken there before such General Appraiser.

There seems to be no authority for any such order; nothing in the statute indicates that the court has power to require the General Appraiser to go beyond its jurisdiction and betake himself to remote localities in the United States to take evidence in these causes. It makes no difference that in this particular cause the General Appraiser has signified his willingness to go. That is purely an act of courtesy on his part; but the right of the parties in these causes to take evidence before the appraiser outside of the jurisdiction of the court, as whose officer he sits, cannot be left contingent upon his convenience or courtesy.

There seems to be no sound objection, however, to the court allowing a commission to issue in the usual form upon written interrogatories, direct and cross, to take the testimony of some particular witness or witnesses whose attendance here cannot be secured.

Motion denied, with leave to renew as a motion for a commission.

In re HALLADJIAN et al.

(Circuit Court, D. Massachusetts. December 24, 1909.)

1. ALIENS (§ 68*)—DUTY—FILING NATURALIZATION PETITIONS.

Clerks of the federal courts are not subject to the instruction by federal district attorneys or by the United States itself as a party to a judicial proceeding, but are required to file naturalization petitions which contain all proper allegations, though in their judgment the applicant, because of his color, race, or other disqualification, may not be entitled to citizenship.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 144; Dec. Dig. § 68.*]

2. ALIENS (§ 61*)—NATURALIZATION—"FREE WHITE PERSONS"—ARMENIANS.

Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333), relating to naturalization, provides that the title shall apply to aliens, being "free white persons," and to persons of African nativity and descent. *Held*, that the word "white" was used to classify the inhabitants and to include all persons not otherwise classified, not as synonymous with "European," there being in fact no "European" or "white" race as a distinctive class, or "Asiatic" or "yellow" race, including substantially all the people of Asia; and hence the term "free white persons" included Armenians born in Asiatic Turkey and on the west side of the Bosphorus.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119, 120; Dec. Dig. § 61.*]

3. ALIENS (§ 61*)—NATURALIZATION—"RACE."

The term "race" primarily means an ethnical stock; a great division of mankind having in common certain distinguishing physical peculiarities, constituting a comprehensive class appearing to be derived from a distinct primitive source. A second definition is a tribal or national stock; a division or subdivision of one of the great racial stocks of mankind, distinguished by minor peculiarities. The word "race" connotes descent.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119, 120; Dec. Dig. § 61.*]

Application by four Armenians, named, respectively, Halladjian, Ekmakjian, Mouradian, and Bayentz, for naturalization. Granted.

Petitioners, pro sese.

James Farrell, Asst. U. S. Atty.

Moorfield Storey and J. Grant Forbes, amici curiæ.

LOWELL, Circuit Judge. Four petitioners presented themselves for naturalization. They were examined, and, except as stated below, were shown to be duly qualified for citizenship. All testified that they were Armenians by race. Halladjian was born at Aintab, Ekmakjian at Dikranagerd or Diarbekir, and Mouradian at Adana, all in Asiatic Turkey. Bayentz was born in a suburb of Constantinople on the west side of the Bosphorus. I find that all were white persons in appearance, not darker in complexion than some persons of north European descent traceable for generations. Their complexion was lighter than that of many south Italians and Portuguese. The United States opposed the naturalization of all these persons upon the ground that they were not "free white persons," within the purview of Rev. St. § 2169 (U. S. Comp. St. 1901, p. 1333). The assistant district attorney submitted a brief in opposition to the petitions, and referred the court to certain letters written by the Chief of the Bureau of Naturalization; the argument contained in the letters being adopted by the United States as its own. The court has also been aided by a brief filed in support of the petitions by two members of the bar as amici curiæ, and it has welcomed notes and references which other persons have furnished it, attracted by the importance of the case.

Brief mention should be made here of a sentence found in one of the letters referred to which was addressed to an assistant district attorney of the United States:

"This office * * * must request * * * that you will oppose the granting of naturalization to Hindoos or East Indians, and that you will instruct the clerks of courts in your district to refuse to accept declarations of intention or to file petitions for naturalization upon behalf of such aliens."

The second request was made without due consideration. The clerks of the federal courts are not subject to instruction by district attorneys, or by the United States itself, as a party to a judicial proceeding. That a clerk should refuse to file a petition for naturalization which contains all proper allegations, because of his judgment of the color, race, or other qualification of the petitioner, would violate the clerk's official duty. The clerk may, as an act of personal kindness, call the statute of 1882 to the attention of one who appears plainly to be a Chinaman, and may suggest that his petition will almost certainly be dismissed; but, if the petitioner persists, the petition must be filed. The act of 1882 (Act May 6, 1882, c. 126, § 14, 22 Stat. 61 [U. S. Comp. St. 1901, p. 1333]), forbids the naturalization of Chinamen; it does not deny them access to a court.

Rev. St. § 2169, reads as follows:

"The provisions of this title [Naturalization] shall apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent."

The phrase "free white persons" dates from the earliest federal statute regulating naturalization. Act March 26, 1790, c. 3, 1 Stat. 103, provided for the naturalization of "any alien, being a free white person." The phrase was repeated in Act Jan. 29, 1795, c. 20, 1 Stat. 414, and in Act April 14, 1802, c. 28, 2 Stat. 153. The same language was used in sundry later modifications of the law. Act March 22, 1816, c. 32, 3 Stat. 259; Act May 26, 1824, c. 186, 4 Stat. 69; Act May 24, 1828, c. 116, 4 Stat. 310. Act July 17, 1862, c. 200, § 21, 12 Stat. 597, provided for the naturalization of "any alien," being an honorably discharged soldier, without qualification, and seems thus to have provided that any person of the class described might be naturalized, irrespective of color. He who had rendered military service was deemed worthy of citizenship. In the earlier statutes the requirement of white color was expressed at the beginning of the sections which provided generally the conditions and methods of naturalization, sections which correspond to Rev. St. §§ 2165-2168 (U. S. Comp. St. 1901, pp. 1329-1333). Act July 14, 1870, c. 254, § 7, 16 Stat. 256, permitted the naturalization of "aliens of African nativity and * * * persons of African descent." Rev. St. 1873, §§ 2165-2168, omitted mention of "free white persons," thus opening naturalization to all aliens. Notwithstanding this universal inclusion, yet the special inclusion of Africans made by the act of 1870 was expressly, though needlessly, continued in section 2169, as follows:

"The provisions of this title [Naturalization] shall apply to aliens of African nativity and to persons of African descent."

The intent of Congress in passing section 2169 in its original form was to insure by express inclusion the right of Africans to be naturalized like all other persons. By Act Feb. 18, 1875, c. 80, 18 Stat. 318, passed "to correct errors and to supply omissions in the Revised Statutes," section 2169 was amended to take its present form, thus again limiting naturalization to (1) free white persons, and (2) Africans within the act of 1870. The broad phrase "any alien" was left unchanged in sections 2165-2168, and its meaning therein was defined and cut down by section 2169. This is the most reasonable construction of section 2169 in its present form. To make the additional express inclusion of whites by the amendment of 1875 operate to exclude all other persons from naturalization is an awkward construction, but seems inevitable. By Act May 6, 1882, c. 126, § 14, 22 Stat. 61, the courts were forbidden to naturalize Chinese.

With the freedom of the petitioners the court need not concern itself. All applicants for naturalization, inasmuch as they reside in the United States, are necessarily free. Since 1790 the requirement of white color in persons naturalized has been expressed in the same words (except between 1873 and 1875). Africans qualified except as to color may now be naturalized, indeed, though they are not white, and Chinese are altogether excluded, whether they are white or not. These exceptions are created by express provisions of statute limited, respectively, to Africans and Chinese. Other applicants, qualified except as to color, may now, as always, be naturalized if they are "white," and may not be naturalized if they are not "white." These petitioners

are neither Chinamen nor Africans of any sort, and the court has here to decide whether they are white or not.

The United States contends that the words "white persons" should be construed to mean Europeans and persons of European descent. Even this definition is ambiguous. Bayentz is a European by birth and previous residence, yet the United States contends that his petition should be dismissed because he does not belong to a race which is "European or white." The United States contends that the proper distinction is not one of mere nativity or of personal color; that "white" is the equivalent of "European," and is used to—

"describe the variations of domicile or origin which are so closely associated with the mental development of a people." "European, or its analogous term, white man, * * * is intended, not merely to describe the local habitat of the person to whom applied, but as a brief and convenient designation descriptive of the prevailing ideals, standards, and aspirations of the people of Europe."

These phrases suggest that the education and intelligence of the petitioner furnish part of the test of his statutory color, but the United States does not thus interpret its own language above quoted. It insists that a petitioner, in order to be naturalized, must be European by race. As the argument is based upon consideration of race, the meaning of that word must be examined with care.

"Race" is defined in the "Century Dictionary" primarily as:

"An ethnical stock; a great division of mankind having in common certain distinguishing physical peculiarities, and thus a comprehensive class appearing to be derived from a distinct primitive source."

A secondary definition is:

"A tribal or national stock; a division or subdivision of one of the great racial stocks of mankind, distinguished by minor peculiarities: as, the Celtic race; the Finnic race is a branch of the Mongolian; the English, French, and Spaniards are mixed races."

The word "race" connotes descent. Persons of wholly different ancestry, however much they are alike in all other respects, are not deemed to be of the same race, while persons of the same ancestry, however dissimilar in other respects, are deemed to belong to the same race. The common ancestry which determines race is necessarily remote, and beyond reach of ordinary genealogy. The offspring of mixed marriages within two or three generations are not here in question. Inasmuch as race connotes descent, the names applied to races are not usually derived from the country now inhabited by the people composing the race, unless that people has long been stationary. Thus we speak of the Anglo-Saxon race, the Teutonic, the Celtic, the Slavonic, the Caucasian, the Mongolian, the Hebrew, the negro, more commonly than of the Swiss race, the Austrian, the Spanish, or the Egyptian. In the rarer cases where the latter names are used, the usage is commonly by figure and analogy. Only where a people has remained without considerable emigration or immigration, substantially unmixed, in the same country for a very long time, do racial and geographical boundaries coincide. The inhabitants of no considerable part of Europe belong to a race thus unmixed. In what is called by

analogy a "mixed race," the cross must have been ancient, and the hybrid must have persisted without much later crossing. In nearly all Europe the mixture is not only ancient, but has continued to modern times, and even to the present day. Where there is least mixture, the departure is farthest from a single type. The Cossack of the Don and the Norwegian differ almost as much in physical appearance as in "prevailing ideals, standards, and aspirations." The United States cites no authority for the use of the term "European race," save a few expressions in judicial opinions used mostly by the way.

Even if we grant for the sake of the argument that it is proper to speak of the British race, the Hungarian, and the Russian, even if these may be designated as European races, yet to classify them as belonging to a single race, called "European or white," is contrary to ordinary usage. When Linnaeus wrote of the European race, he intended something different from the contention of the United States. He made the European race anciently inhabit Europe and the nearer parts of Asia and Africa. He was not writing of modern times nor of geographical limits.

The United States contends, further, that there is an Asiatic or yellow race, to which belong substantially all Asiatics, including these petitioners. No authority to support this theory is cited by reference to history, to ethnological theory, either ancient or modern, or to physical appearance. In their appearance, some or all of the petitioners would pass undistinguished in western Europe. They are no darker than many western Europeans, and they resemble the Chinese in feature no more than they resemble the American aborigines. The court cannot agree with the United States that:

"Without being able to define a white person, the average man in the street understands distinctly what it means, and would find no difficulty in assigning to the yellow race a Turk or Syrian with as much ease as he would bestow that designation on a Chinaman or a Korean."

A Hindoo, also referred to in the argument of the United States, differs in color no less from a Chinaman than from an Anglo-Saxon, and in other obvious physical characteristics he much more resembles the latter.

If we do not speak generally of an Asiatic or yellow race, which includes "substantially all the aboriginal peoples of Asia," the difficulty is greater in applying this name to the present inhabitants of western Asia and the eastern shores of the Mediterranean. The history of that country is known to us for 2,500 years, and nearly every people of Europe and Asia has inhabited it in whole or in part. So far as the ancient Greeks should be classified as one race, that race inhabited both shores of the *Ægean*. Persians, Romans, Gothic barbarians of many sorts, Saracens, French, Venetians, Hebrews, Ottoman Turks, have ruled within it at one time or another, and slaves from all parts of Europe, Asia, and Africa were brought there and mixed their blood with that of the earlier population. A Burgundian, traveling in Syria shortly before the conquest of Constantinople, casually noted in that country the presence, as inhabitants, of Florentines, Genoese, Catalans, Venetians, French, Circassians, Saracens, Turkomans, Arabs, Persians, Tartars, Moors, Greeks, and Hebrews. "*Le Voyage d'Outre*

Mer" of Bertrandon de la Broquière. What was then true of Syria was generally true of Asia Minor and of both shores of the Bosphorus; and the mixture of races thus suggested has gone on during the last 500 years. Doubtless religious and racial quarrels have checked intermarriage, and racial types have persisted more commonly than we might suppose, especially in Armenia proper. But in Asia Minor and in European Turkey blood has mixed otherwise than by voluntary intermarriage. History does not show, as suggested by the United States, that:

"The Turks have never commingled with Europeans, nor can it be said with any truth that they are descendants of Europeans."

For many centuries the Turks have ruled in Europe and Asia over Christians of many names, and have employed Christians for many purposes. Thus Loredano, a Venetian admiral, wrote in 1416:

"On board the captured [Turkish] ships we found Genoese, Catalans, Provençals, Sicilians, and Candiots, and these we cut to bits. * * * George Calergi, a rebel against your Serenity, I ordered to be quartered on the poop of my own ship. This will be a warning to Christians not to take service with the Turk again."

Yet the warning remained unheeded. The left wing of the Turkish fleet at Lepanto was commanded by a Calabrian, who had become Dey of Algiers. Instances of this sort were numberless, and the so-called renegades were not celibates. The Turks, indeed, both socially and sexually, commingled with Europeans to an unusual degree. European mothers bore their children, European architects built their mosques, European generals commanded their armies, and it was charged against them as an act of extraordinary cruelty that they took from European families the most promising boys and brought them up to be Mohammedans and Turks. The Turks and the Saracens did not exterminate the people they conquered. Conversion to Mohammedanism and tribute were usually offered as alternatives to the sword.

To its classification by European and Asiatic races the United States makes an extraordinary exception, viz., the Hebrews. Their history is known for a long period. While absolute purity of blood is out of the question, they have sought with unusual strictness to maintain that purity for 2,000 years at the least. Notwithstanding the opinion of Prof. Ripley and others, both Hebrew history and an approximation to general type show that the Hebrews are a true race, if a true race can be found widely distributed for many centuries. Their origin is Asiatic. Yet the United States admits that they do not belong to the "Asiatic or yellow race," and that they should be admitted to citizenship. If "the aboriginal peoples of Asia" are excluded from naturalization, as urged by the United States, it is hard to find a loophole for admitting the Hebrew. Again, if Hindoos are to be excluded from naturalization, as contended by the United States, because many Englishmen treat them with contempt and call them "niggers," a like argument applies to those who have suffered most cruelly among all men on the earth from European hatred and contempt. In the application of its classification, the United States thus contradicts the principles upon which the classification depends.

It is misleading, therefore, to speak of a European race, of a European or white race to which substantially all inhabitants of Europe belong, or of an Asiatic race, of an Asiatic or yellow race which includes substantially all Asiatics. Furthermore the present inhabitants of western Asia have their racial descent so mixed that there are many individuals who cannot safely be assigned by descent to any one race, however comprehensive. If the statutory classification should be any wise rested upon "mental development," or upon "ideals, standards, and aspirations," as suggested by the United States, a reasonable modesty may well remind Europeans that the origin of their letters was in Phœnicia, the origin of much of their art in Egypt, that Asia Minor claimed, at least, the birthplace of the first great European poet, and that the Christian religion, which most Europeans believe to have influenced their civilization and ideals, was born in Palestine.

If, however, notwithstanding these considerations, we are compelled by statute to classify for the purposes of American naturalization every man living on the earth as a member of some one race, we shall find that the Armenians have always been classified in the white or Caucasian race, and not in the yellow or Mongolian. Ethnological theories have varied greatly and at short intervals. Color, language, the shape of the head, the kind of hair, and other characteristics have been made the basis of one classification or another. Their tradition makes Armenians descend from Japhet; their language is classed as Indo-European. This court cannot be expected in any reasonable time to get a thorough education in ethnology, especially in modern ethnological theories. Its information is got at second or third hand; but a casual examination of books on ethnology, standing together on the shelves of a large library, old and new, weighty and unimportant, shows complete agreement in the proposition that Armenians are to be classed as white or Caucasian, rather than as Mongolian or yellow. Figuiet, Brace, Keane, Pickering, Brinton, Hutchinson, Jeffries, Pritchett, and Retzel, authors taken quite at random, all reach the same conclusion. This is true of Blumenbach, an influential author of the eighteenth century, and of Quatrefages and Huxley about a century later. Cuvier expressly included Armenians, as well as Hindoos, in the Caucasian race, as distinguished from the Mongolian. With this agree modern travelers, such as Bryce and W. H. Ward. Some modern ethnologists, indeed, reject altogether the "Caucasian or white" classification; but their theories do not help the United States. Ripley, for example, asserts that there is no "European or white race," and that there are three great races to be found in Europe, one of which may have come from Africa across the Mediterranean. Topinard, as quoted by Ripley, has said:

"Race in the present state of things is an abstract conception, a notion of continuity in discontinuity, of unity in diversity. It is the rehabilitation of a real but directly unattainable thing."

Race, thus defined, is not an easy working test of "white" color as required by section 2169.

In so far as the test is affected by "ideals, standards, and aspirations," the result is the same. In the warfare which has raged since

the beginning of history about the eastern Mediterranean between Europeans and Asiatics, the Armenians have generally, though not always, been found on the European side. They resisted both Persians and Romans, the latter somewhat less strenuously. By reason of their Christianity, they generally ranged themselves against the Persian fire worshipers, and against the Mohammedans, both Saracens and Turks. Conquered by the Saracens in the seventh century, they recovered their independence in the ninth century under princes, who, they said, were of the lineage of David. Finally conquered in Armenia by the Turks, their refugees set up an independent state in Cilicia,

"Streaming the ensign of the Christian cross
Against black pagans, Turks and Saracens."

Their latest ruler, of the French house of Lusignan, maintained himself beyond 1350. Here is Adana, where Mouradian was born. Halladjian was born in Syria, not far away. No one of the petitioners was born in Armenia. Since their final overthrow, the Armenians have been oppressed by the Turks, and have looked vainly to Europe for relief. They are dispersed through Asia Minor. From 200,000 to 400,000 of them are settled in various parts of Europe, principally in and about Constantinople and in Bessarabia.

Present war and their remoteness are said to have prevented the Armenian bishops from attending the Council of Chalcedon in the fifth century. Thus they say that they were misled as to the pronouncements of that Council, and so a schism arose without heresy on their part. However this may be, the ecclesiastical separation has continued to the present day, and the chief patriarch of the independent Armenian church inhabits, under Russian protection, a convent of great antiquity at the foot of Mt. Ararat. During the Crusades and afterwards many Armenians came into the obedience of the Roman Catholic Church, while retaining distinctive rites and customs. An Armenian convent in the Roman obedience has long been famous in the Venetian lagoons. These facts are stated, without reproach to the followers of Mohammed or of Zoroaster, because history has shown that Christianity in the near East has generally manifested a sympathy with Europe rather than with Asia as a whole.

If the court should inquire, as the United States suggests concerning Hebrews, May Armenians "become westernized and readily adaptable to European standards?" the answer is, Yes. They have dealt in business with Greeks, Slavs, and Hebrews, as well as with Turks, they have sought a modern education at Robert College and other American schools in the East, and they have pursued by immigration the civilization of Great Britain and of the United States.

For all these reasons the Armenians are not to be excluded from naturalization by reason of their race. So far as the test by race is applicable, they are to be classed as Caucasian or white, while the Finns by ethnological theory, and the Magyars by their known history, are deemed to belong to the Mongolian or yellow race.

Section 2169, however, makes no mention of race or of racial discrimination. "White persons" are to be naturalized and (except Africans) no others. If we pass from racial speculation and remote history

to the usage of the colonies and of the United States in statutes and in official documents, the interpretation of the word "white" will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes and mulattos, Indians, and "French neutrals." The Rhode Island census of 1748 as whites, negroes, and Indians; that of 1774 as whites, blacks, and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes, and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children, and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756, and 1771 as white and black; that of 1786 as whites, slaves, and "Indians who pay taxes." The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790. "The population of the earliest English settlements in America," so the chapter opens, "was composed of two elements, white and negro. These two elements, though subject to entirely different conditions, continue to compose the population of the republic." Page 80. Here, again, "white" is made to include all persons not otherwise specified.

The census act of 1790 (Act March 1, 1790 c. 2, 1 Stat. 101) provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by "color," and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the government publication just quoted that the phrase "other free persons" was construed to mean "free negroes," and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat. 428, 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as "white, black, or mulatto." In the census of 1860 the classification was "white, free colored, and slaves," and the class "free colored" was subdivided between blacks and mulattoes. Rev. St. § 2206, provided for census schedules classifying all inhabitants of the United States by color as "white, black, or mulatto," although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 319, § 9, 25 Stat. 763), and the enumeration was made accordingly. "For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while for the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses." Eleventh Census, part I, p. xciv.

In fact, the classification was not uniform in all parts of the country. Census Act March 3, 1899, c. 419, § 7, 30 Stat. 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by "color," and appears to have left the preparation of schedules to the director of the census. The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese, and Japanese. In other instances "colored," as opposed to "white," was used to include negroes, Chinese, Japanese, and Indians. Throughout the chapter cited in the above-mentioned Bulletin, it is assumed that all persons not classified as white, in the first eight federal censuses at any rate, were negroes or Indians.

This use of the word "white," which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes requiring separate accommodation in travel. A statute of Arkansas requires separate accommodation for the "white and African races," and provides that all persons not visibly African "shall be deemed to belong to the white race." Acts 1891, p. 17, c. 17, § 4. See, also, Laws Fla. 1909, p. 39, c. 5893; Acts Va. 1902-1904 (Extra Sess.) p. 987, c. 609, subc. 4 (Code 1904, § 1294d); Civ. Code S. C. 1902, § 2158. Concerning the use of the word "white" in treating of schools, see Civ. Code S. C. 1902, § 1231; Ky. St. 1909 (Russell's) §§ 5607, 5608, 5642, 5765 (Ky. St. 1909, §§ 4523, 4524, 4428, 4487). The recent Constitution of Oklahoma (article 23, § 11) reads as follows:

"Whenever in this Constitution and laws of this state the words 'colored' or 'colored person,' 'negro' or 'negro race' are used, the same shall be construed to mean to apply to all persons of African descent. The term 'white race' shall include all other persons."

References like those made above could be multiplied indefinitely.

From all these illustrations, which have been taken almost at random, it appears that the word "white" has been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where "French neutrals" are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the act of 1790 Congress did not concern itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classed as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants,

these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, "white" is still the catch-all word which includes all persons not otherwise classified.

The interpretation which has been put upon the statutes of naturalization by the courts does not conflict substantially with the principles above stated. In *Fong Yue Ting v. United States*, 149 U. S. 698, 716, 13 Sup. Ct. 1016, 37 L. Ed. 905, it was said by Mr. Justice Gray, speaking for the Supreme Court in 1893, that:

"Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws."

So far as this statement construed in 1893 the existing statutes of the United States even apart from the statute of 1882, it was authoritative. But it was not correct, if historically applied to the practice of federal courts one or two generations earlier. The change of sentiment and usage had produced a change in the construction of the statute. That a change in the meaning of a word should affect the operation of a statute is at least unusual, and may offend legal principles; but this has been the historical result. Only after the feeling concerning the Chinese had led to a discrimination between them and other aliens was their naturalization refused, and, as has been stated above, it was certainly permitted by the act of 1862, and by the Revised Statutes of 1873. The federal censuses classified them as whites until 1860. To the same effect as *Fong Yue Ting* are *In re Ah Yup*, Fed. Cas. No. 104; *In re Gee Hop* (D. C.) 71 Fed. 274; *In re Hong Yen Chang*, 84 Cal. 163, 24 Pac. 156. In these cases the distinction made was between Caucasian and Mongolian.

Somewhat later it was decided, both in this court and elsewhere, that Japanese are also excluded from naturalization. In *re Saito* (C. C.) 62 Fed. 126; *In re Buntaro Kumagai* (D. C.) 163 Fed. 922; *In re Knight* (D. C.) 171 Fed. 299; *In re Yamashita*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860. In the last case the distinction was made between Caucasian and Mongolian. The United States has laid emphasis upon an expression of this court in the *Saito* Case that Asiatics are excluded from naturalization, but the context shows that the court there used the word "Asiatics" to mean members of the Mongolian or yellow race, and those Asiatics alone. To make the list complete, reference should be had to the case of Indians. In *re Camille* (C. C.) 6 Fed. 256; *In re Burton*, 1 Alaska, 111. The City Court of Albany refused to naturalize a Burmese on the ground that he was a Malay or a Mongol (*In re Po*, 7 Misc. Rep. 471, 28 N. Y. Supp. 383), and the Supreme Court of Utah refused to naturalize a Hawaiian because he was not a Caucasian (*In re Kanaka Nian*, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726). A Mexican of aboriginal descent was naturalized, largely because of treaties with Mexico. In *re Rodriguez* (D. C.) 81 Fed. 337. Judge Lacombe, in the Circuit Court for the Southern District of New York, admitted a Parsee to naturalization, though with considerable doubt. In *re Balsara* (C. C.) 171 Fed. 294. A Syrian was lately admitted, against the opposition of the United States, in the Circuit Court for the District of Rhode Island, and the

newspapers report that a like decision has been reached in a federal court sitting in Georgia, while the contrary has been decided by a federal court sitting in Nebraska. No authentic reports have been received of the two cases last mentioned.

We find, then, that there is no European or white race, as the United States contends, and no Asiatic or yellow race which includes substantially all the people of Asia; that the mixture of races in western Asia for the last 25 centuries raises doubt if its individual inhabitants can be classified by race; that, if the ordinary classification is nevertheless followed, Armenians have always been reckoned as Caucasians and white persons; that the outlook of their civilization has been toward Europe. We find, further, that the word "white" has generally been used in the federal and in the state statutes, in the publications of the United States, and in its classification of its inhabitants, to include all persons not otherwise classified; that Armenians, as well as Syrians and Turks, have been freely naturalized in this court until now, although the statutes in this respect have stood substantially unchanged since the First Congress; that the word "white," as used in the statutes, publications, and classification above referred to, though its meaning has been narrowed so as to exclude Chinese and Japanese in some instances, yet still includes Armenians. Congress may amend the statutes in this respect. To provide more specifically what persons may be admitted to citizenship seems desirable. While the statutes are unchanged, without proof, if proof be admissible, that the meaning of the word "white" has been still further narrowed, this court will not deny citizenship by reason of their color to aliens who, like the Armenians, have hitherto been granted it.

The petitioners will be admitted to citizenship.

HOLLENBACH v. ELMORE & H. CONTRACTING CO. BICKEL v. SAME.
GREEN v. SAME.

(Circuit Court, N. D. New York. December 21, 1909.)

1. COURTS (§ 363*)—STATE LAWS AS RULES OF DECISION—ACTION FOR WRONGFUL DEATH.

Code Pub. Gen. Laws Md. 1888, art. 67, authorizing an action in the name of the state for wrongful death for the use of the persons entitled to damages, who are the wife, husband, parent, or child of the person killed, is not so inconsistent with Code Civ. Proc. N. Y. §§ 1902, 1903, relating to the same subject and authorizing a recovery by the executor or administrator for the benefit of the same persons, that the federal courts sitting in New York would not take cognizance of and enforce the Maryland law in actions for wrongful death occurring in Maryland.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 362*]

State laws as rules of decision in federal courts, see notes to Willson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. COURTS (§ 309*)—FEDERAL COURTS—CHARACTER OF PARTIES—REAL AND NOMINAL PARTY.

For purposes of jurisdiction, the federal courts regard the real rather than the nominal party.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 309.*]

Actions by Harry S. Hollenbach and by William H. Bickel and by Francis Green, as administrators, etc., against the Elmore & Hamilton Contracting Company to recover damages for alleged wrongful death under the laws of Maryland. On demurrers to the complaint. Overruled.

Frost, Daring & Warner, for plaintiffs.
Edgar T. Brackett, for defendant.

RAY, District Judge. The plaintiffs, as administrators, etc., bring these actions, respectively, to recover damages for the death of their intestates alleged to have been caused by the negligence and wrongful act of the defendant, the Elmore & Hamilton Contracting Company, in constructing concrete piers for a bridge being erected by the Washington & Berkeley Bridge Company, a West Virginia corporation, over the Potomac river at or near Williamsport, state of Maryland. The accident in which the various intestates lost their lives occurred on or about the 16th day of December, 1908. The said Washington & Berkeley Bridge Company was engaged in erecting the entire bridge including piers and superstructure. That company entered into a contract with the defendant, the Elmore & Hamilton Contracting Company, to erect the piers which were to be of concrete mixed and put together according to certain specifications. The Washington & Berkeley Bridge Company entered into a contract with the Pennsylvania Steel Company to erect and place on such piers when completed the superstructure of such bridge which was to be of steel. At some point at least the superstructure was some 40 or 45 feet above the ground and was to rest upon and be supported by the piers. The defendant company knew the use to which such piers were to be put and knew of the contract between the Washington & Berkeley Bridge Company and the Pennsylvania Steel Company, and knew that it would be necessary for men to go upon the said superstructure resting upon such piers for the purpose of putting same together, and that it would be necessary to use machinery and tools in so doing. There was no contract between the Pennsylvania Steel Company and the defendant company. The plaintiffs' intestates were employed by the Pennsylvania Steel Company in erecting and placing the superstructure upon the piers which had been completed and turned over by the defendant company to the bridge company when one of the piers disintegrated and crumbled away and the intestates of the plaintiffs in these actions were precipitated to the ground and killed or injured, so that they died. The machinery and tools of the Pennsylvania Steel Company were destroyed in the same accident.

The complaints in these actions allege among other things and in addition to the facts stated that the workmen employed by the Pennsylvania Steel Company were not skilled in the erection of concrete, and that the defendant company knew such fact and knew that such workmen were entitled to and would rely upon the proper performance by the defendant of its duty in the construction of such piers and knew the burdens which the piers were intended to support and maintain, and the purposes for which the piers and bridge were intended

to be used; also, that it was the duty of the defendant to use due care in the selection of materials and in the mixing of the concrete of which the piers were to be constructed, and in setting same in place, and to employ competent and experienced workmen in the performance of such duties, and to take due care that the concrete piers when erected and in place should be so constructed and erected as to give the necessary support to the superstructure and other burdens to be placed thereon, and that defendant had due notice thereof; that the defendant by its officers, agents, and employes, in violation of its duties and obligations, carelessly and negligently selected the materials and mixed the concrete used in the construction of pier No. 10, and knowingly used improper material in the construction of said concrete, and failed and neglected to use the ordinary, usual, and proper machinery, and failed and neglected to use suitable and proper methods in mixing such concrete, and carelessly and negligently set and constructed the same after the same had been so improperly made and mixed, and in various other ways and manners negligently and improperly constructed said pier No. 10, and then prior to the 16th day of December, 1908, delivered the said piers to the bridge company, knowing that the same were to be used for sustaining the said burdens above mentioned.

The complaints then allege that, in consequence of the said "wrongful, careless, negligent and unlawful acts of the defendant, said pier No. 10 was improperly made and constructed, and the same was rotten, weak, and wholly insufficient to support the weight of the superstructure and other burdens so to be placed thereon as aforesaid as the defendant well knew, and the defendant nevertheless wrongfully turned over the said pier to the said bridge company, representing that the same had been properly constructed and completed, and was capable of bearing the weight of the said superstructure and other burdens as aforesaid, which defendant knew were to rest thereon, and inviting the erection upon said pier of said superstructure; that the said defects of the said pier were latent and undiscoverable, and were not observable or discoverable by the use of ordinary care on the part of plaintiff, but were fully known to the defendant as aforesaid."

The complaints also allege, respectively, that the plaintiffs' intestates were killed by being precipitated to the ground by the disintegration and falling to pieces of pier No. 10, and that the injuries sustained were due and owing "to the aforesaid wrongful acts and negligence of the defendant and without any fault or omission" on the part of said intestates. The complaints then set forth, respectively, the residence, citizenship, etc., of said intestates and the widows and children left by them, respectively, and also set forth the statutes of the state of Maryland and the statutes of the state of New York, giving a right of action for the benefit of the widow, heirs at law, and next of kin for wrongful acts and negligence in such cases.

The Pennsylvania Steel Company has brought action against the defendant company to recover damages for the loss and destruction of its tools and property alleged to have been caused by the said negligence and wrongful act of the defendant company. The defendant demurred to the complaint and this court has just handed down its

opinion in that case overruling the demurrer, and holding that the defendant company is liable for its negligence in the respects named to third persons injured thereby notwithstanding the absence of contractual relations between the injured persons and the defendant company, and on the ground that the defendant company owed a duty to such third persons imposed by law to safely and properly construct such piers, and, if unsafe or improperly constructed, to inform persons going thereon or about to go thereon or using same or about to use same, if known to the defendant, of their dangerous character and condition. The opinion in that case covers all the propositions presented here except the one now to be considered. The Maryland statutes (Code Pub. Gen. Laws, 1888, art. 67) read as follows:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused and shall be brought by and in the name of the State of Maryland for the use of the person entitled to damages; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above mentioned parties, in such shares as the jury by their verdict shall find and direct; provided, that not more than one action shall lie for and in respect of the same subject matter of complaint; and that every such action shall be commenced within 12 calendar months after the death of the deceased person.

"The word 'person' shall apply to bodies politic and corporate, and all corporations shall be responsible under this article for the wrongful acts, neglect or default of all agents employed by them."

The substance of these provisions is:

(1) When the death of a person is caused by the wrongful act, neglect, or default of another, and the party injured, if death had not ensued, could have maintained an action to recover damages for the injuries caused by such act, neglect, or default, the person or corporation who would have been liable to the injured person shall still be liable and subject to an action in damages for such act, neglect, or default.

(2) Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been caused by such wrongful act, neglect, or default.

(3) Every such action shall be brought by and in the name of the state of Maryland for the use of the person entitled to such damages.

(4) The jury may give such damages as they think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action is brought.

(5) The amount recovered after deducting the costs not recovered from the defendant shall be divided amongst the parties recovering damages in such shares as the jury by their verdict shall direct.

(6) But not more than one action shall lie for and in respect of the same subject-matter of complaint.

(7) Such action must be commenced within 12 months after the death of the person injured.

(8) Corporations are responsible for the wrongful acts, neglect, or default of all agents employed by them.

The general statutes of the state of New York (Code Civ. Proc. §§ 1902, 1903) read as follows:

"Sec. 1902. The executor or administrator of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death.

"Sec. 1903. The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, the reasonable funeral expenses of the decedent and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper."

The substance of these provisions is:

(1) When the death of a person is caused by wrongful act, neglect, or default, and the party injured could, if death had not ensued, have maintained an action to recover damages for such act, neglect, or default, the person or corporation who would have been liable to the injured person shall still be liable and subject to an action for such act, neglect, or default.

(2) The action is for the benefit of the decedent's husband, wife, and next of kin.

(3) The action is brought and maintained by the executor or administratrix of the deceased person.

(4) The damages are fixed by the jury in one lump sum. The jury does not apportion.

(5) The damages recovered are distributed by the executor or administrator as if they were unbequeathed assets deducting the expenses of the action, funeral expenses, and commissions.

(6) Only one action can be maintained.

(7) The action must be commenced within two years after the death of the injured person.

(8) Corporations are responsible for the wrongful acts, neglects, or defaults of its agents representing the corporation and acting within the scope of their employment.

The main and substantial differences between the two statutes are:

(1) In Maryland the action must be prosecuted in the name of the state while in New York the action must be prosecuted in the name of the executor or administrator of the deceased person. In both cases, however, the action is for the benefit of the person or classes of persons named.

(2) In Maryland the jury apportions the damage to each person entitled to share therein, and, if there be a wife and parent and a child, each shall share in the recovery if the jury finds that each suffered damage by the death. In no case does recovery go beyond the husband or wife, as the case may be, and parent and child, while in New York the recovery in one lump sum is to be distributed as in case of intestacy to the husband or wife surviving, as the case may be, and to the children, if any, and the children of the deceased child, if any. Next of kin may go further than this, and the result is that under the New York statute there may be a recovery for the benefit of persons for whose benefit no recovery could be had under the Maryland statute.

(3) Under the Maryland statute, only costs of the action can be deducted from the recovery, while under the New York statute the recovery of damages before division is subject to the payment of the costs of the action, reasonable funeral expenses of the decedent, and commissions of such executor or administrator.

(4) Under the Maryland statute, corporations may be held responsible in cases where they could not be held liable for damages for the acts of their agents under the New York statute.

The real question is whether the statute of the state of Maryland above quoted and in which state this cause of action arose is, in substance, inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced, viz., the state of New York.

In *Stewart v. Baltimore & Ohio Railroad Company*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, the plaintiff's intestate was killed in a railroad collision which occurred in the state of Maryland. The statutes in the state of Maryland then in force were those quoted. The action was brought in the District of Columbia. The statute in force in the District of Columbia at that time was Act Feb. 17, 1885, c. 126, 23 Stat. 307, and "provides for recovery in case the act causing death is done within the limits of the District of Columbia; that 'the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured;' that the recovery shall not exceed \$10,000; that the action shall be brought in the name of the personal representative of the deceased, and within one year after his death, and that the damages recovered shall not be appropriated to the payment of the debts of the deceased, but enure to the benefit of his or her family and be distributed according to the provisions of the statute of distributions."

The Court of Appeals of the District of Columbia held that the action could not be maintained, but the Supreme Court of the United States reversed the holding, and held:

"The Supreme Court of the District of Columbia has jurisdiction of an action sounding in tort brought by the administrator of a deceased person against the Baltimore & Ohio Railroad Company to recover damages for the benefit of the widow of the deceased by reason of his being killed by a collision which took place while he was traveling on that railroad in the state of Maryland. The purpose of the several statutes passed in the states in more or less conformity to what is known as Lord Campbell's act is to provide the means for recovering the damages caused by that which is in its

nature a tort, and, where such a statute simply takes away a common-law obstacle to a recovery for the tort, an action for that tort can be maintained in any state in which that common-law obstacle has been removed, when the statute of the state in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced. While, under the Maryland statute authorizing the survival of the right of action, the state is the proper plaintiff and the jury trying the cause is to apportion the damages recovered, and under the act of Congress in force in the District of Columbia the proper plaintiff is the personal representative of the deceased, and the damages recovered are distributed by law, these differences are not sufficient to render the statutes of Maryland inconsistent with the act of Congress, or the public policy of the District of Columbia."

This case settles the question that these actions are properly brought in the name of the administrators, respectively, and that the difference in the modes of assessing the damages provided by the Maryland and New York statutes is immaterial, or at least not sufficient to prevent the maintenance of these actions, and so of the mode of distribution.

As said by Mr. Justice Brewer in the case cited, the substantial purpose of the two statutes is to do away with the obstacle to a recovery caused by the death of the party injured. By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is the main purpose and effect of each. In neither state does the nominal plaintiff have any direct pecuniary interest in the recovery. True, in New York, the administrator has commissions upon the balance for distribution. In neither state do the damages recovered become a part of the assets of the estate or liable for the debts of the deceased. The volume of the estate is not to be increased under the laws of either state, and the general purpose and effect of the statutes in both states is to give the damages to the immediate family and relatives of the person killed, generally those who would be under obligation to care for the deceased in case he became unable to care for himself and who have an interest in the preservation of his life.

As was said by the court in the case cited, "for purposes of jurisdiction in the federal courts regard is had to the real rather than to the nominal party."

In view of the holding of the Supreme Court in the case cited, I do not see that the differences in the two statutes are so material that it can be said the statute of Maryland is inconsistent with the statute of the state of New York. Clearly the statute of the state of Maryland is quite consistent with the declared public policy of the state of New York. The differences are mainly in modes of procedure and distribution. True, under the Maryland statute, the action must be brought within 12 months of the death, while in New York it must be brought within 2 years. However, the Maryland statute controls and may be enforced here, provided that the action is brought in time. *Stone*, as Administrator, v. *Groton Bridge Manufacturing Company*, 77 Hun, 99, 28 N. Y. Supp. 446, upon which the defendant relies, was decided in 1894, while *Stewart v. Baltimore & Ohio Railroad Company*, supra, was decided in 1897. It may be presumed that the decision in the *Stone Case* would have been different had the *Stewart Case* then been decided by the Supreme Court of the United States.

At least, this court is bound to follow the decisions of the Supreme Court of the United States. This court is enforcing the law of the state of Maryland and not the law of the state of New York, except in mere matters of procedure, and even in matters of procedure it is not controlled absolutely by the New York procedure, but only so far as may be.

In view of the Stewart Case which has been cited with approval by the court in which decided many times, the demurrers must be overruled, with costs. On payment of such costs within 30 days, the defendant may answer.

PLAUT v. GORHAM MFG. CO. et al.

(District Court, S. D. New York. June 15, 1909.)

1. COURTS (§ 280*)—FEDERAL COURTS—JURISDICTION.

It is not sufficient that a complaint alleges facts showing federal jurisdiction, but such facts must be established by evidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816-818; Dec. Dig. § 280.*]

2. BANKRUPTCY (§ 292*)—LEASE—TERMINATION—ACTION BY TRUSTEE.

Where a lease on the premises occupied by the bankrupt was terminated by a warrant of dispossession issued at least four days before the receiver in bankruptcy was appointed, and after the receiver took possession he appeared and announced in open court that he had finished the business and disposed of the bankrupt's assets contained in the premises, and made no objection to the dissolution of an injunction restraining the landlord from interfering with his possession, the bankrupt had no lease which could be an asset of his estate in bankruptcy, nor had the receiver either wrongfully parted with or been deprived of the premises by force of the warrant to dispossess; and hence the federal court had no jurisdiction of an action by a trustee to establish the lease as an asset of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 410; Dec. Dig. § 292.*]

3. LANDLORD AND TENANT (§ 202*)—LEASE—CONSTRUCTION—PAYMENT IN ADVANCE.

Where a lease was silent as to the time of payment of rent, the rent would ordinarily be payable at the end of the month; but where, for a period of six months, the rent had been paid in advance, the parties would be held to have given the lease a contemporaneous construction to require advance payment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 802-806; Dec. Dig. § 202.*]

4. JUDGMENT (§ 652*)—CONCLUSIVENESS—DISPOSSESSION PROCEEDINGS.

A default judgment in dispossession proceedings for alleged nonpayment of rent establishes that the rent was due at the time proceedings were instituted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1164; Dec. Dig. § 652.*]

5. COURTS (§ 189*)—MUNICIPAL COURTS—PROCEDURE—APPEARANCE BY ATTORNEY.

Where a tenant against whom dispossession proceedings were instituted in a New York City Municipal Court appeared by attorney and never at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any time asserted that the attorney was not authorized to appear, but recognized the attorney's acts by sending to him checks with which to pay rent still due, such appearance waived the insufficiency of service of the precept.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.*]

6. LANDLORD AND TENANT (§ 116*)—DISPOSSESSION PROCEEDINGS—JUDGMENT—LEASE—TERMINATION.

A judgment for the landlord in dispossession proceedings on which a warrant was duly issued requiring a surrender of the premises for non-payment of rent constituted a termination of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 116.*]

7. LANDLORD AND TENANT (§ 213*)—PAYMENT OF RENT—CHECK.

A tenant's check for rent received for collection only was not payment thereof.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 852; Dec. Dig. § 213.*]

8. BANKRUPTCY (§ 101*)—ADJUDICATION—APPOINTMENT OF TRUSTEE.

From a bankrupt's adjudication until the appointment of a trustee the bankrupt is not to be regarded as civilly dead.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 101.*]

9. BANKRUPTCY (§ 196*)—JUDGMENT—LIEN—DISPOSSESSION.

A judgment dispossessing a bankrupt as a tenant prior to his adjudication in bankruptcy did not create a lien on his estate within Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]) § 67f, declaring that all liens obtained through legal proceedings against the bankrupt at any time within four months prior to the filing of the petition shall be void.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. § 196.*]

Action by Isaac S. Plaut, as trustee in bankruptcy of Solomon Rothschild, bankrupt, against the Gorham Manufacturing Company and others. Decree for defendants.

Myers & Goldsmith (Emanuel J. Myers, of counsel), for complainant.

George Carleton Comstock (J. Noble Hayes, of counsel), for defendants.

HOLT, District Judge. This action is brought by Isaac S. Plaut, as trustee in bankruptcy of Solomon Rothschild, bankrupt, against the Gorham Manufacturing Company and others to recover, as an asset of the estate, a lease made by the Gorham Manufacturing Company to the bankrupt of the premises 384 Fifth avenue, New York, dated January 16, 1906, for a term of 21 years, at an annual rental of \$35,000 a year, payable monthly. Rothschild, the tenant, went into possession of the premises under the lease, and paid the rent monthly in advance until and including the month of June, 1906. On July 19, 1906, no rent for July having been paid, the Gorham Manufacturing Company instituted a proceeding on a petition in a Municipal Court of the city of New York to dispossess the said Rothschild for the nonpayment of rent, and to recover possession of the premises and terminate the lease. A precept was issued directed to the said Rothschild, requiring him to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

remove from the premises or show cause before the Municipal Court before the 24th day of July, 1906, and was served on July 19th by leaving a copy of the same at Rothschild's place of business with a person in charge. Rothschild thereupon employed the firm of Davis & Kaufman as his attorneys to represent him in the proceeding. On July 23, 1906, the day before the precept was returnable, Davis & Kaufman applied to the firm of Olney & Comstock, the attorneys for the Gorham Manufacturing Company in the proceeding, and requested them to sign a stipulation adjourning the proceeding to July 26, 1906, reserving the right of the tenant to interpose any objection or answer or show cause to the precept returnable on the 24th day of July. Messrs. Olney & Comstock declined to adjourn the proceeding generally, but agreed to withhold the issuance of a warrant until July 26th, and accordingly struck from the proposed stipulation the words which granted the right to the tenant to interpose any objection or answer or show cause to the precept, and interlined the words "pay rent called for by precept returnable," so that the stipulation as finally signed by the attorneys for the respective parties read as follows:

"It is hereby consented that Solomon Rothschild the tenant in the above-entitled proceeding, had until Thursday, July 26th, 1906, in which to pay rent called for by the precept returnable the 24th day of July, 1906, at 9 o'clock in the forenoon."

On July 24th, the original return day of the precept, Messrs. Olney & Comstock appeared in the Municipal Court, filed the stipulation, and had a final order dispossessing the tenant for nonpayment of rent signed by the magistrate, but withheld the issuance of the warrant until July 26, 1906. On July 26th Messrs. Davis & Kaufman applied to Messrs. Olney & Comstock, asking them if they would accept the rent if they sent the money down the next day, the 27th. Messrs. Olney & Comstock replied that they would, but that they would get out the warrant in the meantime. They thereupon directed their clerk to stop at the office of the Municipal Court on the morning of the following day, and get the warrant, and he did so. During the 27th, checks for the amount of the rent were sent by Davis & Kaufman to Olney & Comstock. Mr. Comstock testifies that he left town on the 27th, which was Friday, and did not return until the succeeding Monday, the 30th; that he told his clerk not to accept checks in payment of the rent; but only money. After Mr. Comstock had left the office, late in the afternoon of the 27th, checks for the amount of the rent were brought to Mr. Comstock's office by Mr. Davis. The clerk said that his instructions were to take money only. Mr. Davis suggested that he take the checks and give a receipt for them until Mr. Comstock returned, and the clerk did so. Upon Mr. Comstock's return on Monday, the 30th, he had a conversation by telephone with Mr. Kaufman, and said that he found the checks in his office upon his return, and that he would not accept anything but money in payment of the rent. The checks were drawn by Mr. Rothschild to the order of Mr. Kaufman, and indorsed by the latter. Mr. Comstock asked Mr. Kaufman if he meant by the indorsement to guarantee the payment of the checks. Mr. Kaufman answered that he did not, that he was merely acting for Mr. Rothschild as an attorney, and a mere conduit for the checks.

Mr. Comstock then informed him that he would send the checks back, but Mr. Kaufman requested Mr. Comstock to take them for collection, to which Mr. Comstock replied that, if his client was willing to accept them for that purpose, he would have no objection, and, if they were so received and paid, they would be accepted in payment, but, if not, they would be treated as a nullity. Mr. Comstock thereupon sent the checks to the office of the Gorham Manufacturing Company at New York. Mr. Holbrook, the president of the company, was in Providence. Mr. Spencer, the financial official of the company at New York, refused to deposit the checks, and referred Mr. Comstock to Mr. Holbrook. Mr. Comstock went to Providence that afternoon, and saw Mr. Holbrook, and Mr. Holbrook directed that the checks be deposited, and that, if paid, the rent would be accepted, and, if not, not. These instructions were given on July 31st, and the checks were put in the bank for collection on August 1st. On that day, at 9:15 a. m., an involuntary petition in bankruptcy was filed against Rothschild. None of the checks was paid. One was returned indorsed "Insufficient funds," and the others indorsed "Bankruptcy proceedings pending." On the same day Mr. Charles C. Burlingham was appointed receiver, and qualified as such. He thereupon went to the leased premises, took possession of the property of the bankrupt there, and occupied the premises until September 7, 1906. At the same time, an injunction was issued restraining the Gorham Manufacturing Company and all other persons from interfering with the receiver, and on August 7, 1906, an order was obtained requiring the Gorham Manufacturing Company to show cause why it should not be restrained from prosecuting the dispossess proceedings, which order contained a temporary injunction to that effect. This order, after several adjournments, came on for hearing on September 7, 1906. On the hearing, the receiver's counsel stated that he had discontinued the business of the bankrupt upon the premises, and had sold the stock and merchandise of the bankrupt at public auction, and thereupon an order was made denying the motion for a further stay contained in said order to show cause of August 7, 1906. Thereupon the Gorham Manufacturing Company went into possession of the said premises, and continued in such possession until November or December, 1906, when it leased the said premises to the defendant Adelbert Jaeckel, who has been in possession ever since. The plaintiff was appointed trustee in bankruptcy on October 16, 1906. He thereafter, claiming that the lease was an asset of the estate to which he was entitled, tendered the amount of the rent in arrears, and demanded possession of the premises, which was refused. He thereupon brought this suit.

The first question in this case is whether the facts proved show that this court has jurisdiction. The complaint alleges, in substance, that the receiver took possession of the lease and of the premises thereunder, and that he was dispossessed under the warrant of dispossession, which complainant claims was issued without jurisdiction. On demurrer I held that these allegations made out a case which conferred jurisdiction upon this court under the doctrine of the case of *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. But it is not enough that a complaint alleges facts showing jurisdiction in a

federal court. The evidence must establish such facts. It is necessary, in order to bring this case within the reasoning of *Whitney v. Wenman*, to show that the receiver was in possession of the asset claimed, and that he wrongfully parted with it or was deprived of it. In the first place, I do not think that the evidence establishes that the receiver was ever in possession of the lease. He went into possession of the premises which had been leased, and of the physical assets of the bankrupt which were situated in said premises; but if the lease and all the rights of the tenant under it had been terminated by the issuance of the warrant of the Municipal Court on July 26th, four days before the receiver was appointed, the tenant had no lease, and it was not an asset of which the receiver could take possession. Moreover, assuming that he did take possession of the lease by the fact that he took possession of the premises, and occupied them for about a month, the evidence does not establish that he either wrongfully parted with them, or was deprived of them by the force of the warrant to dispossess. He appeared in open court, announced that he had finished the business, and disposed of the assets of the bankrupt contained in the premises, and made no objection to a vacation of the injunction. The court thereupon made an order vacating the injunction. Instead, therefore, of the receiver being dispossessed by the operation of the dispossess warrant, he voluntarily vacated the premises, and his action in doing so was authorized by the court. Under such circumstances, I cannot see that he wrongfully parted with property or was wrongfully deprived of property by the defendants. Therefore I do not see that this court has any jurisdiction in this case.

This conclusion makes it strictly unnecessary to consider the case upon the merits, but, as an appeal may be taken, and the court on appeal may hold that this court had jurisdiction, and as it is desirable that this elaborate and expensive litigation, if an appeal is taken, should come before the appellate court in such a form that it may be finally disposed of, I will briefly state the conclusions at which I have arrived on the merits.

It is claimed that the dispossess warrant issued by the magistrate was issued without jurisdiction, and that therefore it is void. This claim is based on the proposition, as I understand it, that the rent, by the terms of the lease, was not payable in advance, and therefore no rent was due when the proceeding was begun; that the service of the precept, when made, was not made upon Rothschild personally, but was made by being left at his place of business; and that the original defect in the service was not cured by the appearance of Davis & Kaufman as attorneys for the bankrupt, on the ground that attorneys, as such, are not officers of courts of justices of the peace, and, if they appear for a litigant in such a court, must prove that they have authority to appear by the provisions of the statute relating to such courts.

The question whether the rent was payable in advance is a question of fact. Rothschild, in fact, had paid it, and the Gorham Manufacturing Company had received it, in advance, at the beginning of each of the six months which had elapsed after Rothschild went into possession. The contemporaneous construction of the parties therefore was that the rent was payable in advance. The lease was silent on the sub-

ject of the time of payment, and probably, under the authorities, in the absence of evidence of any other circumstances, it would be held that the rent was payable at the end of the month. But the question from any point of view is purely one of fact, and the judgment of dispossession, if otherwise valid, established the fact that the rent was due. A judgment by default establishes such a fact in the same way as any other judgment. The fact that the service of the precept was made, not upon Rothschild personally, but upon a person in charge at his place of business, appears, under the statute, to have been insufficient service, but no objection to the service was made by Rothschild, and he appeared in the proceeding by Davis & Kaufman as his attorneys. But it is said that the Municipal Courts of the city of New York are substantially the same as the courts of justices of the peace; that attorneys at law, being officers of courts of record, and not of courts of justices of the peace, if they appear for a party in such a court, must furnish proof that they have authority to appear for him. Various cases are cited in which it has been held that such authority must be proved. These authorities all seem to be cases in which the defendant has asserted that an attorney who appeared for him in a justice's court had no authority to appear. In this case Rothschild never asserted that Davis & Kaufman had no authority to appear for him. He recognized that they were acting as his attorneys by sending to them the checks with which to pay the rent which was due. Moreover, it may be questioned whether the rule applicable to country courts of justices of the peace applies to Municipal Courts in this city. In ordinary practice it would certainly be considered an extraordinary proposition by most New York lawyers that a party was not bound by an appearance of reputable attorneys in a Municipal Court of the city of New York unless such attorneys had proved by oath that they were authorized to appear. If such proof is necessary in any case in a Municipal Court, it must be in my opinion in a case in which the party represented by the attorney repudiates his authority, and asserts that he never acquiesced in the attorney's appearance. In my opinion, none of the grounds upon which it is claimed that the magistrate's order dispossessing the tenant was without jurisdiction is valid. I think that the judgment of dispossession, shown either by the signing of the order for the warrant on July 24th, or certainly by the issuance of the warrant on July 26th, was a valid judgment, which terminated the relation of landlord and tenant between the Gorham Manufacturing Company and Rothschild, and that, when the receiver was appointed upon August 1st, the lease of the premises was not an asset of the bankrupt which could be taken possession of by the receiver or by the trustee.

But it is claimed that the landlord waived the provisions of the judgment of dispossession by receiving the checks in payment. If, in fact, no bankruptcy had intervened, and the checks had been paid, and the landlord had acquiesced in Rothschild's continuing in possession of the premises, and had accepted rent subsequently from him, Rothschild would have continued to occupy the premises in accordance with the terms of the lease. Logically, the lease having once been absolutely terminated, it might be claimed that any subsequent reten-

tion of the premises was not strictly under the lease, but was a use and occupation upon an implied lease or agreement, the terms of which would be similar to that of the original lease; but whether it be considered that the judgment would be waived, and the lease actually continued, or that theoretically it was a case of use and occupation, is an immaterial academic question. The checks, in fact, were not paid, and there was no agreement to receive them as payment. The receipt given for them was a receipt for the checks, and not for the rent. The conversations between Mr. Comstock and Mr. Kaufman, the fact that the New York manager of the Gorham Manufacturing Company refused to take the responsibility of depositing the checks, and that Mr. Comstock went to Providence and consulted with Mr. Holbrook on that subject before they were deposited, the fact that by the conversations between Mr. Comstock and Mr. Kaufman, the evidence of which is entirely uncontradicted by Mr. Kaufman, it was agreed between them that the checks should not be taken as payment, but should be taken for what they were worth, all tends to show that the ordinary rule applies in this case that the acceptance of checks does not constitute payment, in the absence of a specific agreement to that effect. The fact that they were endorsed by Mr. Kaufman does not change the general rule, especially in view of the uncontradicted testimony that it was agreed between Mr. Comstock and Mr. Kaufman that Kaufman's endorsement was merely as a means of transferring the checks to the Gorham Manufacturing Company, and that Mr. Holbrook was informed of that fact, and took the checks upon that understanding. A check is nothing but a piece of paper. It is not money. Under the general rules of law, its acceptance is presumably no payment.

The complainant's counsel argues that from the time of the adjudication until the appointment of a trustee the bankrupt is civilly dead, and that nothing that takes place in the meantime can deprive the trustee of his right to elect whether to accept any asset of the bankrupt or not. If that doctrine were true, the court would have no power to authorize any action whatever in respect to the assets of the estate until the trustee was appointed. It could not order a sale; it could not permit a delivery of property admitted not to belong to the bankrupt; it could not permit a business to be carried on. The adjudication would strike the estate with a complete paralysis until the necessary weeks or the usual months had passed before the appointment of the trustee. There is nothing in the bankrupt act which authorizes such a conclusion.

It is also claimed that the judgment of dispossession having taken place when the bankrupt was insolvent, and within four months of his bankruptcy, is null and void, under the provisions of section 67f of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]), which provides that:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt."

But the judgment of dispossession did not create a lien upon the bankrupt's estate. "A judgment or decree in enforcement of an other-

wise valid pre-existing lien is not the judgment denounced by the statute which is plainly confined to judgments creating liens. * * * Moreover, other provisions of the act render it unreasonable to impute the intention to annul all judgments recovered within four months." *Metcalf v. Barker*, 187 U. S. 174, 23 Sup. Ct. 71 (47 L. Ed. 122). The proposition that every judgment for the issue of a warrant to dispossess a tenant for the nonpayment of rent becomes null and void by the subsequent bankruptcy of the tenant within four months, upon proof that at the time the judgment was obtained the bankrupt was insolvent, is, in my opinion, entirely unwarranted by the provision of the act in question. Such a doctrine would render all decrees for the foreclosure of mortgages or liens of any kind liable to be held null and void under similar circumstances.

My conclusion is that this court has no jurisdiction of this case, and that, if it had jurisdiction, there should be a decree for the defendants upon the merits.

In re ELLETON CO.

(District Court, N. D. West Virginia, November 29, 1909.)

1. BANKRUPTCY (§ 293*)—PLENARY ACTION—JURISDICTION—DEED OF TRUST—VALIDITY.

Where a bank, claiming security under a deed of trust executed more than four months before the institution of bankruptcy proceedings, voluntarily submitted to the jurisdiction of the bankruptcy court by presenting its claim for adjudication, and the bankrupt's estate was wholly in the possession of the court, the referee had jurisdiction to adjudicate the validity of the deed in a summary proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 293.*]

2. COURTS (§ 359*)—FEDERAL COURTS—RULES OF DECISION.

Whether a deed of trust is valid or not is a local question, in the determination of which the federal courts will follow the decisions of the state court of last resort.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 359.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

3. FRAUDULENT CONVEYANCES (§ 9*)—INTENT TO HINDER OR DELAY CREDITORS.

Under the statute providing for the invalidity of mortgages and trust deeds intended to hinder, delay, or defraud creditors, an intent to do either is sufficient.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 10-14; Dec. Dig. § 9.*]

4. FRAUDULENT CONVEYANCES (§§ 9, 271*)—INTENT—BURDEN OF PROOF.

An intent to hinder, delay, or defraud creditors is to be proven from the facts surrounding the transaction, either from the appearance of the transfer attacked or from evidence aliunde. If from the latter, the burden of proof is on the plaintiff.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 10-14, 798; Dec. Dig. §§ 9, 271.*]

5. FRAUDULENT CONVEYANCES (§ 138*)—DEED OF TRUST—POSSESSION.

Prior to December, 1904, E. conducted a printing and stationery business with a paper and printing stock amounting to \$4,000. In that month

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1307 to date, & Rep'r Indexes

he sold a one-half interest to C., who was cashier of claimant's bank, for \$12,000, of which C. paid \$5,000, which he applied to the discharge of E.'s indebtedness to the bank. In January, 1905, a corporation was organized by E. and his brother, and C. and his son, and the bookkeeper, each holding one share of stock, except E., to whom shares of the par value of \$49,500 were issued for the business which was transferred to it, worth less than half that amount. C., desiring to withdraw from his contract, it was resolved that the \$12,000 return consideration due from E. to C. should be the debt of the corporation and should be evidenced by five notes secured by deeds of trust on all the property of the corporation. This sum was to reimburse C. for the \$5,000 he had invested. \$3,600 was to discharge an overdraft of the corporation to the bank, and the residue was to be placed to the credit of the corporation in the bank. Both C. and E. participated in such action. Whereupon notes payable at different times were executed, secured by a deed of trust, providing that if the notes were not paid, or if taxes or rent on the plant were not paid, then, on "request or demand" of C., the trustee should sell all the property. The corporation was left in possession for nearly four years, until February 4, 1909, when it was adjudged bankrupt. The first two notes were paid, and \$1,000 paid on the fifth. The third was protested for non-payment November 4, 1904, and the fourth on January 4, 1906. *Held*, that the deed was fraudulent and could not be sustained as security for the bank's debt.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 438-452; Dec. Dig. § 138.*]

In the matter of the Elletson Company, bankrupts. From an order of the referee holding a deed of trust of certain of the bankrupt's property invalid in part, the trustee petitions for review. Order reversed.

Prior to December, 1904, Will A. Elletson was conducting a business at Parkersburg, West Virginia, under the name of the Elletson Printorium. The scope of this business was general job printing, the manufacture and sale of record and like books, and the purchase and sale of stationery. At the time, in addition to the manufacturing machinery plant, he had a stock in store-room and in the paper, stock, and printing department of about \$4,000. His business was apparently successful, although to an extent indebted, and he was limited in means and credit. In this month of December, 1904, he sold a half interest in this business to E. M. Carver, who was then, and still is, cashier of the Ritchie County Bank, for \$12,000. Of this sum Carver paid him \$5,000, which he applied to the discharge of indebtedness of the business. In January, 1905, a corporation was chartered by the state known as the Elletson-Carver Company. Its incorporators were Will A. Elletson, E. M. Carver, Edgar Carver, E. B. Elletson, and Bernadine F. Norton, each subscribing one share of the par value of \$100, with an authorized capital of \$50,000. E. B. Elletson was a brother of Will A. Elletson, Edgar Carver was a son of E. M. Carver, and Miss Norton was the bookkeeper of the Elletson Printorium. These five became the directors of the corporation and were its sole stockholders. Carver manifestly became dissatisfied with his purchase of a half interest in the Printorium business, and, either before or shortly after the formation of the Elletson-Carver corporation, sold back such interest to Will A. Elletson. On January 20, 1905, as shown by its record, this Elletson-Carver Company purchased from Will A. Elletson the entire plant and stock of his Printorium, including its bills receivable, and in payment therefor authorized the issue to him of 495 shares of its stock, the full amount of its authorized capital excepting the five shares subscribed by the original incorporators.

From the date of the organization of the corporation up to February 15, 1905, the amount of stock and supplies was increased by purchases made to about \$7,000, so that, on that date, the corporation had as assets \$7,000 of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merchandise, the value of bills receivable, transferred to it from the Printorium, its own bills receivable (the amount of both which are not disclosed), and the manufacturing plant, which included inks, type, and other consumable property. On this 15th day of February, 1905, the stockholders held a meeting, notice of which was waived by all, and at which all were present. A resolution was then passed setting forth that the company was indebted to E. M. Carver in the sum of \$12,000, and authorizing the president of the company, Will A. Elletson, to execute promissory notes therefor and secure the same by deed of trust upon all the company's property, plant, furniture, fixtures, and lease. The directors, who were the same individuals as the stockholders, immediately met and ratified the stockholders' action, and thereupon five negotiable notes were executed by this company, by Will A. Elletson, its president, all dated at Parkersburg, W. Va., on this February 15, 1905, all made payable at the Ritchie County Bank to the order of Will A. Elletson and indorsed by him. The first four were for \$2,500 each, the fifth for \$2,000. They were made payable on the 1st days of June, September, November, 1905, and of January and March, 1906, respectively. To secure the payment of these notes to E. M. Carver, a deed of trust was executed on this same day by the company, acting by its president, Elletson, whereby it conveyed to George H. Carver, trustee (a brother of E. M. Carver), "every and all appliances, attachments, furniture, fixtures and machinery of all kinds and character, together with the attachments thereof and every part of the equipment, furnishings and fixtures used in and about the conducting of the business known as the Elletson-Carver Company, now in or upon the premises, together with all the accounts then due the Elletson-Carver Company as assignee of the Elletson Printorium, Will A. Elletson, proprietor, it being all the property of every kind, character and description, together with the books, accounts, lease, furniture, fixtures and stock now on hand of the said the Elletson-Carver Company."

It is stipulated in this trust deed that if the company should default in the payment of the notes or any one of them when due, should fail to pay the taxes or rent due, or fail to keep the property insured for at least \$12,000, then, upon "request" or "demand" of E. M. Carver, the trustee should sell all the property for cash.

It is not controverted that, of this \$12,000 so secured, \$5,000 was to reimburse E. M. Carver the sum he had paid Elletson upon his purchase of a half interest in his Printorium, \$3,600 was to discharge an overdraft which the Elletson-Carver Company had been permitted to make in the Ritchie County Bank, and the residue was to be placed to the credit of the company in this bank. At the time this trust was authorized and executed, Will A. Elletson was president, E. M. Carver, vice president, and Edgar Carver, secretary and treasurer, of the company, and all three participated in these transactions both as stockholders and directors. At the same meeting of the directors a resolution was adopted setting forth that Edgar Carver, the secretary and treasurer, would be absent for a time, and that therefore, until the next meeting, Elletson, president, should be empowered to carry on the business of the company with power to execute and indorse promissory notes, sign checks, drafts, and vouchers for the payment of any and all indebtedness of the company.

Of the five notes, it appears that the first two were paid in full and \$1,000 was paid upon the fifth and last one. The third one was protested for non-payment November 1, 1905, the fourth one on January 2, 1906, and as to the fifth one, with the credit of \$1,000 indorsed thereon, protest was waived by Elletson, the indorser.

In this condition of things, from the date of this trust deed, February 15, 1905, up to the 4th of February, 1909, nearly four years, this corporation, which by resolution under the West Virginia statute changed its name to the Elletson Company, under the management and control of Will A. Elletson, its president, remained in full and undisturbed possession of all the property conveyed by the trust and proceeded to carry on its business of manufacturing blank and record books, of job printing, and selling stationery. To this end it sold, without let or hindrance from Carver or any one else, the consumable stock on hand included in the trust and purchased and sold some

\$29,000 of new stock of like nature, except about \$1,500 worth of it on hand. A fire occurred during this period that damaged near \$1,300 of the machinery in the manufacturing plant, a total of \$2,600 insurance money was collected and used, and some \$3,000 worth of new machinery was installed. On February 4, 1909, this company was adjudged bankrupt. R. L. McFarland was appointed trustee. He has listed the assets to be something over \$22,000, and the liabilities over \$34,000.

Before the referee to whom the matter was referred, the Ritchie County Bank has appeared and filed proof of claim for \$9,960.37, \$3,500 of which is not in controversy here, the remaining \$6,400 based upon the three unpaid notes secured to Carver by the trust deed and which the bank claims to be the owner of. To the claim of the bank that this sum is a secured claim by reason of the trust deed and first payable out of the assets of the company, the trustee has filed before the referee a protest, and the bank, E. M. Carver, and G. H. Carver, trustee, have filed replications thereto.

The referee has held the deed of trust to be valid as to all the property conveyed therein except the stock of goods in the stationery and binding departments. To this ruling the trustee has excepted, and, at his instance, the question has been certified for review.

Smith D. Turner, Reese Blizzard, John Marshall, and Merrick & Smith, for trustee and unsecured creditors.

Dorr Casto and Robinson & Prunty, for Carver and Ritchie County Bank.

DAYTON, District Judge (after stating the facts as above). Is the deed of trust of February 15, 1905, void as a security for the bank's debt by reason of its disclosing on its face an intention and purpose to hinder, delay, and defraud creditors of the bankrupt company, or by reason of such intention being shown by evidence aliunde? This deed having been executed more than four months prior to the institution of bankruptcy proceedings, under older decisions some doubt might have arisen as to the right of the referee to pass upon and adjudicate the matter in this summary proceeding instead of requiring the institution of a plenary suit for the purpose. The bank, however, having voluntarily submitted to the jurisdiction by presenting its claim for adjudication, and the estate of the bankrupt being wholly in the possession of the court, there can no longer be doubt of the jurisdiction as thus taken by the referee under the rulings of such cases as *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, and *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157.

The Supreme Court has also determined that the question of whether such a deed of trust is valid or not is a local one and must be governed by the state court decisions which the federal courts will follow. *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956.

Turning to the West Virginia cases, we find that the Supreme Court of Appeals of the state, so recently as March last, has reviewed the question here involved in the case of *Gilbert v. Peppers*, 65 W. Va. 355, 64 S. E. 361. The facts there were, substantially, that Darkey sold his stock of goods to Peppers, took a deed of trust from him to secure 36 purchase-money notes payable one each month thereafter, allowed him to take charge of the goods, sell a part thereof, incur indebtedness, then had the trustee take charge of the store and adver-

tise the same for sale. At the instance of creditors, a receiver was appointed, who sold the goods, keeping separate account of the proceeds arising from the sale of those originally sold by Darkey to Peppers and those arising from the sale of new stock since purchased by Peppers. This deed of trust was assailed as being fraudulent and void per se. It was so held by the court below. The Supreme Court of Appeals, reviewing this ruling and affirming it, points out that, under the West Virginia statute, all deeds of trust on stocks of mercantile goods, allowing the debtor to remain in possession, sell, and dispose of the same, until recently, had been held to be fraudulent and void per se (citing *Shattuck v. Knight*, 25 W. Va. 590; *Klee v. Reitzenberger*, 23 W. Va. 749; *Livesay's Ex'r v. Beard*, 22 W. Va. 585; *Clafin v. Foley*, 22 W. Va. 434; *Garden v. Bodwing's Adm'r*, 9 W. Va. 121; *Kuhn v. Mack*, 4 W. Va. 186); that this ruling is sustained by the decisions in the states of Alabama, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Kansas, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and Wisconsin; that in Arkansas, New Jersey, North Carolina, South Dakota, and Vermont such trusts are held to be presumptively, not conclusively, fraudulent, while in Kentucky, Maine, Michigan, North Dakota, and Rhode Island there is no presumption either way, the question being submitted to the determination of a jury as a question of fact; that such mortgages are in California prohibited by statute, in Georgia legalized, while the statute of Iowa is peculiar and exceptional. This court then points out that after enforcing its rule for many years, by the cases of *Conaway v. Stealey*, 44 W. Va. 163, 28 S. E. 793, *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869, and *Bartles & Dillon v. Dodd*, 56 W. Va. 383, 49 S. E. 414, an exception was established by it in favor of a purchase-money debt secured upon the property purchased, where there were no existing creditors who could be prejudiced, or against whom fraud could have been directed, and where the deed of trust was recorded and notice thereof was thereby given subsequent creditors. This case then, after full discussion and review of these cases, expressly disavows the soundness of this exception and in terms overrules the cases of *Conaway v. Stealey* and *Horner-Gaylord Co. v. Fawcett*. In regard to the case of *Bartles & Dillon v. Dodd*, the court says, it "may possibly be sustained on principle, as the property, except a small portion thereof, was not consumable in its use, nor perishable, nor intended to be sold."

Notwithstanding I might disagree with the reasoning of this case, I would, as hereinbefore indicated, be compelled to follow it. It is the last enunciation of the Supreme Court of Appeals of the state construing a local contract and a local statute. But I do not disagree; on the contrary, I am in full accord in judgment with it. As well said by Judge Poffenbarger:

"A failing merchant, or a solvent one having a store in a bad place, would be required to do no more, in order to profit at the expense of wholesale dealers, than make a pretended sale to an irresponsible party on credit, at any

price they may see fit to adopt, and take such a deed of trust on the stock * * * and let the store continue to operate under it as long as the pretended purchaser can obtain credit."

The illegality of such conveyances under our statute does not turn upon the validity of the debt secured, but upon the intent of the grantor thereby to hinder, delay, and defraud other creditors either existing or subsequent. The intent may not be to actually cheat and defraud; it is enough if it be to hinder and delay. A debtor may honestly believe that by making such conveyance of personal property he will be able to continue in business and in time work out of it a profit sufficient to pay all debts existing and that may be incurred in accomplishing this purpose. The favored creditor, to be so secured, may share in this view and be willing to sell his property on long time thus secured, in order to allow the experiment to be tried. But it is not sound morality or good law to allow these two to determine the rights of others, or to hinder or delay those others in the enforcement of their rights.

The statute is in the disjunctive; therefore either intent is sufficient. This intent is to be proven from the facts surrounding the transaction. These facts may appear upon the face of the deed or from evidence aliunde. If they appear aliunde, the obligation is upon the plaintiff to prove them. These propositions are clearly sustained by a long line of West Virginia decisions, among which are: *Edgell v. Smith*, 50 W. Va. 349, 356, 40 S. E. 402; *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717; *Landeman v. Wilson*, 29 W. Va. 702, 720, 2 S. E. 203; *Knight v. Nease*, 53 W. Va. 51, 44 S. E. 414; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; *Hutchinson v. Boltz*, 35 W. Va. 754, 14 S. E. 267.

In the case before us, the deed of trust is assailed as being both fraudulent on its face and in fact. It is not necessary to consider these two charges separately. There is no difference in effect between the two. Rather let us consider the conditions, as a whole, existing at the time this trust deed was executed. Elletson owned the business personally. He was to some extent indebted. He induced Carver to buy a half interest at \$12,000 and pay down \$5,000. Carver soon became dissatisfied and refused to pay the balance of \$7,000. He wanted to rue the contract, get out of the payment of the \$7,000, and secure repayment to him of the \$5,000. Elletson had paid out the \$5,000 on his debts, and therefore could not repay it to Carver; besides the \$7,000 was absolutely necessary to the continuing of the business because Elletson, upon the strength of Carver's agreement to pay it, had bought additional stock and overdrawn some \$3,600 in the Ritchie County Bank, of which Carver was cashier, and which overdraft Carver had permitted to be made. What was the problem to be solved by these men under these conditions?

Is it not clear that, on Carver's part, it was to get a rescission of his contract of purchase, a repayment of his \$5,000, and of the overdraft in his bank? Is it not also clear that, on Elletson's part, it was to be able to continue the business without litigation and secure the additional capital necessary to do this? What was more natural than that Carver, seeing his absolute inability to secure in cash the \$5,000,

to himself and the \$3,600 to his bank, should think of the next best thing, that of "securing" himself somehow? What more natural than that Elletson should be glad and quick to accede to any proposition that would enable him to continue the business without embarrassment and obtain the needed additional capital? Do not the facts inevitably point to these purposes—to secure Carver, to enable Elletson to continue the business? Elletson bought Carver's half interest back. They formed a close "family" corporation of just five, the lowest number the law allowed, Elletson and his brother, Carver and his son, the bookkeeper of Elletson, becoming the sole stockholders, each holding one share. Elletson then sells the business to the corporation for 495 shares of capital stock, par value of \$49,500, more than double what the property was likely worth, for he had sold to Carver and just bought back a half interest therein for \$12,000. Then the five stockholders, as such and as directors, hold a meeting and resolve that the \$12,000 due from Elletson to Carver is the debt of the corporation and shall be secured by the execution of five negotiable notes, and this deed of trust. Carver and Elletson participated in this action of stockholders and directors, in which they were both so deeply interested—a fact in itself rendering the deed of trust executed in accord therewith liable to be viewed with suspicion and jealousy, as held in *Hope v. Salt Co.*, 25 W. Va. 789, and *Sweeny v. Sugar Refining Co.*, 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88. The deed of trust is drawn in minute detail setting forth hundreds of articles of personal property, very many of perishable and consumable character, and including all books, accounts, bills receivable, and the lease for the building. So far it might have been legal, if it had required the trustee therein to take possession of the goods and sell them to pay the debt. Such, however, was not the purpose. The company was to remain in possession until default was made in the payment of the notes, or some one of them, when due, and then the trustee was to take and sell only at the request of Carver. The directors resolved, Carver participating, that in the meanwhile Elletson should conduct the business, incur liabilities, and discharge them.

Was not the purpose to thus withdraw this property from being liable to any other creditor of the company, keep it together for an indefinite period as a security for Carver's debt, and yet let Elletson under the company's name use it, sell it, wear it out, exchange it, upon condition that the profit of the business derived from such use, sale, wear, and exchange of it should go to the liquidation of Carver's debt? A single undisputed fact, it seems to me, proves this beyond all controversy. The notes became due on the first days of June, September, November, January, and March following. While the first two seem to have been paid, the third one, becoming due in November, was not paid. It was apparently then in the custody of the bank, for it caused it to be protested. Carver was cashier of the bank all this time. He was also vice president of the Elletson corporation all this time. He knew the condition of the company, the perishable character of the property covered by this trust, yet for the whole period from November, 1905, to February 4, 1909, when the company became bankrupt,

three years and three months, no request came from either Carver or the bank to enforce this trust! And again in January, 1906, when the fourth note became due, default was made, protest was had, and no taking possession or sale was required. The conclusion is inevitable that this trust was not to be enforced as long as it could hold together the property and shield the business from attack by other creditors. That the bank and Carver fully understood and participated in this purpose is established by this delay and the connection and association the one with the other.

But, finally, it is insisted that this case comes within the ruling in *Bartles & Dillon v. Dodd*, supra, which Judge Poffenbarger, in *Gilbert v. Peppers*, says might "possibly" be sustained on principle because so small part of the property involved was consumable in its use or perishable or intended to be sold. I do not think this position can be maintained here, for three reasons: First. Because I do not think the decision in *Bartles & Dillon v. Dodd* can possibly be maintained in principle for the reason stated. On the contrary, I think it in direct conflict with the true principles established by very many older cases (such as *Shattuck v. Knight*, 25 W. Va. 590, 600; *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203; *Livesay's Ex'r v. Beard*, 22 W. Va. 585; *Claffin v. Foley*, 22 W. Va. 434, 441; *Gardner v. Johnston*, 9 W. Va. 403) to which the ruling in *Gilbert v. Peppers* directly takes us back, as also with those directly established by this *Gilbert Case* itself. Second. If this be not so, and the *Bartles Case* can be distinguished and upheld, in my judgment it is not applicable here where no small portion of the property conveyed was consumable in its use, perishable, or intended to be sold, but where, on the contrary, near \$7,000 worth of the property so conveyed was of this character. Third. In the *Bartles Case* the trust deed was only assailed as being fraudulent on its face. Here the trust deed is not only assailed for this reason, but also because it is fraudulent in fact, and, as I have indicated, I think the facts disclosed clearly show it to be so, made as it was to hinder and delay creditors from interfering with this property while the company carried on business with it for years.

The decision of the referee must be reversed, and the trust deed, as a security for the bank's debt, must be held wholly null and void.

In re KYTE.

(District Court, M. D. Pennsylvania. December 24, 1909.)

No. 1,035, in Bankruptcy.

1. BANKRUPTCY (§ 408*)—DISCHARGE—OBJECTIONS—FRAUDULENT CONCEALMENT OF PROPERTY.

Where a bankrupt's trustee had possession of his check stubs, and it appeared that the bankrupt, after having had his book made up at the bank, first turned over the checks to the receiver, and, after making up his schedules, delivered them to the trustee's son, which placed them at the command of creditors, he was not guilty of fraudulent concealment of property, consisting of the withholding of his bank checks.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*]

2. BANKRUPTCY (§ 408*)—DISCHARGE—OBJECTIONS—CONCEALMENT OF PROPERTY.

Where a bankrupt received \$110 for goods sold after bankruptcy proceedings had been instituted, but he did not know of the proceedings at the time, and he entered the sale on his cashbook, he was not guilty of fraudulent concealment of the proceeds thereof, though the money could not be traced thereafter.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*]

3. BANKRUPTCY (§ 408*)—DISCHARGE—FRAUDULENT OMISSION OF ASSETS FROM SCHEDULES—ADVICE OF COUNSEL—INSURANCE POLICY.

Where a bankrupt had borrowed the full surrender value on his life insurance and had been advised by counsel that it was not necessary to mention the policies in his schedules, whereupon he gave them to his wife, he was not guilty of fraudulent concealment of assets on the theory that the policies were of no value, though they should have been scheduled; the charge of fraud being rebutted by the advice of counsel.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*]

In re Remmers (C. C. A.) 173 Fed. 484, 23 Am. Bankr. Rep. 78. The advice of counsel cannot be relied on as an excuse for failing to schedule assets, unless there has been a full disclosure of the facts by the bankrupt at the time.

4. BANKRUPTCY (§ 407*) — DISCHARGE — OBJECTIONS — FALSE STATEMENT FOR COMMERCIAL CREDIT.

Where a bankrupt began business in April, 1906, and was put into bankruptcy in September, 1907, and on October 2, 1906, made a false statement to a commercial agency in order to prevent "unfavorable reports" being given out concerning him, and later attempted to correct such statement by another, which was also false, and he referred to the same and was granted credit on the basis thereof, he was guilty of willfully making a false statement for credit, which was sufficient to deprive him of the right to discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

5. BANKRUPTCY (§ 407*)—CREDIT STATEMENTS.

A financial statement, made by a bankrupt for credit, to a commercial agency, is a continuing representation for a reasonable time that the facts stated therein are true.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

6. BANKRUPTCY (§ 407*)—GROUNDS FOR REFUSAL OF DISCHARGE—"FALSE" REPRESENTATIONS IN OBTAINING CREDIT.

In order to be "false" so as to bar a discharge, the representations made by a bankrupt to obtain credit must have been willfully or intentionally misleading.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2654, 2655.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. In the matter of Frank H. Kyte, bankrupt. On exception to the report of referee sustaining objections to the bankrupt's discharge. Affirmed.

See, also, 158 Fed. 121; 164 Fed. 302.

James L. Lenahan and W. I. Hibbs, for bankrupt.

F. C. Mosier, for creditors.

W. N. Reynolds, Jr., for the trustee.

ARCHBALD, District Judge. The bankrupt's discharge is opposed because of alleged fraudulent concealment and transfer of property, as well as the making of a false statement of his financial condition for the purpose of obtaining commercial credit. Particular instances are specified in the objections, a part of which only are sustained by the referee, but enough, in his judgment, to call for the refusal of a discharge, and the question is as to the correctness of his conclusions.

There is nothing in the alleged withholding by the bankrupt of his bank checks, which has any approach to a fraudulent concealment of property. Not only did the trustee have possession of the stubs, which does away with the possibility of concealing what they were given for, but the evidence further shows that, after having his book made up at the bank, the bankrupt first turned over the checks to the receiver, and having got them again, when he made up his schedules, delivered them, after he was through, to the trustee's son, which fully disposed of them, so far as he was concerned, and put them at the command of creditors.

So, also, as to the \$110 received from File, to whom he had sold quite a lot of goods after bankruptcy proceedings had been instituted, the evidence is that he did not know of the proceedings at the time, and, although the price at which he disposed of them and the circumstances attending it are calculated to excite suspicion, the only charge here is that he did not account for the money received, and so was guilty of concealing it, and this is sufficiently met by the fact that he entered the sale on his cashbook, which may be accepted as dispelling the idea that he had any intention of covering up the transaction, even though we may not be able to trace the money after that.

With regard to the life insurance policies, which were omitted from the schedules, it is explained that they were pledged to the companies for loans to their full surrender value, and that the bankrupt was advised by counsel that it was not necessary to mention them in view of that, the gift of them by the bankrupt to his wife, under the circumstances, also parting with nothing of value. Unquestionably these policies ought to have been scheduled; and the failure to do so, accompanied by the gift of them to the bankrupt's wife, naturally aroused suspicion, if it did not indeed go further than that. But the advice of counsel rebuts the charge of fraud in omitting them from the schedules. In re Alleman (D. C.) 20 Am. Bankr. Rep. 745, 162 Fed. 693. And that for the present is all that we are concerned with. There are other objections, however, to the bankrupt's discharge of a more serious character, which are not so easily disposed of.

The bankrupt in April, 1906, began business under the name of the Pittston Mercantile Company, and was put into bankruptcy in Sep-

tember, 1907, a year and a half later. On October 2, 1906, he made the following unsolicited statement in writing to the R. G. Dun & Co. Mercantile Agency.

"Pittston, Pa., Oct. 2, 1906.

Dun Agency, Wilkes-Barre, Pa.—Dear Sir: We are occasionally informed of the unfavorable reports received from you in reference to us, and accordingly think it wise for us to make you a statement, as things have changed somewhat since the writer went in business. The writer would state as follows:

I am the owner of real estate in W. Pittston, valued at.....	3000.
I own one half the Bridge property W. " " ".....	7000.
" " eight shares in Union Saving Trust Co., this city...value,	1200.
" " stock in People's Bank of Erie, Pa.....	2250.
" " bonds " Kewanee Tel. Co., Kewanee, Ill.....	2000.
" " stock " " " " ".....	1000.
Mortgage against property in Dorranceton.....	2500.
8000 shares in Umpqua Coal Co., Umpqua, Oregon.....	4000.
Own real estate on Broad St., this city.....	6000.
Have a stock of Builders hardware.....	3000.

"I have mortgaged my own property for \$2,000, thus risking my own money and increasing my business capital. I also have a mortgage of \$3,000 on Broad St. property, and have a cash capital of \$7,000. We have started to erect a building on Broad St. property, in order to have more suitable quarters for our increasing business. We started in business about the first of April, and have turned a business of over \$14,000 since that date.

"Yours truly, [Signed] Pittston Mercantile Company,

"F. H. Kyte, Treas."

This statement in several particulars was untrue and misleading, and must have been known by the bankrupt to have been so. Eight thousand shares of Umpqua Coal Company stock, for instance, which is put in at \$4,000, was purchased at from six to eight cents a share, making not to exceed \$320, and a few months later, in March, 1907, without any suggestion that it had depreciated in the meantime, or that anything had occurred to change his estimate of it, he gave the stock to his wife; his explanation being that it was of no value.

The same is true with regard to the Kewanee Telephone stock, valued at \$1,000, which was obtained by the bankrupt as a bonus, at the time of taking \$2,000 of bonds of the company, and was also turned over as a gift to his wife in April or May, 1907, about the same time as the coal stock. There is no direct evidence as to the value of the stock, but the probabilities against it are so great as to warrant the inference that it had none; this indeed being the only thing to justify the transfer to his wife, which was without consideration, and while involved in commercial obligations.

The bonds of the Kewanee Telephone Company, to which the stock was a bonus, put in at \$2,000, were no doubt worth that; but they were held at the time by the First National Bank of Pittston, as collateral security for a loan of \$2,300, and were thus pledged to their full value, which the bankrupt was bound to disclose, in order to convey a correct idea of his financial condition.

The mortgage against the property in Dorranceton, which is listed at \$2,500, is also given a misleading value, if indeed it is entitled to any place at all in the statement. This was a second mortgage, subject to a first mortgage of \$3,000, it being a question whether the prop-

erty was good for the aggregate, and was executed by Walter H. Kyte, a son, to his father, the bankrupt, to secure him for the loan of certain stock held by the bankrupt as collateral security to the note of one C. M. Hileman for \$2,000. The son, as it seems, was allowed to take this collateral and obtain a loan on it, and gave his father a mortgage to protect him. The Hileman note, to which the stock so borrowed and used was collateral, was, of course, an asset, if owned by the bankrupt, although it turned up in the end, in the hands of his wife, like so much of his other property; and it was good for its face, if the maker was solvent and the collateral available. But only by the extremest courtesy, under the involved conditions with regard to it, could the mortgage in question be similarly accepted. If the stock turned over by the bankrupt to his son was not forthcoming when required, the mortgage could be enforced, and, subject to the first mortgage, the property could be made to respond for it; the Hileman note in the meantime being uncollectible until the collateral had been accounted for. It may be that a solution could be worked out in this way, by which the bankrupt would get out of Hileman the \$2,000 called for by his note, although if the collateral went to pay the son's loan, and happened to be of any considerable value above that, the bankrupt, instead of getting anything from Hileman, might be liable to him for the difference. If Mrs. Kyte is to be believed, however, the Hileman note was given to her in May, 1906, "as a free will offering," and, if so, it was not owned by the bankrupt in October when he made his statement, and there would be nothing therefore coming to him out of the transaction. He still claimed it on May 17, 1906, in his letter to the Stewart Iron Works; but it was ultimately paid to his wife, after his bankruptcy, and she is therefore probably correct with regard to it. At all events, the mortgage which was put in at \$2,500 in the statement, being at best a mere indemnity of the bankrupt against loss by reason of the loan of the collateral which he had parted with, had no place among his available assets.

The statement, as made, is thus shown to have been untrue, and the purpose of it being to secure commercial credit, if it was intentionally so, and property was in fact obtained on the strength of it, a case is made out within the terms of the statute, and the bankrupt cannot expect a discharge in the face of it. It is of no consequence, in this connection, that the statement was made to Dun & Co. and not to a creditor. The object of the bankrupt was to secure a favorable rating in the reports of the commercial agency, and in that way to reach its subscribers and customers. This he very well understood and acted upon, as is shown by his letters to various parties. And in so doing it was the same in fact, as in legal effect, as if he had made the statement direct to the parties who relied on it. *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; *Irish American Bank v. Ludlum*, 49 Minn. 344, 51 N. W. 1046; *Ralph v. FonDersmith*, 10 Pa. Super. Ct. 481; *In re Carton & Co.* (D. C.) 17 Am. Bankr. Rep. 343, 148 Fed. 63. He sent it in to Dun & Co., as the opening sentence shows, to obviate unfavorable reports with regard to his financial standing, which had previously emanated from this agency, and thus took upon himself the consequences.

On January 31, 1907, the bankrupt ordered a bill of goods, amounting to \$301.40, of J. Wiss Sons & Co., of Newark, N. J. These parties seem to have had some doubts about filling the order, and on March 15 the bankrupt sent a second letter, urging that the goods should be forwarded. In the meantime Wiss & Co. had requested the Dun Agency to report on the bankrupt, and a copy of the statement which he had made was accordingly forwarded to them, accompanied, however, by the suggestion that some of the values were high, and that \$18,000 was probably a fair estimate of his net worth, instead of \$27,000, as he himself figured it. And on the strength of this the goods were sent. It is very likely that these were not the only ones which were got in this way. But it is certain that they were. And a case is thus made out of property obtained on the strength of a false statement, within the meaning of the statute, provided, of course, that it was intentionally so. It is true that the estimates of the bankrupt were revised and cut down by Dun & Co., and considerably more eliminated than has here been shown necessary. But there are no means of identifying the items as to which this reduction was made, and it is none the less true, without regard to it, that the goods in question were obtained by the bankrupt on the credit secured by the exaggerated estimate of his assets, which was not only copied in the Dun & Co. report, but, however modified, necessarily entered into it and affected it. Neither is it requisite, in order to make out the false pretense charged, that the bankrupt's statement should have been the sole inducing cause in obtaining the goods. 19 Cyc. 407. Nor does it matter that an independent investigation to a certain extent was made with regard to it. *People v. Luttermoser*, 122 Mich. 562, 81 N. W. 565. It is enough if the representations of the bankrupt had a material influence in securing goods, and that the creditors in question would not have made the sale except for them.

To bar a discharge, however, a credit statement must not only be untrue, but it must be false. Section 14b (3) (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1310]). And that means that it must be willfully or intentionally misleading. The bankrupt, in other words, must have knowingly misrepresented his condition. *Gilpin v. National Bank*, 21 Am. Bankr. Rep. 429, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023. He must not simply have been self-deceived or mistaken. To rebut any such charge in the present instance, evidence has been given that the bankrupt on October 12, 1906, 10 days after making his first statement, sent in another to Dun & Co., in which, in correction of the other, he claimed, as available assets, book accounts of \$4,000, and cash on hand \$1,050; and at the same time specified further indebtedness of \$10,500, to wit, \$4,500 of bank paper, and \$6,000 of judgment notes, not recorded. He also stated that the estimate put on the telephone stock should merely be taken as its par value, and that the Dorranceton mortgage was a collateral one. If anything was wanting to prove the misleading character of the former statement, it is to be found in this one. While \$5,050 of alleged assets (\$4,000 of which, it is to be noted, are book accounts, always uncertain) may have been

added on the one side, \$10,500 of indebtedness, not in any way previously suggested, appears on the other, making the net result over \$5,000 to the disadvantage of the bankrupt; while the Kewanee Telephone stock put in at a \$1,000, and the Dorranceton mortgage at \$2,500, are practically discredited, thus still further reducing the value of his property. These corrections the bankrupt claims to have sent by mail to F. H. Stevens, who had charge of the local office of Dun & Co. at Wilkes-Barre, Pa., a few miles from where the bankrupt was in business, and he seeks to vouch for this by producing an alleged carbon copy, which his son testifies he made at the time of typewriting the original. According to Mr. Stevens, however, this paper was never received; and, if it had been, it undoubtedly would have been entered upon his records. The letter also speaks of a conversation had with Mr. Stevens, a few days before, which it was intended to confirm, of which Mr. Stevens has no recollection. Taken altogether, the story of the bankrupt with regard to the corrected statement is far from convincing. Assuming, however, that it is true, and that the statement was in fact sent, it only partly relieved the situation. There was no correction in it, for instance, of the misrepresentation as to the value of the Umpqua Coal Company stock, or the Kewanee Telephone Company bonds; nor was there any explanation as to the real condition of the Dorranceton mortgage. The statement, in other words, while not so bad as before, is nearly so. At the same time, if actually and in fairness made, it would go a good ways to dispel the idea of a fraudulent purpose in the original. Unfortunately, however, for the bankrupt, there are other things which dissipate the effect of it. The statement to Dun & Co., both in its original as well as its corrected form, was a continuing one. In *re Terens* (D. C.) 172 Fed. 938. And, unless recalled, was entitled, for a reasonable time at least, to be taken and relied on. The bankrupt understood this, and on January 19, 1907, in an interview with a representative of Dun & Co., he stated that there was no change in his affairs, except that he was starting a wholesale plumbing business in connection with his other lines, and had already put a stock of several thousand dollars in the building which he was erecting, which would be completed shortly. As late as February 21, also, while the Wiss & Co. order was still pending, in a letter to Kellogg & Miller, of Amsterdam, N. Y., to whom he also had sent an order, he referred to his rating with Dun and Bradstreet, as a basis for the credit which he asked.

Now, it is just about this time, notwithstanding his outstanding statement, that he began to turn over to his wife property, some of which at least figures in it. In March, 1907, for instance, the Umpqua Coal Company stock, which was put in at \$4,000, was so disposed of. The transfer on the books of the company was not made until September, 1908, a year and a half later; but the testimony is that it was given to her at the time mentioned. So on May 6, 1907, the Kewanee Telephone stock was similarly turned over to her; both of these transactions being without consideration. The explanation of the bankrupt, the same as with regard to his life insurance policies, which went the same way, is that the securities were worthless. But that is not the way they were listed in his statement. And if they were, what is to

he said of the fact that, at the time they were being so disposed of by the bankrupt to his wife upon that basis, they were being held out, and he was getting credit for them, as worth thousands of dollars, which they were not?

Contrasting the one position with the other, it is difficult to resist the conclusion that, in representing these stocks as of large value for the purpose of obtaining goods from prospective creditors, as he did, and in subsequently making a gift of them to his wife as having none, he adapted himself in each instance to the necessities of the occasion, in reckless disregard of the consequences, to an extent which may well be characterized as fraudulent. Nor, in any event, can he escape the fact that, at the time he was asking and obtaining credit on merchandise account from various parties, on the strength of his statement, he had withdrawn and given to his wife securities of the asserted value of \$5,000, and that to allow the statement to go uncorrected in the face of this was equally culpable. It matters little, therefore, which alternative is taken. Either the securities were not, as now testified, of the value given them, making the discrepancies in the statement so wide of the mark as to warrant the belief that it was knowingly and intentionally misleading; or, if they were of the value assigned to them, the transfer by the bankrupt to his wife, without consideration, was not only itself a fraud, but it made the statement without a corresponding correction absolutely untrue, as he could not but know, and therefore must be held to have acquiesced in.

The referee further found that the transfer of the insurance policies by the bankrupt to his wife in July, after he had become so involved that he had to ask an extension from his creditors, was also fraudulent, which would itself be effective to bar a discharge; his bankruptcy having occurred within four months afterwards. But, without stopping over that, there is enough in what has been already discussed to produce the same result, and it may be allowed to rest there.

The objections, to the extent indicated, are therefore overruled, and the report of the referee confirmed, and a discharge will be refused in consequence.

PHILLIPS v. WESTERN TERRA COTTA CO.

(Circuit Court, D. Kansas, First Division. December 22, 1909.)

1. REMOVAL OF CAUSES (§ 95*)—FILING PETITION AND BOND—EFFECT.

On the filing of a proper petition and bond for the removal of a cause to the federal court, the jurisdiction of the state court ceases, except to pass on the petition and make the order of removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 204; Dec. Dig. § 95.*]

2. REMOVAL OF CAUSES (§ 107*)—MOTION TO REMAND—EFFECT.

A motion to remand a cause removed to the state court is in the nature of a demurrer, and goes only to matters apparent of record, being insufficient to present matters outside the record arising in pais, which can only be presented by plea in abatement, denying the facts relied on to establish federal jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 107.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. REMOVAL OF CAUSES (§ 107*)—MOTION TO REMAND—GENERAL DENIAL.

A motion to remand a cause to the state court does not operate as a general denial of the allegations of the petition for removal.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 107.*]

4. REMOVAL OF CAUSES (§ 97*)—GROUND FOR REMOVAL—DENIAL—ANSWER.

Since the presentation to the state court of the petition for removal of a cause, accompanied by the required bond praying for removal, is effective to deprive the state court of jurisdiction *eo instante*, if the petition on its face shows facts essential to entitle plaintiff to remove, the filing of an answer in the state court after the presentation of the petition to remove is ineffective to raise an issue as to the facts relied on for removal, since all pleading attacking the facts so alleged and the federal court's jurisdiction must be filed in and heard by the federal court to which the cause is removed.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 97.*]

Action by J. A. Phillips against the Western Terra Cotta Company. Motion to set aside an order, previously made, overruling plaintiff's motion to remand the cause to the state court, and for rehearing. Denied.

E. C. Little, for plaintiff.

Rosenberger, Taylor & Reed, for defendant.

PHILIPS, District Judge. The plaintiff has filed motion to set aside the order of this court, heretofore made, overruling the motion of plaintiff to remand this cause to the state court, and for a rehearing.

The petition of the plaintiff in the state court was silent as to the citizenship of the parties. The petition of the defendant for removal, supported by affidavit, and accompanied with sufficient bond, alleged that at the time of bringing suit, and since, the plaintiff was a citizen of the state of Kansas, and the defendant was a citizen of the state of Missouri. That entitled the defendant to an order of removal, which was made. The jurisdiction of the state court then ceased, except for the purpose of passing on and making the order of removal. When the transcript was filed in this court, the record proper on its face showed the requisite jurisdictional facts to authorize this court to proceed to judgment. In this state of the record the plaintiff filed a motion—

"to remand the action to the district court of Wyandotte county, Kansas, because this court has no jurisdiction of the said action, for the reason that it is a suit between citizens of the same state; that the plaintiff and defendant, at the time this action was first instituted, were both citizens of the state of Missouri; the plaintiff lived there, and the defendant was incorporated there."

It has been my uniform holding that a motion to remand is not the proper remedy in such condition of the record. Such motion is likened to a demurrer. It goes only to matters apparent of record. If the record, taken as a whole, discloses that the controversy was improperly removed into the federal court, a motion to remand hits the blot. Such motion does not present matter *dehors* the record, arising in pais. Where the record, as in this case, discloses by the allegations of the petition for removal that at the time of instituting the suit the plain-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiff was a citizen of the state of Kansas, and the defendant was a citizen of the state of Missouri, upon which the jurisdiction of the federal court attached, and continued until disproved, the correct legal method of putting such allegation in contestation is by a plea thereto in the nature of a plea in abatement to the jurisdiction of the federal court, denying the allegation of diverse citizenship.

"Where the petition for removal states jurisdictional facts, such as citizenship, etc., which are not true, the plaintiff may traverse these facts by allegations in the nature of a plea in abatement, and the court can receive evidence to determine the same." *Dillon's Removal of Causes*, par. 158, note 4; *Weaver v. Northern Pac. Ry. Co. et al.* (C. C.) 125 Fed. 155, 156.

"The motion to remand does not raise an issue upon the facts thus alleged and sustained, but presents the legal questions already discussed, and upon these the ruling must be adverse to the motion to remand." *Dow v. Bradstreet Co.* (C. C.) 46 Fed. 828.

In *Durkee v. Illinois Cent. R. Co. et al.* (C. C.) 81 Fed. 1, it was held that a motion to remand did not operate as a general denial of the allegations of the petition for removal. It is not too much to say that this is the consensus of the Circuit Courts. *Filer et al. v. Levy* (C. C.) 17 Fed. 609; *Rumsey et al. v. Call et al.* (C. C.) 28 Fed. 769; *Kelly v. Chicago & A. Ry. Co.* (C. C.) 122 Fed. 286; *Dishon v. Cin., N. O. & T. P. Ry. Co.*, 133 Fed. 471, 66 C. C. A. 345; *Hax v. Casper et al.* (C. C.) 31 Fed. 499.

There may be some dicta of courts, where the proper mode of procedure on remand was not before the court, implying that a motion to remand may lie, taking issue on the allegations of the truth of the petition for removal. No considerate authority has been found sustaining such course. The language of Mr. Justice Brewer, in *Re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, respecting the employment of a motion to remand, is to be understood as applied to the situation there in question. It appeared from the petition for removal that neither party was a citizen of the state in which the suit was brought. Unquestionably in such instance a motion to remand would raise the question of jurisdiction arising on the face of the record.

It is suggested in this motion for rehearing that the plaintiff did file an answer in the state court to the petition for removal, putting in issue the truth of the allegation of diverse citizenship. This was not called to the attention of the court by counsel on the former hearing of the motion to remand. The only question ever submitted to this court for decision was the simple motion to remand.

I now find in the transcript from the state court that after the petition and bond for removal were made the plaintiff filed in the state court an answer denying the allegation that the plaintiff was a citizen of the state of Kansas, alleging that he was a citizen of the state of Missouri. That was an unprecedented proceeding in the state court, and one which, in my judgment, should not be tolerated. The Supreme Court, with reiteration, has held that when the defendant presents to the state court his petition for removal, accompanied with the required bond, praying for removal of cause into the federal court, if the petition on its face shows the facts essential to entitle the defendant to such removal, the only question left for decision by the state court is whether or not, taking the record then before it, the order

should be made. If the petition be sufficient and the bond be given, eo instante every other jurisdiction of the state court ceases, and that of the federal court attaches over the parties and subject-matter.

"The state court is only at liberty to inquire whether, on the face of the record (i. e., the petition of the plaintiff and the petition for removal) a case had been made which requires it to proceed no further. * * * With that fact established, the necessary citizenship for a removal existed. Whether it was a fact or not could only be tried in the Circuit Court." *Carson v. Hyatt*, 118 U. S. 287, 6 Sup. Ct. 1054, 30 L. Ed. 167.

"Upon the filing of the petition and bond, the suit being removable under the statute, the jurisdiction of the state court absolutely ceased, and that of the Circuit Court of the United States immediately attached. The duty of the state court was to proceed no further in the cause. Every order thereafter made in that court was coram non judice, unless its jurisdiction was actually restored." *Steamship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. 60, 27 L. Ed. 87; *Crehore v. Ohio*, etc., Ry. Co., 131 U. S. 244, 9 Sup. Ct. 692, 33 L. Ed. 144; *Stone v. South Carolina*, 117 U. S. 432, 6 Sup. Ct. 799, 29 L. Ed. 962.

So Judge Sanborn, in *Boatmen's Bank v. Fritzlen*, 135 Fed. 653, 68 C. C. A. 291, said:

"When a petition for removal and the bond required by the act of Congress are filed, and the record on its face shows the right of the petitioner to a removal, the jurisdiction of the state court ceases, and that of the federal court attaches. If issues of fact arise upon the averments of the petition for removal, the jurisdiction to try them is in the federal court, and not in the state court."

In *Donovan v. Wells, Fargo & Co.* (C. C. A.) 169 Fed. 363, the court again said:

"On the filing of a removal petition, it becomes a part of the record, and if, on the face of the record as so constituted, the suit appears to be a removable one, the state court is bound to surrender jurisdiction."

The inevitable corollary is that no other pleadings, no other issues, are permissible in the state court after the sufficient petition and bond are presented for removal. What did the answer tender, in contemplation of law, but a plea to the jurisdiction? It could not be a plea to the jurisdiction of the state court, for it had lost jurisdiction of the parties and subject-matter. Why file in that court a plea which it had no jurisdiction to hear or determine? No record could be made in that court of any such answer. A plea to the jurisdiction of the court necessarily must be addressed to and filed in the court possessing jurisdiction to try it, which in this case was the federal court.

"Plaintiff, in order to controvert the facts stated in a removal petition, must make an issue with respect thereto in the federal court, in which the issue must be tried." *Donovan v. Wells, Fargo & Co.*, supra.

No such plea has been filed in this court. It can take no judicial cognizance of such a paper, presented to the state court after its jurisdiction had ceased and the cause stood as if pending in this court.

It results that the action of this court in overruling the motion to remand was correct, and will not be disturbed, but is amended, with leave to the plaintiff, if he so desire, to file in this court a plea, in the nature of a plea in abatement, taking issue on the allegations of the petition for removal. When made, the court will hear and determine that issue in due and ordinary course of procedure.

BRENT v. CHAS. H. LILLY CO.

(Circuit Court, W. D. Washington, N. D. October 22, 1909.)

No. 1,760.

1. SALES (§ 71*)—CONTRACTS—CONSTRUCTION.

Plaintiff in Kentucky offered defendant in Washington blue grass seed at "\$1.40 per bu., f. o. b. cars," to test 21 pounds to the measured bushel. The offer was accepted by wire, which plaintiffs acknowledged, and four days thereafter plaintiffs acknowledged defendant's confirmation of the order for seed "testing 21# to the measured bushel at \$1.40 per bushel (14#) f. o. b. cars here." Defendants, on receiving this letter, corrected plaintiffs' statement as to amount, claiming that the order called for a car load and not for 325 bags, but made no claim as to the number of pounds which should constitute a bushel until after the seed was shipped. There was uncontradicted evidence that by custom prevailing in Kentucky and neighboring parts of the country the word "bushel" was understood to mean 14 pounds. *Held*, that the contract called for a delivery of seed testing 21 pounds to the measured bushel to be paid for at \$1.40 per bushel weighing 14, and not 21 pounds.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 190; Dec. Dig. § 71.*]

2. CUSTOMS AND USAGES (§ 14*)—CONTRACT—CONSTRUCTION.

Where a contract for the sale of seed by correspondence plainly provided for payment at the rate of 14 pounds to the bushel, it must be so construed, though the custom of treating 14 pounds as a bushel did not prevail in the purchaser's locality.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 29; Dec. Dig. § 14.*]

3. CONTRACTS (§ 147*)—CONSTRUCTION.

Where there is doubt as to the meaning of a contract, the party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730-743; Dec. Dig. § 147.*]

4. CONTRACTS (§ 170*)—CONTEMPORANEOUS CONSTRUCTION.

Where parties to a contract of doubtful meaning have themselves given it a definite construction, this, in the absence of illegality or other controlling circumstance, will be adopted by the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

5. ESTOPPEL (§ 52*)—EQUITABLE ESTOPPEL—ELEMENTS.

A party who has induced another to act on a certain understanding cannot, after the other has acted, deny that understanding to the other's loss.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.*]

6. TRIAL (§ 170*)—DIRECTION OF VERDICT.

Where evidence was such that a verdict for defendant could not be sustained, the trial court properly directed a verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390-395; Dec. Dig. § 170.*]

7. SALES (§ 355*)—ACTION FOR PRICE—PLEADING—EVIDENCE.

Where, in an action for the price of grass seed, no reference to the market price was made in the pleadings, evidence thereof was inadmissible to raise an inference that defendant would not have made the con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tract with plaintiff at the price named had its officers understood that 14, instead of 21, pounds was to constitute a bushel.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 355.*]

8. EVIDENCE (§ 461*)—PAROL EVIDENCE—WRITTEN CONTRACT.

Where a contract is in writing, the intention of the parties is to be gathered therefrom and from the surrounding circumstances; evidence of a party's uncommunicated intention being inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

At Law. Action by N. Ford Brent against the Charles H. Lilly Company. Judgment for plaintiff. On motion for a new trial. Denied.

E. M. Carr and Harold Preston, for plaintiff.
John H. Allen, for defendant.

DONWORTH, District Judge. This action is brought to recover the purchase price of a car load of Kentucky blue grass seed sold by plaintiff to defendant. There is no dispute as to the quantity or quality of the seed. The controversy turns on the construction of the contract of sale, and the only substantial question between the parties is how many pounds constituted a bushel within the meaning of the contract, which fixed the price at \$1.40 per bushel. It is admitted that the seed delivered weighed 30,240 pounds. Plaintiff computing a bushel as 14 pounds, sues for the price of 2,160 bushels, amounting to \$3,024, while defendant, computing a bushel at 21 pounds, contends that it is liable for only 1,440 bushels, amounting to \$2,016. It does not appear that the seed was ever measured, and therefore the number of actually measured bushels contained in the shipment is unknown. Neither party claims that the number of bushels was to be determined, under the contract, by a measurement in fact.

At the close of all the evidence, the court peremptorily instructed the jury to find for the plaintiff for the full amount claimed. On this petition defendant assigns as grounds for a new trial (1) the instruction to find for plaintiff; and (2) the court's ruling excluding testimony offered by defendant to show the market price of that kind of seed at the time the contract was made. The first point involves a consideration of the entire case. The parties never had any oral negotiations, and the contract was entirely by correspondence. This began with the following communication (Plaintiff's Exhibit A):

"Paris, Ky., June 17, 1908.

"Mess. Chas. H. Lilly & Co., Seattle, Wash.—Dear Sirs: We offer you, for wire acceptance and if unsold 325 bags of fancy cleaned true Kentucky blue grass seed at \$1.40 per bu., f. o. b. cars here. *August, Sept. or October shipment.* Samples of the new crop will not be ready before the first of August, but we will guarantee to deliver only new crop and that it will test 21 pounds to the measured bushel.

"Hoping to be favored with your order, we are

"Yours truly,

Chas. S. Brent & Bro."

The foregoing exhibit consists of a printed form with blanks filled by typewriting. The typewritten words are shown above in italics;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the remainder, including the signature, being printed. To this defendant answered by telegram (Plaintiff's Exhibit A $\frac{1}{2}$), as follows:

"Seattle, Wn., June 22nd, Chas. S. Brent & Bro. Book order one minimum car Kentucky blue grass yours seventeenth The Chas. H. Lilly."

This telegram was acknowledged by plaintiff the next day by the following letter (Plaintiff's Exhibit S):

"Paris, Ky., June 23, 1908.

"The Chas. H. Lilly Co., Seattle, Wash.—Gentlemen: Your telegram of the 22nd accepting our offer of one car load fancy cleaned Ky. blue grass seed, testing 21#, at \$1.40 per bu. f. o. b. cars here came to hand late and we wired you promptly this a. m. acknowledging the order. We now confirm the trade and await your advices. Trust that you will let us know which month you prefer shipment, as the early shipments generally tax our capacity and we do not want to delay your shipment if you wish it to go early.

"Thanking you for the order and awaiting your further advices, we are
Yours very truly,
Chas. S. Brent & Bro."

On sending its telegram of June 22d, defendant immediately confirmed it by mailing to plaintiff one of its printed forms of purchase contract (Plaintiff's Exhibit B), on which were typewritten after the words "ship when" the words "Aug.—Sept.—Oct.—1908. Our option," and below, in the body of the page, appears the following:

"One minimum car new crop fancy cleaned true Kentucky blue grass seed weighing 21 lbs. to the bushel \$1.40 per bushel f. o. b. cars Paris, Ky. Per your quotation June 17th. Confirming our wire to you this date as follows: 'Book order one minimum car Kentucky blue grass yours seventeenth.' Please acknowledge."

This is signed by defendant per Mr. Leckenby, the manager of its seed department. On receipt of this plaintiff wrote to defendant as follows (Plaintiff's Exhibit E):

"Paris, Ky., June 27, 1908.

"The Chas. H. Lilly Co., Seattle, Wash.—Gentlemen: Yours of the 22nd (Your No. 7272) confirming purchase of blue grass seed from us duly to hand and seems to be correct. 325 bags fancy cleaned true Kentucky blue grass seed, testing 21# to the measured bushel, at \$1.40 per bu. (14#) f. o. b. cars here.

"While the shipment is optional with you as to Aug., Sept., or October, yet we would like for you to express your preference now so that there will be no delay in making the shipment when you want it. You understand that we are generally very much rushed during these months and would not like to sell to others up to capacity for August and then learn that you wanted your car shipped that month.

"Awaiting your further favors,
Yours very truly,

Chas. S. Brent & Bro."

Five days later defendant answered the foregoing letter as follows (Plaintiff's Exhibit F):

"Seattle, 7-2-08.

"Chas. S. Brent & Bro., Paris, Kentucky—Gentlemen: Answering your favor of the 27th, we wish to correct your understanding of our order. This called for minimum car of 15 tons and not for 325 bags.

"We would like to have shipment between August 15th and September 15th, providing new crop is harvested by that time, but notify us and send sample before shipping so that we will be ready to take care of the seed.

"Yours truly,
FL/FL

The Chas. H. Lilly Co.
By Frank Leckenby, Vice Pres."

The further correspondence up to the time that the car load of seed was shipped relates to details not now material. On August 22d plaintiff loaded the seed on a Louisville & Nashville Railroad car at Paris, Ky., and mailed to defendant an invoice for 2,160 bushels at \$1.40, amounting to \$3,024, at the same time sending through bank a sight draft for that amount on the defendant at Seattle with the bill of lading. When this invoice reached the defendant, it immediately wrote to plaintiff, claiming that it should be charged with only 1,433 $\frac{1}{3}$ bushels (a clerical error meant for 1,440 bushels), and refusing to pay the draft. Further correspondence ensued. The draft was never paid, and it does not appear that the bill of lading ever came into possession of defendant. Defendant's evidence tends to show that, after the car reached Seattle, the seed was unloaded into defendant's warehouse and sold through some misunderstanding of subordinate employés without the knowledge or consent of their superiors.

Plaintiff introduced the depositions of numerous seed dealers doing business in different parts of the United States, who testified that at the time of this transaction, and for a long time before, it was the custom of wholesale dealers and jobbers in Kentucky blue grass seed throughout the United States and Europe to treat 14 pounds of such seed as a bushel, and that when the word "bushel" was used in this connection by jobbers and dealers it meant invariably 14 pounds. Evidence was introduced by the defendant tending to show that this custom did not exist west of the Missouri river, and particularly did not exist in the city of Seattle or the state of Washington, and that in this market the custom was to buy and sell by pound only. Undoubtedly, if the question of the existence of this custom and its generality, so as to make it binding upon the defendant merely as a custom, is an open question between the parties, the case should have been submitted to the jury on that issue. I feel satisfied, however, that in reason and justice, as well as law, the correspondence precludes the defendant from disputing the claim of the plaintiff that 14 pounds of seed constituted a bushel according to the terms of the contract. The evidence is entirely uncontradicted that the custom claimed by the plaintiff prevailed in the state of Kentucky and throughout all the neighboring parts of the country. There can be no question but that the plaintiff at all times understood the contract to call for 14 pounds to the bushel. The contrary is not seriously contended by defendant. Now in his letter of June 27th to the defendant (Plaintiff's Exhibit E) plaintiff expressly defined a bushel as being 14 pounds; and, while defendant acknowledged the receipt of this on July 2d (Exhibit F), and corrected plaintiff's understanding of the contract in other respects, it made no objection to, or criticism of, this feature of plaintiff's letter. Conceding that defendant was not bound by any notice of the custom defining a bushel as 14 pounds in first placing its order, it was fully informed of plaintiff's understanding to that effect when it received plaintiff's letter of June 27th. Taking defendant's contention at its best, and assuming that, when sending its first telegram, it expected 21 pounds to the bushel (which is not at all clear when plaintiff's offer of June 17th is read in the light of all the evi-

dence), the most that would follow would be that there was no meeting of minds, and therefore no contract as a result of the first exchange of communications. But defendant, having received the letter of June 27th, allowed plaintiff to rest under the belief that it acquiesced in the construction of the contract fixing a bushel at 14 pounds until after the seed had been delivered on the railroad car, and had started on its westward journey. Further, the evidence shows that defendant was the largest seed dealer in the northwest, and perhaps the largest on the Pacific Coast. It had for a number of years issued an annual seed catalogue, and in listing Kentucky blue grass seed its catalogue had invariably referred to a bushel as 14 pounds. It is very likely true, as claimed by defendant, that this was merely intended to inform farmers and others sowing the seed that 14 pounds by weight should be sown where the directions called for the sowing of a bushel. It is to be noted, however, that regardless of the quality of the seed (it being undisputed that the better the quality the greater the weight of a measured bushel) 14 pounds is invariably designated as a bushel in defendant's catalogues. The evidence makes it clear that persons desiring to buy blue grass seed intelligently must be informed of the weight per measured bushel for the purpose of testing the quality of the seed, whether it is to be sold by the pound or by the bushel. It is apparent that, since the increased weight per measured bushel is brought about by cleaning the seed from chaff and similar waste, a greater weight shows a better quality, and therefore the weight per measured bushel is an important fact, regardless of the method of computing quantity. An experienced seed dealer knowing these facts could not have been misled as to the meaning of the letter of June 27th.

Construing the entire correspondence in the light of the undisputed evidence, I have no hesitation in concluding that the defendant is bound, especially in view of the letter of June 27th, to treat 14 pounds as a bushel. My attention has not been called to any statute of the state of Kentucky defining the number of pounds constituting a bushel of blue grass seed in that state. The contract was to be performed there, but no statute of that state bearing on the subject has been suggested, and I do not base the ruling upon that ground. Neither do I sustain plaintiff's contention that the circumstances attending the unloading of the car at Seattle estop the defendant from disputing plaintiff's claim, as that question should be left to the jury if the other circumstances mentioned did not conclude the matter. There are several principles of law which, when applied to the facts of this case, require that plaintiff should have judgment for his claim. (1) Where there is doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties. (2) Where the parties to a contract of doubtful meaning have themselves given it a definite construction, this, in the absence of illegality or other controlling circumstance, will be adopted by the courts. (3) A party who has induced another to act on a certain understanding cannot, after the other party has acted, deny that understanding to the other's loss.

In the federal courts, before submitting a case to the jury, there is always a question for the court as to the sufficiency of the evidence to justify a verdict. In whatever aspect I view this case I feel that a verdict in accordance with defendant's contention should be set aside as contrary to the law and right of the case. I therefore hold that there was no error in instructing the jury to find a verdict for the plaintiff.

On the second error assigned, defendant urges that it should have been permitted to show the market price of seed of this character at the time the contract was made for the purpose of raising the inference that defendant would not have made the contract with plaintiff for a bushel of 14 pounds at the price named. No reference to the market price was made in the pleadings, and plaintiff could not be expected to be prepared to meet evidence on that point, even if it could be considered admissible under any circumstances. It is sufficient to say that, even if defendant had been allowed to introduce such evidence, it would not have affected the reasons hereinbefore stated which require a judgment for plaintiff.

On the argument on this petition, reference is made to the remarks of the court at the trial touching the admissibility of evidence concerning the intention of the parties. I do not think these remarks can be misunderstood. Where a contract is entirely in writing, as in this case, the intention of the parties must be gathered from the writings and from the surrounding circumstances. It is not competent for a party to testify as to what intention existed in his mind when he has not communicated that state of mind to the other party. What was said by the court on that subject merely expressed this idea.

For the reasons stated, the petition for a new trial is denied.

CARTER v. RINKER.

(Circuit Court, D. Kansas, First Division. December 13, 1909.)

1. BREACH OF MARRIAGE PROMISE (§ 3*)—PARTIES—INCAPACITY—KNOWLEDGE.

An unmarried woman may recover in an action *ex contractu* for breach of promise made by a married man, where she had no knowledge of his disqualification to perform at the time of the promise and acceptance.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 5; Dec. Dig. § 3.*]

2. BREACH OF MARRIAGE PROMISE (§ 3*)—CONTRACT—INVALIDITY.

Where, at the time of making a contract to marry, both parties are aware, or have reason to know, that one of them is under coverture, the contract is *contra mores* and void.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 5; Dec. Dig. § 3.*]

Effect of existing marriage on subsequent contract to marry, see note to *Davis v. Pryor*, 50 C. C. A. 583.]

3. ESTOPPEL (§ 107*)—PLEADING.

An estoppel arises as a question of law from the facts pleaded, and hence is enforceable, though the pleading does not designate any act as an estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 297; Dec. Dig. § 107.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

At Law. Action by Jessie Carter against James M. Rinker. On demurrer to petition. Overruled.

Charles Blood Smith, T. A. Milton, and Samuel Barnum, for plaintiff.

David Ritchie, for defendant.

PHILIPS, District Judge. This is an action for breach of promise to marry. While the amended petition was not wholly free from the criticism made by defendant's counsel, for presenting the double aspect of an action in assumpsit for breach of promise to marry and one in trespass for fraud and deceit in bringing about the engagement, which respective actions might present a different measure of damages, this objection has been obviated. On the hearing of the motion of the defendant striking at this claimed defect, plaintiff's counsel stated that he construed the petition as founded alone on a breach of promise, and he would so try his case. Thereupon the motion was denied, and the defendant has demurred to the petition as not stating a cause of action.

The substance of the allegations of the petition is that at the time of making the contract, in February, 1907, the plaintiff was, and ever since has remained, an unmarried woman; that she then, at defendant's request, promised to marry him, and he at the same time promised to marry her; that the defendant at the time represented himself to be an unmarried man, when in fact he was then married to another person, of which the plaintiff had no notice; that he represented himself as a man of wealth; that he was a widower, and that if she married him he would establish their home at Kansas City, Mo., apart from his children; that after said contract of marriage was announced and made known to plaintiff's relatives and friends, at the urgent request of the defendant, she discarded former friends and ceased to have social intercourse with them; that she believed the representations of the defendant that he would carry out his promise of marriage; that he thereafter gave her constant attention, referring to her as "wife," "darling," and "sweetheart," in their correspondence; that as his fiancée, and at his earnest solicitation, and in expectancy of said marriage, she consented to sexual intercourse with him; that this continued until about March or April, 1907, when she discovered for the first time that he was a married man, and had been such during their entire acquaintance, during which time he was living with his wife in the state of Kansas; that until such discovery she was at all times ready and willing to marry the defendant. The petition then alleged that in consequence of her situation she was greatly humiliated, prostrated, etc.

The question presented by the demurrer for decision is: It appearing that the defendant, at the time of making the promise, was a married man and incapable of performing the contract, is this action maintainable? The argument of defendant's counsel is that such a contract is contrary to public policy, and as such is nonactionable; that being incapable of performance by the defendant at the time it was entered into, and ever thereafter during his coverture, the general rule of law is that such a promise cannot be the basis of a suit at law.

I have examined the authorities cited in support of the foregoing proposition. In *Eve v. Rogers*, 12 Ind. App. 623, 40 N. E. 25, the court used the following language:

"The contract must be binding upon both parties, or it cannot bind one. Hence it follows that a contract of marriage entered into between a man and a woman, one of whom is qualified to make such a contract and the other is not, is void and cannot be enforced. Neither can damages be recovered for a breach thereof, for the reason that the contract, not being binding as to one, is not binding as to the other."

No authorities were cited in support of this broad proposition.

The case of *Leaman v. Thompson*, 43 Wash. 579, 86 Pac. 926, is not in point. The evidence there showed that when the first promise of marriage was made the plaintiff herself was under coverture, and, of course, she could not predicate an action upon such a contract contrary to public policy; she herself being aware of her incompetency. The case turned upon the question of fact as to whether or not the promise was not renewed after the defendant was divorced.

The case of *Buelna v. Ryan*, 139 Cal. 630, 73 Pac. 468, is not different in principle from the last case cited. The question there involved was whether or not the plaintiff, a divorced woman, could enter into such contract within a year subsequent to the decree of divorce under the Civil Code of California. The court held:

"That when she was divorced she was no longer a married woman, and that under the Code she could not marry in the state until after the lapse of the year; she had the right to marry after the expiration of the year; that she had the right to marry at a certain time, and to agree to so marry, provided the agreement was not consummated until the end of the year."

Reed v. Reed, 49 Ohio St. 654, 32 N. E. 750, only holds:

"That an action will not lie in the state of Ohio to recover damages for a breach of contract of marriage made in that state between first cousins"

—for the reason that the statute prohibits such contract.

The case of *Fuller v. Fuller*, 33 Kan. 582, 7 Pac. 241, only holds:

"That where a man innocently marries a woman who has a husband living, he may maintain an action against her in equity, independent of the statutes relating to divorce and alimony, to have the colorable marriage declared a nullity."

Werner v. Werner, 59 Kan. 399, 53 Pac. 127, 41 L. R. A. 349, 68 Am. St. Rep. 372, is practically to the same effect.

The case of *Noice v. Brown*, 38 N. J. Law, 228, 20 Am. Rep. 388, cited by counsel for defendant, does not support his contention. That presented the naked question of an agreement of a married man to marry when he should obtain a decree of divorce from his wife. It was held that an agreement to marry the plaintiff under such an arrangement as that was contrary to public policy and void. There both parties were entering into such agreement with the full knowledge of the present disability of one of them. Such a compact is so manifestly pernicious in its tendency as to demand its condemnation.

It seems to be a well settled rule of the English common-law courts that this action is maintainable. They hold that the promise of the plaintiff to marry the defendant within a reasonable time, which implies a promise to remain single for a reasonable time, is a sufficient

consideration to support the promise. The leading case is that of *Wild v. Harris*, 7 Com. Bench, 999, in which Chief Justice Wilde said, *inter alia*:

"The defendant's promise to marry the plaintiff within a reasonable time was not absolutely impossible of performance; for his wife might have died within a reasonable time, and so he would have been in a condition to have performed his promise to the plaintiff."

In *Millward v. Littlewood*, 5 Exc. Rep. 773, Parke, B., at page 778, said:

"The promise by the defendant to marry the plaintiff implies, on his part, that he is then capable of marrying, and he has broken that promise at the time of making it. The consideration to support the promise is that the plaintiff, at the request of the defendant, engaged to marry him within a reasonable time, and therefore she remained unmarried; and that is a sufficient consideration to bind the defendant."

To the same effect is *Daniel v. Bowles*, 2 C. M. P. 553.

I think it not too much to say that the decided weight of authority shows that the foregoing is the American rule. See *Cammerer v. Muller*, 60 Hun, 578, 14 N. Y. Supp. 511, affirmed in 133 N. Y. 623, 30 N. E. 1147; *Paddock v. Robinson*, 63 Ill. 99, 14 Am. Rep. 112; *Coover v. Davenport*, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706; *Pollock v. Sullivan*, 53 Vt. 507, 38 Am. Rep. 702.

The leading case, perhaps more generally recognized and followed in this country, is that of *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336, in which Colt, Judge, said:

"The defendant is not permitted to escape responsibility on the ground of his present legal inability to perform a promise of marriage to an innocent party. The damages to the plaintiff are certainly not diminished by the consideration that the promise was made under such circumstances. The strict rule that a consideration to support a promise is insufficient, if its performance is utterly and naturally impossible, is met by the suggestion that, even if the future performance here is to be treated as utterly impossible, yet the detriment or disadvantage which must necessarily result to the plaintiff in relying for any time on the promise affords sufficient consideration to support the defendant's contract. 2 *Parsons on Contracts* (5th Ed.) 67; *Wild v. Harris*, 7 C. B. 999."

This seems also to be the view of the Circuit Court of Appeals of this Circuit, expressed by Judge Adams in *Davis v. Pryor*, 112 Fed. 274, 50 C. C. A. 579, in which he said:

"We fully recognize the just and well-settled rule of law by which a man, even though married, and for that reason incapacitated from executing a contract or promise of marriage to another, shall not escape liability for damages occasioned to a third party, if in point of fact, she entered into the contract with him in ignorance of the fact that he had a living wife"—Citing *Kelley v. Riley*, *supra*, and *Bishop, Mar., Div. & Sep.* § 192.

This case holds, very properly, that where at the time of making the promise both parties are aware, or have reason to know, that one of them is under coverture, no action can be maintained for the breach of such promise. No action can be predicated of such a compact *contra mores*. Some of the authorities base the right of action in such cases upon the ground that the defendant is estopped by his own conduct to assert nonliability for breach of such promise. This rests upon the rule of law that:

"Where a party by his acts or words causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous condition, he will be concluded from averring anything to the contrary against the party so altering his condition." *Chouteau et al. v. Goddin et al.*, 39 Mo. 250, 10 Am. Dec. 462.

The suggestion of counsel for defendant that estoppel cannot avail the plaintiff, for the reason that it is not pleaded, in my opinion is not tenable. An estoppel arises as a conclusion of law from the facts pleaded, rather than from the mere designation of the act as an estoppel.

It results that the demurrer must be overruled.

DEBITULIA v. LEHIGH & WILKESBARRE COAL CO.

(Circuit Court, E. D. Pennsylvania. December 10, 1909.)

No. 51.

1. COURTS (§ 366*)—FEDERAL COURTS—RULES OF DECISION—STATUTES.

In the construction of a state statute, the federal court is governed by the construction of similar statutes in *pari materia* by the highest courts of the state.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 954-968; Dec. Dig. § 366.*

Conclusiveness of judgment between federal and state courts, see note to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

2. DEATH (§ 31*)—RIGHT TO SUE—NONRESIDENT—"WIDOW."

Act Pa. 1891 (P. L. 207), providing for the health and safety of persons employed in and about anthracite mines, in article 17, § 8, declares that for any injury to person or property occasioned by any failure to comply with the act by any owner of any coal mine, etc., a right of action shall accrue to the person injured; and, in case of loss of life, a right of action shall accrue to the "widow" and lineal heirs of the decedent for like recovery for damages for the injury they shall have sustained. *Held*, that the word "widow" construed in connection with Act April 15, 1851 (P. L. 674), and Act April 26, 1855 (P. L. 309), giving a right of action to a "widow" for the wrongful death of her husband, did not include a non-resident alien widow, and hence such widow who was an Italian subject and had resided in Italy since before July 11, 1907, was not entitled to recover under the Act of 1891 for the negligent death of her husband in a coal mine in Pennsylvania, notwithstanding such a right might be enforced under the laws of Italy.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 37; Dec. Dig. § 31.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7457-7459.

State laws as rules of decision in federal courts, see note to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

Action by Merchese Angela Debitulia against the Lehigh & Wilkesbarre Coal Company. On demurrer to plaintiff's amended statement. Sustained.

Marcel A. Viti, for plaintiff.

Dickson, Beitler & McCouch, for defendant.

J. B. McPHERSON, District Judge. The plaintiff is an Italian subject and has resided in that kingdom since before July 11, 1907. She

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

brings this action to recover damages for the death of her husband, who lost his life on the date just mentioned by the alleged negligence of the defendant. He was a laborer employed in an anthracite coal mine operated in the state of Pennsylvania, and the negligence of the defendant is said to consist in certain acts and omissions to which a detailed reference need not be made. Her statement of claim contains two counts; one of them is put upon the Acts of 1851 (P. L. 674) and of 1855 (P. L. 309), and the other count is put upon article 17, § 8, of the Act of 1891 (P. L. 207). It is conceded that the Acts of 1851 and 1855 give her no right of action. These statutes have been thus construed by the Supreme Court of Pennsylvania in *Deni v. Railroad Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676, and this construction was followed in *Maiorano v. Railroad Co.*, 216 Pa. 402, 65 Atl. 1077, 21 L. R. A. (N. S.) 271, 116 Am. St. Rep. 778. The latter case also decided that the treaty between the United States and Italy did not give to an Italian subject residing in that kingdom a right of action under the foregoing Pennsylvania statutes, so far as they permit the recovery of damages for the death of a husband; and this construction of the treaty was affirmed by the Supreme Court of the United States. 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 801. The cases of *Deni* and of *Maiorano* have been followed in the federal courts of this circuit; first, by Judge Ewing in the Western district of Pennsylvania (*Zeiger v. Railroad Co.* [C. C.] 151 Fed. 348), whose ruling was affirmed by the Court of Appeals in 158 Fed. 809, 86 C. C. A. 69, and afterwards by Judge Archbald, sitting in the Eastern district of Pennsylvania (*Fulco v. Stone Co.* [C. C.] 163 Fed. 124), whose opinion collects numerous cases on the general subject. This decision was also affirmed by the Court of Appeals (169 Fed. 98) on the well-known ground that the decisions of the Supreme Court of Pennsylvania construing the Acts of 1851 and 1855 bound the federal courts sitting within the state. I am not sure whether the force of the Pennsylvania decisions is thought to be affected by the averments in the plaintiff's amended statement "that under the law of Italy the nonresident alien widow and children of an alien killed in Italy through negligence are permitted to recover for their loss and damage resulting from said death"; but if this position is insisted upon I am not able to uphold it. *Deni's* Case was decided upon the ground that the scope of the two Pennsylvania statutes was not broad enough to include a nonresident alien; and I do not see how the scope of the statutes can be enlarged by the fact that the legislation of Italy contains the permission referred to in the plaintiff's statement. The question decided was the meaning of the Pennsylvania statutes, and in my opinion this meaning could not possibly be affected by the contents of an Italian statute, earlier or later, upon the same subject.

As I understand the plaintiff's argument, her sole reliance is placed upon the Act of 1891, under which the second count of the statement is drawn. The statute is entitled:

"An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith."

Article 17, which is devoted to "Penalties," provides in its eighth section as follows:

"That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any owner, operator, superintendent, mine foreman or fire boss of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid, a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained."

Assuming that the plaintiff's statement in its account of her husband's death sets forth as the cause some violation of the act or some failure to comply with its provisions, it remains to inquire whether the plaintiff, as a nonresident alien, has been given a right to sue by the language of the foregoing section. This question has not yet been passed upon by the Supreme Court of Pennsylvania, and the plaintiff is therefore entitled to have it considered and decided by a federal court. But, as the question involves the construction of a Pennsylvania statute, it is not only decorous, but I think it is imperative, that the circuit court should pay great deference to the decisions of the state tribunal that have construed similar language in a similar statute. Unquestionably the Acts of 1851, 1855, and 1891 are in *pari materia*. They all concern the subject of injury or death by wrongful act, and the fact that the Act of 1891 necessarily applies to a smaller class of wrongdoers—since the section under consideration only punishes the offending owner or operator of an anthracite coal mine or colliery, while the earlier statutes apply to wrongdoers generally—has no bearing upon the question whether the benefits of the Act of 1891 have been extended to a larger class than was embraced by the previous legislation. Or, to state the proposition differently, the later statute is not to be extended to a larger class unless the fair interpretation of its words leads to that conclusion. If its language is essentially the same as the language of the Acts of 1851 and 1855, I can see no escape from the decision that it must be construed according to the judgments already pronounced by the Pennsylvania court.

Section 18 of the Act of 1851 (P. L. 674) relates to cases where a person, who has been injured by negligence, himself brings suit, and afterwards dies. In such a situation, it is provided that his personal representatives may go on with the suit. This section was not involved in *Deni's Case* and need not now be considered. It is section 19 (page 674) that calls for examination, namely:

"That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

The Act of 1855 (P. L. 309) modifies this section by declaring:

"The persons entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the deceased, and no other relative."

Reading these two acts together, the state of Pennsylvania has provided that if death shall be caused by wrongful act—unlawful violence

or negligence—the husband, widow, children, or parents of the deceased may recover damages for the death thus caused; and it is this provision that was construed by the Supreme Court of Pennsylvania in *Deni's Case* to be too narrow to include a nonresident alien mother of the deceased; and in *Maiorano's Case* was held to be too narrow to include a nonresident alien widow. Now, this provision of the earlier statutes is identical in effect with the provision in the Act of 1891, namely, if death shall be caused by a wrongful act—negligence or failure to obey the statute—the widow and lineal heirs of the deceased may recover damages for the death thus caused. The difference in the language employed by the three statutes is immaterial; so far as the present question is concerned, the meaning is precisely the same. In all the statutes the “widow” is spoken of without qualification; and if “widow” in the first two acts is to bear a restricted meaning, the same word in the third act can be no broader.

The very careful and thoroughly satisfactory brief of the plaintiff's counsel shows plainly that his attack upon the two Pennsylvania cases (especially upon the case of *Deni*) is not directly upon the judgment of the court, but is distinctly aimed at the reasoning by which the judgment is supported. He attacks the opinion, and endeavors to show that it rests in part upon a misapprehension of some of the cases that are cited to sustain it; and in part upon a ground that was mistakenly taken for granted, namely, the absence of a similar statute in Italy—this mistake having now been corrected by the averments of the plaintiff's statement. He dwells further upon the numerous decisions in which other courts have construed like statutes in other states, and have held them to include nonresident aliens; and he insists that the reasoning of these decisions should commend itself as more in accord with the purposes of the Act of 1891 and with considerations of humanity and of public policy. The argument for construing this statute so as to include the plaintiff among its beneficiaries would deserve careful consideration, if the question were open in this court. But it must be evident, I think, that I am to be controlled by the judgment of the Pennsylvania court, and not necessarily by its reasoning. If there were nothing before me except the bare judgment of that tribunal to the effect that the plaintiff in *Deni's Case* was given no right of action by the Act of 1851 or of 1855, I should be bound by the decision precisely as I am now bound, although the court has seen fit to give reasons for its ruling. I have neither the right nor the disposition to examine critically the structure of the court's syllogism. It is the judgment that binds me, and the judgment alone. When, therefore, I find a later statute upon the same subject that is framed in essentially the same language, it seems to me that I must follow the earlier judgment and give the statute the same construction.

In construing statutes *in pari materia*, it is an established rule that the words of a subsequent act are to be given the recognized meaning which they had in a former act, if nothing shall be presented to show a contrary intention, and therefore judicial decisions construing one of such acts form a sound rule of construction for the other. 26 *Amer. & Eng. Enc. of Law* (2d Ed.) p. 611, par. “g” (2). In *Hersha v. Breneman*, 6 Serg. & R. (Pa.) 2, the Supreme Court of Pennsylvania had

occasion to construe section 22 of the Act of 1794 (3 Smith's Laws, p. 151). It had been taken from the third and fourth sections of the Act of 1764, and, indeed, it not only substantially followed those sections, but pursued them for the most part word for word. The Act of 1764 had received a particular construction in a decision that was rendered in 1788 and the Supreme Court said (speaking in 1820) that they were unwilling to depart from it—

“particularly as we are of opinion that the slight differences that exist between the sections alluded to do not in any respect affect the question before us. The difference of phraseology between the words ‘heir at law’ and ‘oldest son’ can have no effect; for those terms have evidently the same meaning.”

And in *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566, it was held that, where Congress had evidently given a special meaning to a particular word or phrase in a statute, the Supreme Court would put the same interpretation on the same word or phrase, when it was used in a later statute upon the same subject. The facts were these: In 1861 Congress exempted from duty “animals living, of all kinds; birds, singing and other; and land and water fowls.” Act March 2, 1861, c. 68, 12 Stat. 193. In 1866 it imposed a duty upon “horses, mules, cattle, sheep, hogs and other live animals imported from foreign countries.” Act May 16, 1866, c. 82, 14 Stat. 48. Afterwards *Reiche* imported certain live birds, and the Circuit Court sustained the New York collector in charging them with duty under the later statute. But the Supreme Court reversed the judgment, holding that when Congress said “animals living of all kinds” in the Act of 1861, it adopted the popular meaning of the word “animals,” and applied it to quadrupeds only, placing birds and fowls in a different classification. The court continued:

“Congress having therefore defined the word in one act so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are in pari materia, and it will be presumed that, if the same word be used in both, and a special meaning were given it in the first act, it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention.”

Accordingly it was held that the Act of 1866 when it spoke of “animals” also meant quadrupeds, and intended to impose a duty upon domestic quadrupeds, leaving the Act of 1861 to apply as before to all other quadrupeds, and also to birds and fowls.

As it seems to me, the present question is closely analogous to the problem that was presented in *Reiche v. Smythe*. It will be observed that Congress had not expressly defined the meaning of the phrase “living animals” in the Act of 1861; the Supreme Court discovered the meaning for itself, and decided that the phrase had been employed with a particular signification. Having decided what that signification was, the court applied it to the same language (“live animals”) in the later statute, because the two acts were dealing with the same subject. In the case now under consideration the Supreme Court of Pennsylvania has decided—for this is the essence of their decisions—that neither of the words “parent” and “widow,” as they are used in

the Acts of 1851 and 1855, means a nonresident alien parent or widow, the subject-matter being the right of a parent or a widow to recover damages for injuries resulting in death to a son or a husband. When, therefore, the Legislature had occasion to deal again with the same subject in the Act of 1891, and spoke again of the "widow," the conclusion seems to be irresistible that a similarly restricted meaning must be borne by the language of the later statute.

It is not necessary to pass upon the defendant's further objection that, even if the suit be maintainable at all, it has been improperly brought in the name of the widow alone. The statement of claim shows that there are two children, and it is objected that they should have been joined as plaintiffs, because the Act of 1891 apparently gives the right of action to the "widow and lineal heirs." If, however, I am right in the view that has already been expressed, this objection need not be considered.

In other respects the demurrer as amended is sustained, and judgment thereon may be entered in favor of the defendant.

Note.—Since the foregoing opinion was filed, the decision of the Court of Appeals of the Ninth circuit in *Saveljich v. Lytle, etc., Co.*, has been reported. 173 Fed. 277. In that case the Court of Appeals follows the Supreme Court of Washington in construing the statute of that state to give a right of action to the nonresident alien widow and children of a person whose death has been caused by the wrongful act of another. The decision with its accompanying note contains a full, and probably a complete, collection of the conflicting authorities upon this subject.

SHELTON v. PRICE.

(District Court, N. D. Alabama, N. D. December 16, 1900.)

1. BANKRUPTCY (§ 182*)—ASSETS—FRAUDULENT TRANSFER—VACATION.

Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), declaring invalid a transfer made by the bankrupt within four months prior to the filing of a petition in bankruptcy with intent to defraud his creditors "except as to purchasers in good faith and for a present, fair consideration," such a sale, in order to be sustained, must present both elements, namely, a purchaser in good faith and payment of a present, fair consideration.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 182.*]

2. BANKRUPTCY (§ 303*)—PREFERENCES—CONSIDERATION.

Evidence held to require a finding that a sale of a bankrupt's stock and fixtures in bulk for \$5,000 presently paid by the buyer was based on a present, fair consideration.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

3. BANKRUPTCY (§ 303*)—PREFERENCES—VACATION—BAD FAITH—BURDEN OF PROOF.

Where, in proceedings to set aside an alleged fraudulent conveyance of a bankrupt's stock and fixtures, it appears that the sale was made on a present adequate consideration, the burden of proof that the buyer purchased in bad faith was on those attacking the transfer.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. BANKRUPTCY (§ 303*)—FRAUDULENT TRANSFERS—SALES IN BULK.

Under the present bankrupt act, a sale of the bankrupt's stock and fixtures in bulk is not, in an action by the trustee, *prima facie* fraudulent in the sense that such sale alone establishes the bad faith of the purchaser; the sale being merely a circumstance reflecting on the bona fides of the transaction.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

5. BANKRUPTCY (§ 303*)—PREFERENCES—SALES IN BULK—FRAUD—BUYER'S BAD FAITH—EVIDENCE.

Evidence *held* insufficient to show that a buyer of a bankrupt's stock and fixtures in bulk within four months prior to bankruptcy was actuated by bad faith, or that he had knowledge, actual or constructive, of the bankrupt's intent thereby to defraud his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

Bill by M. B. Shelton, trustee of B. B. Garner & Co., bankrupts, against Charles H. Price to set aside a sale of the bankrupt's stock and fixtures as made with intent to defraud creditors. On final hearing. Bill dismissed.

Kirk, Carmichael & Rather, Cooper & Cooper, and Ashcraft & Bradshaw, for complainant.

Walker & Spraggins and Almon & Andrews, for defendant.

GRUBB, District Judge. This was a bill in equity filed by the trustee of B. B. Garner & Co., bankrupts, by direction of the bankrupt court to have declared null and void a sale of the bankrupt's stock of goods and fixtures to the respondent, and restore the goods or the proceeds of the sale of them to the bankrupt estate for distribution among creditors, upon the ground that the sale was made with intent to defraud the creditors of the bankrupt, and that respondent knew or should have known of such intent. The issue is simplified by the express admission in the respondent's answer that the alleged fraudulent sale was made within four months prior to the filing of the petition in bankruptcy and while the bankrupt was insolvent, and, by the admission implied therein, from absence of any denial of the averment of the bill that the sale was made with the intent on the bankrupts' part to defraud their creditors. The sale so made would be null and void under section 67e of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), "except as to purchasers in good faith and for a present, fair consideration." The important inquiry is whether the respondent is shown by the evidence in the record to have been a purchaser in good faith and for a present, fair consideration. Both elements must concur in order to uphold the sale as against the trustee.

The sale of the stock of goods and fixtures attacked by the bill was made in bulk and for an actual presently paid consideration of \$5,000. Without extending the opinion by an analysis of the evidence relating to the fairness of the consideration paid, the conclusion reached by me is that the respondent paid a fair value for the goods purchased in view of their condition at the time of the purchase and the fact that he overbid another purchaser for them. When the consideration paid is shown by the record to have been adequate, the burden shifts to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complainant to affirmatively show that respondent purchased in bad faith—i. e., that he knew of the intent of the bankrupt McSwine, who made the sale, to make it for the purpose of paying the debt owing by the bankrupt firm to his mother to the exclusion of the other creditors of the bankrupt; or was put on inquiry as to the existence of such intent on the bankrupt's part, and failed to prosecute such inquiry with the required diligence, the doing of which would have disclosed to respondent the existence of such fraudulent intent. *Jones v. Simpson*, 116 U. S. 614, 6 Sup. Ct. 538, 29 L. Ed. 742. Under the present bankrupt act, it does not seem to me that the purchase of a stock of goods and fixtures in bulk is *prima facie* fraudulent in the sense that proof of such sale alone answers the exigencies of the burden imposed on complainant, of showing bad faith on respondent's part in purchasing. *Houck v. Christy*, 152 Fed. 612, 81 C. C. A. 602. It is merely a circumstance along with the other attendant circumstances of the sale reflecting on the *bona fides* of the transaction. The question for decision is whether the court is reasonably satisfied from the evidence in the record that the respondent was charged with the duty to discover the fraudulent intent of his vendor to use the proceeds of the sale for the purpose of paying one creditor to the exclusion of other creditors. If such duty rested upon respondent, before making the purchase, inquiry of the bankrupt McSwine would not answer the requisition in this respect. Inquiry from the bankrupt Garner, however, would, under the facts in this case, be on a different footing.

The facts attending the transaction, briefly stated, are as follows: The bankrupt firm consisted of two members, R. W. McSwine and B. B. Garner. At the time of the sale, the latter had withdrawn from the firm, and for some time, before his complete withdrawal, had been a salaried employé only and not a partner. He took no part in the sale and had no knowledge of it until after it was completed. He was an experienced groceryman, while McSwine was not. The business had not been a prosperous one, but at the time of the sale the firm was not under strenuous pressure from any of its creditors. Even the Merchants' Bank seems to have been induced to press its indebtedness only because of the suggestion of the bankrupt B. B. Garner, and not from any apprehension of its own as to its claim. No commercial creditors were pressing their claims or discontinuing credit. Had Garner remained with the firm, its business could have easily been continued until late in the spring without financial embarrassment or pressure. The immediate inducement to the sale may be fairly inferred to have been that B. B. Garner, the only experienced groceryman, severed his connection with the firm the first of the year; that the other member of the firm was incompetent to conduct the business of the firm without him, and was desirous of moving to Florida with his mother and stepfather. The evidence fairly shows that a sale had been contemplated and openly discussed in Florence by the bankrupt McSwine and his stepfather Wilson, speaking for him, for these anticipated reasons, for at least two months before the sale to respondent was made, and offers were solicited during that period both from respondent and others, and brokers were employed by McSwine and Wilson to procure a purchaser. This state of affairs was reasonably

well known in Florence for a considerable period before the sale. It seems clear that a bulk sale, attended by such circumstances, would not arouse suspicion of intending purchasers that it was a sale made in contemplation of insolvency by the vendors, and for the purpose of defrauding their creditors. Any suspicion arising from the offer to sell in bulk, and, so, out of the usual course of business, would be allayed by such generally known innocent reasons therefor. The reputation of the firm up to the time of the sale was not shaky. Garner was a man of integrity and known business capacity, while McSwine seems to have had an undeserved reputation of being a man of some means. It was not publicly known that Garner had left the firm until the time of the sale to respondent. The mere fact that the firm would likely owe mercantile debts, because of the character of its business, would not put upon inquiry an otherwise innocent purchaser, when the sale was publicly and not secretly made, and when there existed, known to the purchaser and the public, a sufficient and an innocent motive on the vendor's part for making the sale, and when there was current in Florence no rumor that the contemplated sale was due to the shaky financial condition of the firm or to the impossibility of its continuing the business because of pressure from its creditors. The evidence fails to disclose the existence of any suspicion in Florence as to the financial instability of the firm prior to the time of the sale. Indebtedness is not sufficient to create suspicion; it must be insolvency or indebtedness of a character likely to prevent the business from being conducted as a going concern. *Simmons v. Shelton*, 112 Ala. 294, 21 South. 309, 57 Am. St. Rep. 39.

Does the record show any facts within the peculiar knowledge of respondent, as distinguished from the public generally, that would put him on inquiry as to the fraudulent intent? The evidence shows that respondent was asked by McSwine or Wilson about December 1st to make an offer for the stock; that at one time respondent had been in the grocery business, and later and at the time of the sale had been engaged in buying secondhand stocks and disposing of them. Respondent had known B. B. Garner, one of the bankrupts, all his life, and was an intimate friend. McSwine, the other bankrupt, was a comparative stranger in Florence, and an acquaintance merely of respondent. Under such circumstances it does not seem unnatural that respondent should have informed Garner of the proposition of his partner, nor imply that respondent believed McSwine to be untrustworthy. Garner was reticent in his disclosures about the condition of the firm to respondent. He did not at that time tell him of his lack of interest in the stock or his contemplated severance of all relations with the firm. Considering his testimony with that of respondent, I do not think that it is affirmatively established that Garner disclosed any indebtedness of the bankrupt firm, except that to the Merchants' Bank and to Mrs. Wilson. He did inform him that he felt personally responsible for the payment of the bank's indebtedness, and believed that future collections of the firm would easily take care of it. Respondent conveyed to Garner the idea, in the first conversation, that he would not feel free to buy the stock unless Garner was protected. The only protection which Garner claimed to need was against the indebtedness

of the Merchants' Bank. Upon the second interview, Garner voluntarily told respondent that he was out of the business; that his matters were arranged, and it would be all right for respondent to buy the stock. Garner, having then no interest in the old firm or in the property sold, but only an interest to see it applied to the indebtedness of the firm, especially that of the Merchants' Bank, was a person upon whose information as to the condition of the bankrupt firm respondent could reasonably rely. Taking the two conversations together, I think respondent was reasonably assured by Garner that the only indebtedness of any consequence owing by the firm was that owing to the Merchants' Bank and to Mrs. Wilson, and that the bank's indebtedness had been satisfactorily arranged, so far as any disposition of the stock to respondent was concerned. While, as a matter of fact, the arrangement referred to by Garner was merely a promise by McSwine to pay the firm debts, upon Garner's withdrawal, I think a fair construction of the evidence shows that the character of the arrangement was not communicated to respondent by Garner, but only the fact that an arrangement of the bank's indebtedness, consistent with the purchase of the stock by respondent, had been effected. It seems to me that whatever suspicion as to the firm's indebtedness was created by the first talk between Garner and respondent was allayed by the second, and that respondent was justified in acting upon the assurance given him by Garner in the second talk.

Complainant contends that the circumstances under which the sale was made cast suspicion on the good faith of the purchaser, in that it was made hurriedly and without an inventory or examination of the firm's books; and that the consideration was paid in money. While it is true that the sale was negotiated in two days, it is also true that it had been under consideration by both parties in a general way for at least a month. The passing of Garner from the firm on December 28th, and his suggestion to respondent that he could now buy the stock, revived the idea of a purchase by respondent. When the negotiations were renewed, other purchasers from Sheffield were in conference with the bankrupt for the purchase of the stock, and this fact naturally stimulated the respondent to expedition. It was the presence of a competitive bidder for the stock, and not the necessitous condition of the bankrupt firm, that operated on respondent. Due time was taken to ascertain the value of the stock, and the sale was conducted openly. That secrecy was not intended appears from the fact that visible possession changed upon the execution of the bill of sale, and within half an hour thereof the cashier of the Merchants' Bank was in the store under circumstances that indicated that he was aware of the transfer. It is true that no inventory was taken by the purchaser, but a careful examination of the stock was made by the respondent and Kilburn both on Friday and Saturday before the sale was made. Respondent and Kilburn were both experienced grocerymen, and were not trained bookkeepers, and could better ascertain the value of a stock by examination and calculation, as they did, than by taking a formal inventory. Only the stock was purchased and not the accounts, and so no examination of the books would naturally occur to the respondent as being necessary; especially in view of the fact that

he was not a trained bookkeeper. His experience in handling secondhand stocks is important, both as qualifying him to quickly appraise the value of this stock and as constituting him a natural bidder for it. It is not intimated that he was influenced in making the purchase by any other motive than the profit to be obtained on resale, and it is hardly probable that such a purchaser would fail to investigate the value of the stock sufficiently before purchasing. The payment in money, rather than by check, was unusual, and, unexplained, would be suspicious. The unpleasant relations between Wilson and the bank with which the respondent did business is proven by the evidence of Elting. The objection by Wilson to a check on respondent's bank on this ground is testified to by respondent, and not disputed. It is true the bankrupt could have deposited the check in his own bank, but in that case would probably desire certification of it by respondent's bank. If the purpose of a money payment had been to conceal the transaction from the Merchants' Bank, it could have been accomplished as well by taking respondent's check and cashing it at the bank on which it was drawn. As a matter of fact, the transaction was not attempted to be kept secret, for the record tends to show that a number of non-participating persons, including the cashier of the Merchants' Bank, learned of it within less time than an hour from the execution of the bill of sale. It is true, also, that the respondent began the sale of the goods at retail and wholesale, immediately on being put into possession. But this was done openly and with no purpose to make away with the stock, and was consistent with the object of the purchase, which was to resell the goods, at once, to merchants and at retail, for the purpose of realizing on them.

It is also contended that the known purpose of the bankrupt McSwine to go to Florida should have put the respondent on notice that he intended to abscond with the purchase money. No immediate departure was in contemplation; on the contrary, the bankrupt, as a part of the sale agreement, reserved the right to desk room in the store, for the purpose of collecting the accounts due the bankrupt firm, which implied a continued residence in Florence of some duration. The fact that another bidder for the stock was present on the day of the sale, and that respondent was told by the bankrupt McSwine that he would not consider a bid from him until the other bidder had been disposed of, tends to show that respondent paid a fair value for the stock, and bought under circumstances that would disarm suspicion.

The evidence convinces me that respondent had no other motive in purchasing than a profit on resale; that he bought a stock that had been offered for sale in bulk for a month or more, and was being offered then for an assigned reason that would reasonably disarm suspicion of fraud; that many of the circumstances under which the purchase was made were calculated to allay, rather than to arouse, suspicion in a purchaser; and all are reasonably explained consistently with the good faith of the purchaser. This case, in its facts, seems to me more analogous to the case of *Simmons v. Shelton*, 112 Ala. 284, 21 South. 309, 57 Am. St. Rep. 39, than to that of *Houck v. Christy*, 152 Fed. 612, 81 C. C. A. 602.

My conclusion is that the respondent did not have actual knowledge

of any intent on his vendor's part to defraud his creditors, and was not charged with notice thereof from the circumstances. The bill is therefore dismissed, at the complainant's costs.

GOEHRIG v. STRYKER.

(Circuit Court, M. D. Pennsylvania. November 15, 1909. On Motion to Vacate December 10, 1909. On Rehearing, December 13, 1909.)

No. 165, October Term, 1908.

1. TRIAL (§ 105*)—RECEPTION OF EVIDENCE—EFFECT OF ADMISSION OF INCOMPETENT EVIDENCE.

A verdict cannot be supported by incompetent evidence alone, although it was admitted without objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 261; Dec. Dig. § 105; *Evidence, Cent. Dig. § 2430.]

2. EVIDENCE (§ 243*)—ADMISSIONS BY AGENT—STATEMENT AFTER TRANSACTION.

An admission is an acknowledgment of the existence of a fact, of which it is evidence only in the sense that it dispenses with the proof of it. To be binding, it must necessarily be made by the party himself against whom it is introduced, or by some one having authority at the time, to speak for him in the premises. The admissions of an agent, therefore, to bind his principal, must be made in the course of his agency, and be concerned with the furtherance of it; and a statement by an agent with respect to a completed transaction, as to which his agency has ceased, however close in point of time, is a mere declaration or narration, which is not competent evidence to affect his principal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 887, 912; Dec. Dig. § 243.*]

3. EVIDENCE (§ 243*)—ADMISSIONS BY AGENT—EVIDENCE OF NEGLIGENCE.

Plaintiff's intestate, who was in defendant's employ, engaged in the construction of a building, was killed by falling from a gin pole on which he was rigging a block and fall. There was evidence that the leader line which held the block until hooked in the sling was not properly fastened at the ground end; otherwise, the block could not have fallen as it did. Deceased was an experienced rigger, and the only evidence tending to show any negligence or liability on the part of defendant was that his son, who was superintending the work on the building, stated that he had himself fastened the line. The testimony was that he made such a statement 15 minutes after deceased fell, and again an hour later. *Held*, that such statements, if made, were not competent evidence against defendant; the agency of the son with respect to the transaction having terminated before they were made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 912; Dec. Dig. § 243.*]

4. TRIAL (§ 92*)—MOTION TO STRIKE OUT EVIDENCE—NUNC PRO TUNC ORDERS.

The filing nunc pro tunc as of the date of the trial of a motion to strike out evidence, and an amendment of the record to show a ruling thereon and exception, should not be allowed several months after the trial, when it does not appear that a formal motion was in fact made and ruled on at the time.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 92.*]

5. JUDGMENT (§ 199*)—MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT—COMPETENCY OF EVIDENCE.

The motion for judgment non obstante veredicto is a searching one, which goes to the vitals of the case, and on its consideration incompetent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

evidence must be disregarded, even though admitted without objection; and the fact that, if it had been objected to and excluded, competent evidence might have been produced, is not sufficient to warrant its consideration, where it is the only evidence to sustain the verdict, since it was the duty of the party offering it to produce all the material evidence he had, not unnecessarily cumulative.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 199.*]

Action by widow for death of husband by alleged negligence of defendant, and verdict for plaintiff for \$8,850. Binding instructions for defendant having been refused, a rule for judgment non obstante veredicto was taken. Rule made absolute.

C. E. Sprout, H. T. Ames, and John E. Cupp, for the rule.
N. M. Edwards, opposed.

ARCHBALD, District Judge. The plaintiff's husband was killed while endeavoring to rig a block and fall to the top of a gin pole for use in the construction of a building, of which the defendant was contractor. He was an expert "rigger," and the duties in which he was engaged, while hazardous, were perfectly familiar to him. The pole was equipped with a sling at the top, into which to hook the blocks, which were drawn up to it by a light rope called a leader line, passing over a pulley, and were held in place by it while the rigger inserted the hook in the sling. The defendant was not present at the building at the time of the accident, and had not been for several days, being represented in his absence by his son, James Stryker, who superintended the job when his father was not there. The gin pole in question was properly equipped, and nothing broke or gave way; the accident resulting solely from the way it was used or operated. It was the defendant's contention that the blocks fell because they were not properly hooked into the sling by the deceased, and gave way in consequence, when he rested his weight upon them to come down. The plaintiff claimed that the ground end of the leader line, which held the blocks after they were drawn to the top, was not fastened as it should have been, and that when the deceased, having temporarily hooked the blocks into the sling, made use of them to raise himself up to make a permanent attachment, not being sufficiently supported, they fell, and precipitated him to the floor of the building.

There was evidence that the ground line was being looked after by Bidlack, a young man of little experience, assigned to assist the deceased, who had hold of it after the blocks had been hauled to the top, and that the deceased called out to him, as he slung himself upon the blocks to come down, to "let go the crab," meaning to unlatch the windlass, by which the rope that ran over the pulleys of the block and fall was controlled, and that, Bidlack having dropped the end of the leader line to go to the windlass and execute this order, the hook came out of the sling when the additional weight of the deceased was thrown upon it, and, not being otherwise supported, the whole thing fell. If these were the facts, no negligence on the part of the defendant was shown, and something else must be made to appear to entitle the plaintiff to recover. Realizing this, the contention is that young

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stryker, and not Bidlack, was the ground man, and that, instead of staying at his post, as he should, he tied the end of the line and went off, and the line, being insufficiently fastened, gave way, when the deceased put his weight on the blocks to climb higher, with the result which followed. The jury adopted this view, and gave a verdict for the plaintiff, and the question is whether there is any evidence to sustain it.

That James Stryker was in general charge of the work on the building, as superintendent, in the absence of his father, has been already stated. But that he had anything to do with the setting up or the operation of the gin pole, either before or at the time of the accident, is denied; and that he was not there when the deceased fell to his death, and had not been for anywhere from 5 to 15 minutes, is conceded, his absence, in fact, being the subject of complaint, and in part, at least, the basis of the charge of negligence. No negligence, however, can be predicated upon the fact that he was not there, unless he was the ground man, relied on by the deceased to look after the line while he went up the pole. And the only evidence that he was, are certain admissions, alleged to have been made by him, after the accident had taken place. It is testified, for instance, by John S. Goehrig, a brother of the deceased, himself a rigger, who was at work 600 or 700 feet from the building, and got to the spot within 10 or 15 minutes afterwards, that, as they were lifting the body of the dying man to take him home, he, the witness, looked up and saw James Stryker standing there, and asked him, "Who was the ground man?" and he answered, "I was;" and, "Who tied the leader line?" and he said, "I did;" at the same time pointing out a place in the floor where it had been fastened to a beam. About an hour later, also, at the house of the deceased, according to the testimony of several members of the family who were present, the same question was put by another brother, Reno Goehrig, also a rigger, and the same response made to it, accompanied by the further statement by young Stryker, according to some, that while he was not there when the deceased fell, having gone to a cigar store a few minutes before, he knew that everything was safe on the ground when he left, because he himself did the tying.

This evidence came in without objection; it being frankly conceded by plaintiff's counsel that, as then advised, they considered it admissible. It is now contended, however, that it was not, and that, even though no objection was made to it at the time, it was not competent to affect the defendant, who could not be bound by the declarations of an agent, not made in the course of the transaction, but after it was at an end, descriptive of what had already taken place. That no objection was interposed to the reception of the evidence is persuasive of its competency; but if, upon further consideration, it is found to be otherwise, there being no evidence outside of it to charge the defendant, and the verdict in that view being left without anything to support it, there is no reason why it should not be controlled, and the case disposed of as though it had not been received. *Pitcairn v. Hiss*, 125 Fed. 110, 61 C. C. A. 657.

An admission is an acknowledgment of the existence of a fact, of

which it is evidence only in the sense that it dispenses with the proof of it. 1 Elliott, Ev. § 220; 16 Cyc. 938. To be binding, it must necessarily be made by the party himself against whom it is introduced, or by some one having authority, at the time, to speak for him in the premises. The admissions of an agent, therefore, to have this effect, must be made in the course of his agency, and be concerned with the furtherance of it; it being only as he stands as the representative of his principal in the matter to which they relate that this is true of them. 1 Elliott, Ev. § 252; 16 Cyc. 1003. Mere declarations after the fact, and unconnected with the prosecution of his agency, are no more admissible against his principal than those of an entire stranger. The subject is very much confused by the efforts which are constantly made to get in the statements of an agent, under the guise of their being a part of the *res gestæ*. But they are admissible as such only when they enter into the occurrence as a constituent fact, and not as mere declarations, and where this is not the case they have no evidentiary value. 1 Elliott, Ev. § 252; 16 Cyc. 1007, 1008. After the transaction is complete, any statements with regard to it, from whatever source, become purely descriptive of the event, and are not within the province of the agent to make; his agency not being to that end. The proximity to the occurrence may inspire the belief that, as a narrative of it, the statements are true, and this may account for their acceptance at times by the courts, as by the common mind, when the principle involved is not kept in view. But, on the other hand, if not manufactured in the desire to incriminate some one, as they easily, if not often, are, they are liable even more than the ordinary admissions to be incorrectly reported, if not altogether misunderstood, and clearly on principle are not to be received. The declarations of a bystander, describing the incident immediately afterwards, have the same persuasive force; but that does not make them evidence to bind any one, which the fact that the person making them happens to bear a representative relation to the party against whom they are brought forward does not change. No doubt there are cases where the distinction is not observed; the nearness of the declarations to the incident being accepted as the guide. *Hanover R. R. v. Coyle*, 55 Pa. 396; *Shafer v. Lacock*, 168 Pa. 497, 32 Atl. 44, 29 L. R. A. 254; *Coll v. Easton Transit Co.*, 180 Pa. 618, 37 Atl. 89; *Kansas City R. R. v. Moles*, 121 Fed. 351, 58 C. C. A. 29; *Sample v. Consolidated R. R.*, 50 W. Va. 472, 40 S. E. 597, 694, 57 L. R. A. 186.

But the law for this court is laid down in *Vicksburg & Meridan R. R. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299, approved in *Boston & Albany R. R. Co. v. O'Reilly*, 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006, where it was held that the declarations of a locomotive engineer, made within a few minutes after an accident, as to the speed at which he was running when the accident happened, were not admissible to charge the company. "His declaration, after the accident had become a completed fact," says Mr. Justice Harlan, "and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of 18 miles an hour, was not explanatory of anything in which

he was then engaged. It did not accompany the act from which the injuries in question arose. It was in its essence the mere narration of a past occurrence, not a part of the *res gestæ*—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ* simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between 10 and 30 minutes—an appreciable period of time—after the accident cannot, upon principle, make the case an exception to the general rule.”

In the present instance the statements made by James Stryker at the house of the deceased, an hour after the accident, were inadmissible upon any theory, being altogether too remote in point of time, if that is a controlling consideration, to make them part of the *res gestæ*, according to which alone, in any event they could be introduced. But so equally were those at the building, when the deceased was being removed, 10 or 15 minutes after the accident; the occurrence as such being closed, and the circumstances, by which the responsibility for it was to be determined, being complete. His declaration then as to his part in it, if any, was narrative merely, being individual and personal, and having nothing whatever to do with his being superintendent of the job. It was his mere say-so, which was incompetent to change or color any fact, and so inadmissible to make evidence against this principal, any more than in his favor, if it had happened to be the other way. If, before the accident had taken place, on inquiry from the deceased as to who was going to act as his ground man, he had been heard to say that he was; or if, as he was about to leave the building, he had told Bidlack to take his place in looking after the end of the leader line; these would be examples of declarations, made by an agent in the course of his employment, which would be effective to bind his chief. They would be facts, and not a mere recital of them; the one being an assurance to the rigger that he could rely on his assistance; and the other a direction to a subordinate, by which at the same time, his own relation to the work in hand was defined. But when the man had fallen, and all that entered into the fatality had passed, any statement then was after the fact, and no more competent to bind his superior than that of any other person there.

If this be correct, the verdict cannot stand. The blocks fell, and the deceased was killed, because they were not supported as they should have been. And this was due, in part at least, to the fact that the end of the leader line was not secured. If it had been, even though the hook was not properly inserted in the sling, the blocks would not have come down. No doubt the hook would have sustained them by itself, and the deceased was responsible, of course, for that. But if the attachment which he made was only temporary, and not intended

to be permanent, and he relied on the blocks being held by the leader line until he had finally adjusted them, of which there is some evidence, and as the jury have apparently found, the accident is not to be laid at his door. But neither upon this showing, without more, is there anything by which the defendant can be held. It is only as he is made responsible for the leader line being as it was that this can be done. And the declaration of young Stryker that he was the ground man, and tied the line, is all there is for that. So far as the defendant is concerned, however, this was mere hearsay, and it matters not that it was received in evidence, if it had in fact no legal force. *Pitcairn v. Hiss*, 125 Fed. 110, 61 C. C. A. 657; *Hamilton v. Railroad*, 51 N. Y. 100. *Moody v. McCown*, 39 Ala. 586.

At the close of the case the defendant moved to strike out this evidence, and to have a verdict directed in his favor; nothing having been shown without it by which he could be charged. These motions should have prevailed. And the verdict for the plaintiff having been taken subject to the point reserved, whether under all the evidence she was entitled to recover, the defendant has the right to have the case disposed of now, the same as it should have been then. The verdict must stand, if at all, on the competent, and not the incompetent, evidence, and the latter, having no sustaining force, is to be taken as though it was not in. It follows, therefore, there being no competent evidence to hold the defendant, that the verdict cannot be sustained.

Judgment is therefore directed to be entered in favor of the defendant non obstante veredicto on the point reserved.

On Motion to Vacate Motion to Strike Out Testimony.

(December 10, 1909.)

N. M. Edwards, for the motion.

J. E. Cupp, opposed.

ARCHBALD, District Judge. Pending the disposition of the rule for judgment non obstante veredicto, a motion was made by counsel for the defendant for leave to file, as of the date of the trial, a motion to strike out as incompetent the evidence of admissions made by James Stryker with regard to his part in the accident, and to have an exception noted to the refusal of the court so to do. Such a motion was said to have been made at the trial in connection with the argument by counsel of a request for binding instructions in favor of the defendant, and, not being shown by the record, the present motion was made to supply the deficiency. It was sustained by the affidavit of counsel, and, corresponding as it did with my general recollection on the subject, the amendment was allowed as prayed for. Unfortunately, however, this was done without notice to counsel for the plaintiff, and it is now made the subject of complaint in consequence; it being denied that it correctly represents what happened, no question having been raised, as it is said, with regard to the admissibility of this evidence, nor any request made to strike it out, until after the jury had been charged and retired, and then only in an informal and per-

functory manner. I regret that action was taken by the court without first hearing from the plaintiff, and without being fully advised in the matter, and the motion to vacate the order referred to, which is now made, is the not unnatural consequence.

The stenographer's notes show nothing, but neither do they show the request for binding instructions, which was undoubtedly made; it being in the course of the argument of this request, as it is claimed, that the motion to strike out was offered. These notes are, therefore, of no assistance, and in no event, of course, would they be controlling. With due respect to the ordinary accuracy of shorthand reports, they are not infallible, and the court is not bound by what the stenographer may or may not see fit to set down, according to his conception of what is or is not important. After the 10 months which have elapsed, however, my own recollection is not so clear as it might be, and I confess that I am considerably unsettled as to what took place, after hearing from the plaintiff's counsel. That some suggestion was made about striking out the evidence in question, after an intimation from the court that it was incompetent and would have been excluded upon timely objection, seems to be conceded. But that it took definite shape, or was made in season to affect the trial, or be entitled to a place on the record, is strenuously denied, and is certainly doubtful. Entertaining such views, as I have from the start, with regard to the incompetency of this evidence, it is hardly possible, if a motion had been made, that I would either have refused it, or gone on in the face of it, and submitted the case to the jury, when I knew that this was all there was to sustain a verdict. Whatever reference to the subject was therefore made, it is my best judgment that no formal motion to strike it out was tendered, and certainly no exception was taken to the refusal of it, by which the action of the court would have been preserved and brought upon the record. If there was anything, it was nothing more than a passing suggestion, which was not pressed, and is not, therefore, entitled to be revived and put in shape by a nunc pro tunc order, so as to be considered and made the basis of decision on the motion for judgment non obstante veredicto. The record on which that judgment must stand is the record as it was made at the trial. And while it is not above amendment to correct mistakes, or supply omissions, it is not to be pieced out by anything which has the appearance of an afterthought, or which was not deemed of enough importance at the time to be noted and made the subject of exception. Under all the circumstances, I am convinced that in allowing the nunc pro tunc order an undue advantage was accorded to the defendant, and that it must be recalled and vacated in consequence. If a motion to strike out was in fact made, which is doubtful, it was made in such a casual and inconsequential way that it cannot be insisted on and given place by such an order.

The order, amending the record so as to show that a motion was made at the trial to strike out the evidence of admissions of James Stryker with regard to his participation in the accident, and that an exception was taken by the defendant to its refusal, having been unadvisedly made, is therefore set aside and vacated.

On Rehearing of Motion for Judgment Non Obstante.

(December 15, 1909.)

N. M. Edwards, for the motion.

John E. Cupp, opposed.

ARCHBALD, District Judge. Notwithstanding the vacating of the order allowing the entering nunc pro tunc of the motion to strike out the evidence with regard to the admissions of James Stryker, the defendant's superintendent, I see no occasion to disturb the judgment for the defendant non obstante veredicto, which has been entered. It is true that in entering that judgment it was assumed that a motion to strike out was made, and the position was taken that, as it ought to have prevailed, it therefore left the verdict with nothing to stand on. But, regardless of whether it was made or not, the same conclusion is to be reached; the evidence, although admitted, being clearly incompetent, and the case having to be ruled on the competent, and not the incompetent, evidence. The motion for judgment non obstante veredicto is a searching one, which goes to the vitals of the case, and if there is any weakness in the proofs it finds and uncovers it. The reception of incompetent evidence does not change the character of it, and it matters not whether or not objection was made to it. As said in *Hamilton v. New York Central R. R.*, 51 N. Y. 100: "It does not follow that the omission to object to testimony is a concession that it is competent." Where, therefore, as in that case, a passenger was wrongfully ejected from a train for failure to produce a ticket or pay his fare, but afterwards, upon the mistake being discovered, was refunded what he had been compelled to pay on another train, in an action of trespass for the injury, it was held that any slander or abuse of the passenger by the conductor at the time of returning his money was not competent to bind the company, and that a request for instructions to that effect should have been given; the failure to object to the introduction of the evidence being of no consequence. So, in *Moody v. McCown*, 39 Ala. 586, where parol evidence was admitted which tended to vary the agreement of the parties as expressed in a written contract which they had executed, it was held that, being incompetent for that purpose, it must be disregarded and the writing construed according to its own terms, and that it made no difference that the parol evidence came in without objection. In *Chesapeake Transit Company v. Walker* (C. C.) 158 Fed. 850, also, after evidence directed to establish the damages resulting from the breach of a contract to build a railroad had been received and submitted to the jury, the jury having failed to agree, the court, upon further consideration, being convinced that a recovery could not be sustained on it, directed a verdict for the defendant; and this was affirmed on appeal. (C. C. A.) 169 Fed. 543. See, also, *Pitcairn v. Hiss*, 125 Fed. 110, 61 C. C. A. 657.

There is nothing to the contrary in *First Unitarian Society v. Faulkner*, 91 U. S. 415, 23 L. Ed. 283. In that case the plaintiff sued for services as architects in making plans for a church, and a conversation with the pastor was given in evidence. Objection was made that his

authority was not shown, and the plaintiffs thereupon offered to follow this with proof that he was the duly authorized agent of the church in that behalf, and that the congregation subsequently acquiesced in what he had done. No such proof was in fact made, and the case closed without further reference to it. The case was submitted to the jury, however, upon a theory which made this evidence immaterial, and it was held that, in view of this, as well as the failure of the defendants to call attention to the omission, the judgment should not be disturbed. It is manifest that this is entirely different from anything which we have here. Not only was the evidence as to the conversation with the pastor, even if erroneously admitted, harmless; but, being competent when it was received, the court could not be convicted of error because the accompanying offer which made it competent was not complied with, which the defendants acquiesced in by their silence. In no view was the verdict made to rest, as here, on incompetent evidence, which was not effective to sustain it.

It is said, however, that, if objection had been made at the time, the plaintiff possibly could have supplied the deficiency, and that the case ought not to be thrown out of court for want of proof, which might have been cured by other evidence, had attention been properly called to it. But it is incumbent on a party to bring forward all the evidence that he has; and, except where it is unnecessarily cumulative, there is no objection to duplicating it, particularly as to essentials. Neither can there be any just complaint that, where a party has not proved all that he could, the little that he has proved is adjudged insufficient. The people are interested that litigation should be brought to an end once for all, when it can be, and this is more than ever to be adhered to in these days, when complaint is being made of the law's delays, and the existing facilities for securing proofs are so abundant. The crucial point in the present case admittedly was the alleged declarations of James Stryker as to his participation in the accident. Without this no case was made out; and, so far as appears, this was all the evidence which the plaintiff had to rely on. But incompetent evidence is the same as no evidence, and, notwithstanding that it is let in, on a motion non obstante veredicto, it can be given no force, and is the same as though it was not. The case as it stands, therefore, is in this plight: That there is no effective evidence by which the defendant can be held liable, and therefore nothing upon which the verdict can be sustained. If there was other evidence which the plaintiff could have supplied, while it might be ground for a new trial, the discretion of the court being appealed to, it will not do to withhold judgment and overturn what has been done on the mere possibility of it.

The judgment for defendant non obstante veredicto will therefore stand.

In re KESSLER & CO.

(District Court, S. D. New York. November 29, 1909.)

No. 10,268.

1. JOINT ADVENTURES (§ 1*)—RELATION OF PARTIES.

Where claimants in bankruptcy agreed to subscribe for certain bonds and stock of a corporation on joint account, they became joint adventurers in the transaction; their legal rights and obligations being substantially those of partners.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. PARTNERSHIP (§ 89*)—ACCOUNTING—PARTNERSHIP ASSETS—LIEN.

A partner has a lien on partnership assets for protection of his rights on settlement of the partnership accounts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 137; Dec. Dig. § 89.*]

3. BANKRUPTCY (§ 185*)—TRANSFERS BY BANKRUPT.

Where claimants and the bankrupts entered into a joint adventure to purchase certain corporate stocks and bonds, which were in fact entirely paid for by claimants, and the bankrupts voluntarily transferred to claimants the legal title to certain of the bonds and stock in controversy on receiving a part of the securities purchased, such transfer terminated the partnership lien existing between them, and hence the bankrupt's trustee was not entitled to recover the stock and bonds in controversy so transferred; claimants being only required to credit the value thereof on their claim against the bankrupts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 235; Dec. Dig. § 185.*]

In the matter of Kessler & Co., bankrupts. From a referee's order, awarding to the trustee in bankruptcy certain corporate shares in the possession of Cunliffe Bros., and, they being beyond jurisdiction, directing that no dividends be paid to them on their claim against the bankrupt estate until they surrendered the shares, they petition for review. Reversed.

See, also, 171 Fed. 751.

Winthrop & Stimson (George Roberts and Loring C. Chrystie, of counsel), for Cunliffe Bros.

Wallace Macfarlane and George H. Gilman, for trustee.

HOLT, District Judge. This is a petition to review an order of the referee, directing that the title to 105 shares of stock of the Beaver Land & Irrigation Company, in the possession of Cunliffe Bros., an English firm, is in the trustee of Kessler & Co., and that dividends upon the claim of Cunliffe Bros. be withheld until Cunliffe Bros. deliver to the trustee said 105 shares of stock.

Cunliffe Bros. and Kessler & Co., before the bankruptcy of Kessler & Co., entered into an arrangement to subscribe for \$100,000 of bonds and \$150,000 of stock of the Beaver Land & Irrigation Company on joint account. They thus became joint adventurers in this transaction, and their legal rights and obligations in relation to this purchase were in law substantially those of partners. Prior to the bankruptcy of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Kessler & Co., the Beaver Land & Irrigation Company had delivered to Kessler & Co. the entire 100 bonds and 1,500 shares of stock, in two certificates, of 750 shares each. Eighty-five of the bonds and 1,275 shares of stock had been paid for by drafts drawn by Kessler & Co. upon Cunliffe Bros. Kessler & Co. had divided equally the 85 bonds, sending \$42,500 of the bonds to Cunliffe Bros. and retaining for themselves an equal amount. They also sent to Cunliffe Bros. one of the certificates for 750 shares of stock. Kessler & Co. then placed the remaining 15 of said bonds and the remaining certificate for 750 shares of stock in an envelope, and indorsed upon the envelope a statement to the effect that the 15 bonds and 225 shares of the stock were the property of the Beaver Land & Irrigation Company. Upon the bankruptcy of Kessler & Co. a receiver was appointed, who took into his possession the said bonds and stock remaining in the possession of Kessler & Co. Prior to the bankruptcy, as the acceptances of Cunliffe Bros. had matured, they had been renewed, and at the time of the bankruptcy there were outstanding \$85,000 of such acceptances, which, upon maturity, were paid by Cunliffe Bros. After the bankruptcy the Beaver Land & Irrigation Company instituted reclamation proceedings against the trustee of Kessler & Co. to recover the 15 bonds and the 225 shares of stock which had not been paid for, and in such proceedings the trustee was directed to deliver said bonds and stock to the Beaver Company, which was done.

Thereafter Cunliffe Bros. brought a proceeding in this court to have delivered to them the remaining bonds and stock in the possession of the trustee, on the ground that they were partnership property, upon which Cunliffe Bros. had a lien as partners. This proceeding, after a hearing before the referee, was denied in this court, on the ground that, the parties to the joint adventure having agreed upon a distribution of the proceeds of the purchase, no partnership lien existed on the bonds and stock. The situation then was that Cunliffe Bros. and the trustee of Kessler & Co. each had \$42,500 of bonds, and that Cunliffe Bros. had 750 shares of the stock, while the trustee of Kessler & Co. had but 525 shares of the stock, so that Cunliffe Bros. had received 225 shares more than Kessler & Co. Cunliffe Bros. subsequently purchased from the trustee of Kessler & Co. $7\frac{1}{2}$ shares. The trustee then brought this proceeding, claiming that Cunliffe Bros. should deliver to him 105 of said shares, on the theory that Cunliffe Bros. had obtained twice that amount, which they had not paid for, and that the trustee was therefore entitled to one-half of such shares. The referee held that the trustee was entitled to said 105 shares, and, as Cunliffe Bros. are beyond the jurisdiction of this court, he ordered that no dividends be paid to Cunliffe Bros. on their claim proved against the bankrupt's estate until they turned over to the trustee the 105 shares. The question involved upon this motion is whether the referee's decision is correct.

Kessler & Co. and Cunliffe Bros., in this adventure, had the legal rights and liabilities of partners. Each partner has a lien on the partnership assets for the protection of his rights upon the settlement of the partnership accounts. Cunliffe Bros. having paid the entire \$85,000 which was paid for the bonds and stock, this court had previously

held that by the voluntary distribution of the bonds and stock between the parties the partnership lien was lost. The allotment of the full half of the stock, being 750 shares, to Cunliffe Bros. before it was entirely paid for, was undoubtedly in the expectation that it would be entirely paid for; but the fact remains that it was transferred to Cunliffe Bros., and that the legal title to that stock is in them. This court having previously held that the division by these joint adventurers of the proceeds of their purchase between them put an end to the partnership lien, and Cunliffe Bros. having by the voluntary act of Kessler & Co. obtained the legal title to the shares in controversy, I cannot see how the trustee has any legal right to recover the stock. If Kessler & Co. had furnished half the money with which the property was purchased, their trustee would be entitled to half the property, and therefore to the 105 shares in question; but, as they did not furnish any of the purchase money, Cunliffe Bros., if a suit at law were brought, could offset its claim for contribution. On the other hand, if the amount of stock which Cunliffe Bros. received in excess of the half to which they would have been entitled is to be regarded as undivided property of the joint adventure, still held by one of the parties, then Cunliffe Bros. have a lien upon the stock, in the nature of a partnership lien, and cannot be obliged to turn it over until their claim for contribution towards the expense of the joint adventure be paid. From any point of view, it seems to me that Cunliffe Bros. are entitled to retain the stock, but that its value should be credited upon their claim as filed. The fundamental fact in this case is that Cunliffe Bros. paid the entire amount which was paid for the purchase of this property, and that fact raises the weightiest possible equitable considerations in their favor in this case.

My conclusion is that the referee's order should be reversed, upon condition that Cunliffe Bros. credit the value of the 105 shares upon their claim filed against the bankrupts' estate.

In re KRANICH.

(District Court, E. D. Pennsylvania. December 15, 1909.)

No. 3,443.

1. BANKRUPTCY (§ 252*)—RECOVERY OF ASSETS—COMPROMISE.

Where a bankrupt's trustee claimed that the bankrupt's wife had certain bonds of the face value of \$5,000, and \$6,274 in money which, in fact, belonged to the bankrupt's estate, but the wife claimed the money as her own, and conflicting testimony taken before the referee indicated that the trustee would be unable to recover the money except after tedious and expensive litigation, if at all, a proposed compromise by which the wife agreed to pay to the trustee \$5,000, approved both by the creditors and by the referee, would be allowed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 348; Dec. Dig. § 252.*]

2. BANKRUPTCY (§ 283*)—COMPROMISE—INJUNCTION BY BANKRUPT—RIGHT TO SUE.

A bankrupt's title to property in the hands of his wife claimed to belong to his estate passed by the adjudication to his trustee, and hence

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he had no capacity to sue in a state court to restrain the trustee from carrying out a proposed compromise of the claim against the wife.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 283.*]

In the matter of the bankruptcy of Charles Kranich. On certificate of a referee asking for the approval of a compromise, and motion for an order restraining the carrying out of the compromise. Order approving compromise affirmed, and injunction granted.

The following is the certificate of the referee's certificate on review:

I, Theodore M. Etting, the referee in bankruptcy, to whom the above-entitled matter was referred, do hereby certify that in the course of said proceedings I made, on the 23d day of June, 1909, the following order:

"And now, to wit, this 23d day of June, 1909, it is ordered, without prejudice to any interest, that, pending the determination of the right of ownership to certain 5 per cent. bonds of the St. Louis & Springfield Traction Company, having a face value of \$5,000, now in the hands of Sheldon Potter, Esq., and \$6,274 in money also in the hands of Sheldon Potter, Esq., said money and bonds shall, until the final determination of the ownership thereof, be retained by Sheldon Potter, Esq., provided however, nevertheless, that, pending the determination of said controversy, the said Sheldon Potter, Esq., is authorized to pay to Hannah Kranich the sum of \$10 per week for maintenance and support. This order is made with the consent of all parties in interest."

For the better understanding of this order, it is proper to state that in the course of the proceedings the trustee called Hannah Kranich, the wife of the bankrupt, as a witness. From the testimony of Mrs. Kranich and other witnesses, it appeared that there was in the possession of Sheldon Potter, Esq., her counsel, \$6,274 in money and certain 5 per cent. bonds of the St. Louis & Springfield Traction Company having a face value of \$5,000. The bonds and money were claimed by Mrs. Kranich as her property, acquired from carrying on a retail bakery at No. 100 Brinhurst street under an agreement with her husband, Charles Kranich, by the terms of which she was to conduct the store and have the profits in consideration of keeping house, boarding all the help, and clothing herself and children. This was denied by her husband.

Neither the bonds nor money were at any time in the hands of the trustee in bankruptcy. The referee did not consider that he was authorized to make an order directing Mr. Potter to deliver the bonds or money to the trustee or to determine the ownership thereof. It was, however, desired, if possible, that, pending the determination of ownership, possession should be retained by Mr. Potter. An agreement was arrived at between Mr. Potter, the trustee in bankruptcy, and Hannah Kranich that, pending the determination of ownership, and without prejudice, the money and bonds should be retained by Mr. Potter, provided that in the interval he was given authority to pay \$10 a week to Hannah Kranich for her maintenance and support.

The order of June 23, 1909, was drawn to give effect to the above understanding. It may be that at the time the order was made counsel for bankrupt was consulted, but if so the referee has no remembrance that such was the case, nor has he any remembrance that any suggestion was at that time made that the bankrupt could, by any possibility, have an interest in the fund in the event of its recovery. It is averred in the petition for review that the effect of the above order was a submission of the ownership of the property to the bankruptcy court by the parties in interest. The referee does not understand the order, nor does he believe that such was the intention of the parties. That the trustee in bankruptcy did not so understand it is manifest. The compromise hereinafter referred to was occasioned by proceedings which he was about to bring in another forum to determine ownership. The offer of compromise which was made before the above proceedings were brought was submitted by the trustee to the creditors of the bankrupt and to the referee. The creditors were unanimous in desiring to accept the compromise, and after due consideration it was approved by the referee notwithstanding the objections of the bankrupt, and the following order with respect thereto was on the 1st day of November, 1909, entered:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"And now, to wit, this 1st day of November, 1909, the above and foregoing petition having come on for a hearing at a meeting of creditors held, after 10 days' notice, and all of the creditors present in person, or by attorney, having voted in favor of the offer of settlement contained in said petition, and said offer having been approved by the referee, the trustee is authorized and directed to accept in full and final settlement of any and all claims of the trustee against Hannah Kranich the sum of \$5,000."

On the 11th day of November, 1909, the bankrupt, feeling aggrieved thereat, filed a petition for review which was granted. In said petition it is averred that the value and amount of the property and funds in the hands of Sheldon Potter, Esq., together with the assets in the trustee's possession, far exceed the debts and claims against the estate, and that if recovered there will be a large excess to which the petitioner will be entitled. Whether this be true or not must, of course, depend upon the amount recovered and upon the amount of claims made against the bankrupt estate. If it should be found that the entire amount in dispute is the property of the bankrupt, and if no claims are filed other than those scheduled by the bankrupt, the averment will be true. There would, in that event, probably be a fund of, say, \$4,000, after the payment of his debts.

It is further averred by the petitioner that the purpose of Hannah Kranich in making the offer of settlement is to withdraw the surplus of this property, after making the payment authorized by the above order, and appropriate it to her own use. This, I assume, is true.

The contention of the bankrupt, as I understand it, is that the order of June 23, 1909, precludes an amicable adjustment of the controversy and compels the creditors of the bankrupt at their expense and risk and against their wishes to carry on a contest. If, as a result of such contest, Hannah Kranich should succeed, it may be doubted if the creditors of the bankrupt would receive a penny, as the litigation would probably consume the small fund now in the hands of the trustee. If, on the other hand, the contest should be successful, if the bankrupt has the interest which he claims, more than half of the fund will revert to him. In other words, the expense of litigation falls upon the creditors in either event; and if successful they will lose half of the fund, and if defeated they lose it all.

The compromise of controversies is by section 27 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3433]) to be made "with the approval of the court"; even the action of creditors is not final. *Collier on Bankruptcy* (4th Ed.) p. 275; *In re Heyman* (D. C.) 5 Am. Bankr. Rep. 808, 108 Fed. 207.

The referee, subject to review, determines whether an offer of compromise shall be accepted or refused. The question therefore is whether the discretion thus given has or has not been wisely exercised.

For the further information of your honorable court, I send up herewith the petition for certification above referred to.

All of which is respectfully submitted.

Sidney L. Krauss, for trustee.

Joseph H. Shoemaker, for bankrupt.

J. B. McPHERSON, District Judge. When Charles Kranich was adjudged a bankrupt, whatever right he may then have had to recover the money that was afterwards found to be in his wife's possession passed by operation of law to his trustee. It was a right of property which the statute laid hold upon and transferred to the trustee for the benefit of the creditors. But when its existence was disclosed it was seen, also, that it might never be fruitful. The wife claimed to be the sole owner of the fund, and the conflicting testimony that has been taken showed that the trustee's road to recovery would certainly not be unobstructed, and might also be tedious and expensive. Under the circumstances the proposed compromise of the claim against her—

which has been approved by the creditors as well as by the referee—seems to me a judicious settlement of the dispute.

The order of the referee approving the compromise is therefore affirmed.

The bankrupt, forecasting a possible profit to himself in case the trustee should go on with the litigation against the wife and recover the whole fund—for the fund is large enough to pay all his debts and leave a surplus for himself—has filed a bill in equity in the court of common pleas of Philadelphia county, seeking to restrain his wife, her counsel, and his trustee in bankruptcy, from carrying out the proposed compromise. The remaining matter now before the court for decision is a petition asking that he be restrained from further prosecuting the suit. It is clear, I think, that the bankrupt had no right to bring the action. He has no legal title to the fund in controversy, for the title is now in his trustee; and, moreover, he cannot be permitted to ask the common pleas to interfere with the administration of an estate in bankruptcy.

The restraining order is therefore granted as prayed.

In re SAMUELSON et al.

(District Court, W. D. New York. December 9, 1909.)

1. BANKRUPTCY (§ 234*)—EXAMINATION OF BANKRUPT—RIGHTS OF CREDITOR.

A creditor of a bankrupt, though his claim has not been filed, proven, or allowed, is entitled to examine the bankrupts before the referee, under Bankr. Act July 1, 1898, c. 541, § 7a (9), 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), requiring the bankrupt to submit to an examination concerning his business, etc., and with reference to all matters affecting the administration and settlement of his estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 234.*]

2. BANKRUPTCY (§ 274*)—STATUTE—CONSTRUCTION—"PARTY IN INTEREST."

Bankruptcy Act July 1, 1898, c. 541, § 39, subd. 3, 30 Stat. 555 (U. S. Comp. St. 1901, p. 3436), provides that the referee shall furnish such information concerning estates in process of administration as may be requested by parties in interest. Section 47, subd. 5, provides that the trustee shall furnish such information as may be requested by parties in interest; and section 49 declares that the accounts and papers of the trustee shall be open to inspection of officers and parties in interest. *Held*, that a creditor of a bankrupt was a "party in interest" within such sections, even though he had not formally proved his claim.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 274.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3696; vol. 8, p. 7691.]

3. BANKRUPTCY (§ 243*)—TESTIMONY OF BANKRUPT—ACCESS OF CREDITORS.

Testimony of a bankrupt, taken as authorized by the referee, is a part of the record, to which creditors generally are entitled to access while it remains in the custody of the referee; and this, though the interests of the creditor seeking an examination and the trustee are antagonistic, in that the trustee intends to bring suit against the examining creditor to recover alleged preferences, and that a disclosure of the bankrupts' testimony, who were hostile to the trustee, might result prejudicially to the creditor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 243.*]

In the matter of Lesser Samuelsohn and others, as individuals and copartners composing the firm of Samuelsohn Bros. & Co., bankrupts.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On petition for review of a referee's order denying the petition of Simon M. Shimberg, a creditor, for an order directing the trustee to file with the referee or clerk the testimony of the bankrupts, or to permit examination thereof. Order reversed, and petition granted.

Frank Hopkins, for petitioner.

Wilé & Oviatt, for trustee.

HAZEL, District Judge. This is a petition for the review of an order made by the referee in bankruptcy herein, denying the petition of Simon M. Shimberg, a creditor herein, for an order directing the trustee to file with the referee, or with the clerk of this court, the testimony of the bankrupts, given upon their examination, or to permit said Shimberg to have access to the same.

The question submitted for review is in principle controlled by *In re Saur* (D. C.) 10 Am. Bankr. Rep. 353, 122 Fed. 101. In that case, it is true, the claim had been proven and allowed; but such fact is not a material distinction from this case, in which the petitioner for review was scheduled by the bankrupts as a creditor, had received notice of the meeting of creditors, and had duly filed his claim. Under section 7a (9) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]) the petitioner had the unquestionable right to examine the bankrupts before the referee, even though his claim was not filed or formally proven (*In re Price* [D. C.] 91 Fed. 635; *In re Jehu* [D. C.] 94 Fed. 638; *In re Walker* [D. C.] 90 Fed. 550); and under section 39 (9) a party in interest has the right to apply to the referee to preserve the evidence taken. The petitioner for review was a party in interest within the meaning of sections 47 and 49, and section 39, subs. 3, 9, even though he may not have formally proved his claim. This would seem to be the effect of the decision of the Circuit Court of Appeals for the Second Circuit in *Matter of Sully*, 18 Am. Bankr. Rep. 123, 152 Fed. 619, 81 C. C. A. 609. The testimony taken, as authorized by the referee, is a part of the record in the proceedings, and creditors generally have access to it while it remains in the custody of the referee. *Collier on Bankruptcy* (7th Ed.) p. 522.

It is urged in opposition to permitting the petitioner to examine the testimony of the bankrupts that the interests of the petitioner and the trustee are antagonistic, and that he intends to bring suit against such petitioner to recover preferences given him by the bankrupts, and therefore a disclosure of the testimony of the bankrupts, who are hostile to the interests of the bankrupt estate, may result prejudicially to the creditors. This contention, however, is not maintainable, in view of the absolute right which a party in interest has to examine a bankrupt, and the right which he has to be informed concerning the estate by the trustee or referee. The trustee is not wholly at a disadvantage; for, if his surmise prove correct, there is nothing to prevent the impeachment of the bankrupts on the trial, if they should materially vary their former testimony.

An order may be entered directing the trustee to file the testimony with the referee, and that the petitioner herein, or his attorneys, may be allowed an inspection of the same, and upon payment of the usual fees may receive a copy thereof.

NORTHWESTERN S. S. CO., Limited, v. RANSOM et al.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1910.)

No. 1,732.

1. SHIPPING (§ 164*)—CARRIAGE OF PASSENGERS—LIABILITY OF VESSEL FOR FAILURE TO FURNISH PROPER ACCOMMODATIONS.

Steerage passengers who purchased tickets from Alaskan ports to Seattle, and were compelled to occupy the steerage with a large number of foreign fishermen, who were drunk and disorderly, and kept the place in a filthy condition, which the officers of the vessel made no effective effort to remedy, and who were not furnished with sleeping accommodations nor suitable or wholesome food, *held* entitled to recover damages from the steamship company in the sum of \$300 each.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 534, 537; Dec. Dig. § 164.*]

Accommodations to passengers on vessels, see note to *The Oregon*, 68 C. C. A. 630.]

2. ADMIRALTY (§ 105*)—PLEADING—WAIVER OF OBJECTIONS.

The verification of a pleading in admiralty filed on behalf of a number of passengers of a vessel claiming damages for mistreatment by one of the number only, even though not in conformity with a rule of the court, was an irregularity only, and, where not objected to in the trial court, is not ground for reversal of a judgment in favor of each claimant by the appellate court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 720; Dec. Dig. § 105.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

Proceedings by the Northwestern Steamship Company, Limited, as owners of the steamer *Santa Clara*, for limitation of liability. From a decree in favor of damage claimants, petitioner appeals. Affirmed.

W. H. Bogle, C. P. Spooner, and Ira A. Campbell, for appellant.
William Martin and J. L. Baldwin, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. This is a suit in admiralty wherein the owner of the steamship *Santa Clara*, appellant here, claims protection to the extent of limiting to the appraised value of the ship liabilities for damages claimed on account of the mistreatment of passengers on a voyage from ports in Alaska to Seattle. All claims for such damages were contested. The claimants for damages charged substantially that the ship was not supplied with sufficient provisions nor equipped to carry comfortably or safely the number of passengers received for the voyage; that no berths were furnished and the quarters were unsuitable; that a large number of Chinese and Japanese were in the steerage; that the vessel was in an unclean and unsanitary condition during the voyage, and that the air was foul and close; that the steerage department was crowded and dirty; and that the food was unclean and unwholesome. Testimony was taken, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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District Court decreed that each of the 33 contestants recover \$300 and costs. The steamship company appealed.

The lower court in ordering a decree against the steamship company was of the opinion that the steerage in which the appellees were was foul and filthy; that the ship carried many more passengers than it could furnish berths to; and that, on account of these several facts, the contract of carriage was broken, and the appellees were sorely inconvenienced and abused, and suffered much pain and discomfort. We quote from the opinion of the district judge:

"That the steerage passengers suffered discomfort from the filthy and bad condition of the steerage quarters is well proved. In the steerage there were 90 Chinese and Japanese fishermen, and a number of other foreigners, returning from a fishery where they had been employed during the preceding summer, and a company of United States soldiers. They filled all the space available for the accommodation of steerage passengers. The soldiers were received on board after the vessel reached Valdes, but they occupied space especially reserved for them, so that the steerage passengers other than the fishermen and soldiers were not provided for. The fishermen were all filthy and offensive in their manners. The Europeans were especially so, being intoxicated and turbulent, and the voyage was rough, and there was a good deal of seasickness. In view of these well-established facts and of the captain's testimony, it is absurd to expect the court to believe the testimony of employes on the vessel tending to prove that the steerage was kept in a condition fit for human habitation. In his testimony the captain makes the remarkable admission that conditions in the steerage were so bad that he did not care to go there, and only looked into it a few times."

The testimony is conflicting on nearly every point. The captain and officers of the ship testify that good sleeping accommodations were furnished to all, and that no one was incommoded in that respect. The company further introduced evidence to the effect that, if there were any inconvenienced on account of the lack of berths, the company was not responsible therefor, because warning had been given to those embarking that all the berths were taken, and that their tickets would be redeemed upon presentation at the company's city ticket office. The appellees, on the contrary, testify that no such warning was given them, and that they were not furnished berths or reasonably decent and comfortable places to sleep, but were compelled to roll up in their blankets wherever they could find a vacant surface. There is abundant evidence in the record to support the court's finding.

The appellees testified graphically concerning the unclean condition of the ship and their sufferings resulting therefrom. On the other hand, there is testimony that the steerage quarters were kept in as clean and wholesome a condition as possible under the circumstances. It was well proven that many of the appellees were forced to sleep on the deck of the steerage where they could see the condition of the quarters. A number testified that filth of all kinds was allowed to accumulate on the floor, the sight and smell of which caused them much physical and mental suffering, and rendered their quarters foul and uninhabitable. The circumstances under which the ship was laboring, and the number and behavior of many of the passengers, warrant the belief that the stories of dirt and suffering related by appellees are true. Even the testimony of the appellants tends to show that the steerage was not as it should have been, and that the crew and of-

ficers of the ship made little effort to better things. The deplorable conditions existing in the steerage were directly attributable to the disgusting, not to say dangerous, behavior of a crowd of foreign fishermen. There is no evidence to show that the ship's officers or men made any real effort to control the men, many of whom were drunk and boisterous. They let them go their own way, rendering the steerage unfit for well-behaved men. When the appellees bought their tickets and boarded the ship, they had a right to reasonably clean and comfortable quarters, and they had a right to expect that the ship's officers and employes would do all in their power so to furnish them. This the company failed to do, and for all injury resulting from this culpable neglect it is liable. Sweeping up the filth at stated intervals does not mark the extent of the company's duty. Some earnest effort ought to have been made to stop the trouble at its source—to force the men to conduct themselves properly. No reasonable conclusion seems possible other than that the findings made by the lower court are accurate.

An award of \$300 damages does not seem excessive in view of all the circumstances of the case. That was the sum assessed by a jury in an action by one of the passengers against the appellant in the state court, and was regarded as a just and fair allowance by the District Court, from which this appeal is taken. We do not feel that it is unfair.

Appellant contends that the court erred in holding that each of the claimants could recover upon his claim, inasmuch as the answer was signed by the proctor for claimants and was verified by William Lundberg alone. Lundberg recited in his verification that he was one of the claimants named in the answer and was familiar with the facts therein and made the affidavit for and on behalf of each of the claimant passengers, and that he was informed that the other claimants were absent from the city of Seattle. It appears, also, that a joint answer had theretofore been authorized by an order of the court. It would thus seem that the mode of procedure was not at variance with that which was sustained by this court in the case of *The Oregon*, 133 Fed. 609, 68 C. C. A. 603. But if we assume that rule 56 of the District Court of the Western District of Washington, which prescribes that one claiming damages shall make his claim under oath made by himself, was not followed, still appellant cannot complain, because in the lower court it made no objection to the mode of procedure adopted or to the lack of verification. This court will not now hold that what was at most an irregularity should bar the right of recovery. The general rule is applicable that the requirement of verification is for the protection of a defendant. He may not be obliged to answer to the merits of an unverified claim, provided he objects in due time; but, if he answers without timely objection by pleading to the merits, he waives the privilege of insisting upon a verification. 22 Encyc. of Pleading & Prac. p. 1031.

These views dispose of those features of the case entitled to special attention.

The decree of the District Court is affirmed.

SWORDS v. PAGE.

(Circuit Court of Appeals, Eighth Circuit. November 28, 1909.)

No. 2,910.

1. TRIAL (§ 169*)—DIRECTION OF VERDICT—INSUFFICIENCY OF EVIDENCE.

The direction of a verdict for a defendant is proper if, considering all of the evidence and the inferences which might naturally and logically be drawn therefrom, there is not sufficient to sustain a verdict in favor of the plaintiff, and the court in the exercise of a sound judicial discretion would feel impelled to set aside such a verdict if returned.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. § 169.*]

2. BANKS AND BANKING (§ 287*)—NATIONAL BANKS—ACTION BY RECEIVER—SUFFICIENCY OF EVIDENCE.

In an action by the receiver of an insolvent national bank against a former stockholder and director to recover the price he received for shares of stock which it was alleged he sold to the cashier and received payment from funds of the bank, evidence considered, and *held* insufficient to charge defendant with notice either that the stock was bought by the cashier or paid for with funds of the bank, if such was the fact; it appearing that he delivered the stock on a contract signed by the cashier as agent for another director, and that the greater part was paid for by such director to whom it was transferred, and who received dividends thereon.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 287.*]

In Error to the Circuit Court of the United States for the District of North Dakota.

Action by G. W. Swords, receiver of the Minot National Bank, against E. B. Page. Judgment for defendant, and plaintiff brings error. Affirmed.

Tracy R. Bangs, for plaintiff in error.

George A. Bangs, for defendant in error.

Before SANBORN, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge. This action was brought by the receiver of the Minot National Bank of Minot, N. D. (hereinafter called the "Bank"), to recover from defendant, E. B. Page, the sum of \$2,500, and interest thereon; it being alleged in the petition, and claimed by the receiver, this sum of money had theretofore been wrongfully and illegally paid out of the funds of the Bank by its cashier, J. A. Erickson, to defendant as the purchase price of 20 shares of the capital stock of the Bank, at an agreed price of \$2,500, such payment being evidenced by a draft for \$500 drawn by Erickson in favor of defendant, October 18, 1904, on the First National Bank of Minneapolis, Minn., and by that bank paid to defendant by a draft for \$1,896 drawn in the same manner on November 14, 1904, and paid to defendant, the remaining sum of \$104 being the value of certain articles of furniture theretofore purchased by the defendant from the Bank.

The facts in the case necessary to decision may be briefly summarized, as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Bank was first organized as a state bank, thereafter reorganized as a national bank with a capital of \$50,000. In the spring of 1904 this capital was reduced to the sum of \$25,000. One J. A. Erickson was cashier of the Bank. Defendant Page, who resided at Leeds, a town about 90 miles east of Minot on the line of the Great Northern Railway, was president of the First National Bank of that place, a stockholder in the Bank, owning 65 shares, and a member of its board of directors. His friends, Hull and Hackett, of the state of Wisconsin, were each the owner of 5 shares, and Noltimier and Studness, also his friends, of Church's Ferry, a town on the Great Northern Railway east of Minot, were each the owner of 30 shares, all purchased through Erickson, and aggregating 135 shares; the same being a controlling interest in the Bank. Defendant had engaged with his friends to visit the Bank as frequently as his business interests would permit for the purpose of keeping himself advised in regard to the affairs of the Bank. The price at which the shares had been purchased after the reduction of the capital stock of the Bank was at a premium of about 6 per cent. One C. H. Parker, a citizen of Minot, a man of means, proprietor of the Leland Hotel at that place, the owner of 10 shares of the capital stock of the Bank, and a member of its board of directors, in the latter part of September, or the first of October, 1904, being desirous of purchasing further shares in the Bank, accompanied Erickson, the cashier, to Church's Ferry for the purpose of negotiating the purchase of shares held by Noltimier or Studness. On the 18th day of October, 1904, defendant while on a visit to the Bank, for the purpose of keeping himself familiar with its business affairs, for the benefit of himself and his associates, after some negotiations, entered into the following agreement for the sale of his shares and the shares of his associates to Parker through Erickson, cashier of the Bank.

"Minot, North Dakota Oct. 18-04. In consideration of five hundred dollars to E. B. Page in hand paid the receipt whereof is hereby acknowledged, said E. B. Page agrees to sell to C. H. Parker six thousand five hundred dollars of the capital stock of the Minot National Bank of Minot, North Dakota, for the sum of eight thousand one hundred twenty-five dollars, said sum to be paid upon the delivery of said stock to C. H. Parker, provided, nevertheless, that the said C. H. Parker will buy at the same figure \$500. of the capital stock of said bank from R. H. Hackett, and \$500. from J. Y. Hull, and \$3000. from A. H. Noltimier and \$3000. from C. T. Studness; if this deal is closed by the 15th of November, then this five hundred dollars to apply as part payment on the \$8125, but should C. H. Parker fail in any of the agreements set forth, then the said \$500 is to be forfeited as damages to said E. B. Page.

"[Signed]

E. B. Page, C. H. Parker, by J. E. Erickson."

At the time this contract was entered into, although not known to Page, Erickson was not authorized to purchase the shares at \$125 per share, or to enter into the contract on behalf of Parker. After the making of this agreement Erickson executed and delivered to defendant the draft of the Bank on its correspondent the First National Bank of Minneapolis, Minn., for \$500. It appears from the evidence the account of Parker with the bank was at this time overdrawn, but this sum of \$500 was charged against said account on the following day.

On October 27th, thereafter, defendant revisited the Bank, delivered certificates for 50 shares of his stock, and received the check of Parker

for \$6,875 in payment therefor, which check was afterwards paid on presentation. At this time Mr. Noltimier was present in the Bank with defendant and Erickson with a certificate for 20 shares. There was some controversy whether he was to receive \$125 or \$120 per share for the stock. However, the sum of \$125 per share was agreed on as the price, and his certificate for the 20 shares was indorsed in blank and left at the Bank, as Erickson informed him it was not then known to whom it would go. At this time defendant tendered his resignation as a director of the Bank, which was accepted at a meeting of the board of the Bank on October 29th. Thereafter, on November 2d, Erickson wrote defendant, as follows, on the letter head of the Bank:

"Minot, N. D., 11-2-04.

"E. B. Page, Esq., Leeds, N. D.

"Dear Sir: If you will send up your other \$1000. stock in the Minot Nat. Bank we will remit by return mail for same at \$1.25 as per agreement try to send it up tomorrow if possible we would like to have it here by to-morrow night if possible.

"Yours truly,

J. A. Erickson."

In response to this letter defendant replied, as follows:

"Leeds, North Dakota, 11-12-1904.

"Mr. J. A. Erickson, Minot, N. D.

"Enclosed please find One Thousand dollars of Minot Nat. stock of E. B. Page and five hundred of same stock of J. Y. Hull and five hundred of same stock of R. H. Hackett for which you will please remit to me.... \$2,500 00

Less contract money..... \$500.

" Bank fcts..... 100.

" 4 sav. bks..... 4.

604 00

Total due me..... \$1,896 00

"Please send me draft for same.

"With best wishes for your continued prosperity and success I am, as ever,
your friend,
E. B. Page."

In response Erickson on November 14th forwarded to defendant the draft for \$1,896, which was paid. It is this sum of \$2,500 so paid for which this action is brought.

An examination of the stock register and stock ledger of the Bank show all the 65 shares of stock sold by defendant on his own account to Parker through the agreement made with Erickson were transferred on the books of the Bank to Parker. Thereafter, on January 1, 1905, there was a dividend of 15 per cent. declared and paid the shareholders of the Bank, Parker receiving his dividend on 75 shares, the same being 10 shares originally owned by him, and on the 65 shares sold him by defendant, aggregating \$1,125.

On the 29th day of October, 1904, the day the check which he had theretofore given for \$6,875 was presented for payment, there was deposited by Parker in his account with the Bank \$2,000 in cash, and his promissory note for \$5,800, out of which was paid the \$500 theretofore charged against his account by Erickson, and the check for \$6,875. The purchase price of the 10 shares of stock last delivered by defendant to Erickson was charged to the account of Parker on the books of the Bank, he giving his promissory note to the Bank on the

15th day of November, the day following that on which the draft for \$1,896 was drawn.

The evidence further discloses while Erickson had, by the form of his agreement on behalf of Parker made with defendant, agreed to pay \$125 per share for defendant's stock, there existed between Parker and Erickson the agreement that Erickson was to pay \$5 per share of this agreed price; that the aggregate amount thus to be paid by Erickson of the purchase price, \$325, was not paid by him personally, but was paid by the Bank, and charged to the account of profit and loss in the Bank. The stock ledger and register of the Bank do not show to whom the 10 shares of Hull and Hackett stock were transferred. The purchase price was charged to the account of J. A. Slocum, a director of the Bank. This charge created an overdraft in the account which was long afterward, but before the failure of the Bank, covered by the promissory note of either Slocum or his wife, and, although both are shown by the evidence to be financially responsible, this note remained among the uncollected assets of the Bank at the time this case was tried.

The Bank was closed by order of the comptroller September 10, 1905, and the plaintiff, G. W. Swords, was appointed receiver, and brought this action.

At the conclusion of the evidence for the plaintiff the court directed a verdict in favor of defendant, judgment was entered thereon, and plaintiff brings error.

The only question presented and relied on by plaintiff in error to work a reversal of the judgment rendered is the action of the trial court in directing a verdict for defendant. If, considering all the evidence found in the record, and the inferences naturally and logically flowing therefrom, there be found no evidence sufficient to uphold a verdict in favor of the plaintiff, had one been returned, or if the state of the case at the conclusion of the evidence was such that the trial court, in the exercise of a sound judicial discretion, would have felt impelled to set aside a verdict in favor of the plaintiff because not supported by the evidence, then the action of the court in directing a verdict for defendant was right, and must be sustained. *McGuire v. Blount*, 199 U. S. 142, 26 Sup. Ct. 1, 50 L. Ed. 125; *Union Pacific Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; *Elliott v. Chicago, Milwaukee, etc., Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Delaware, etc., Railroad v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Anderson County Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966.

In determining the question presented for decision, it becomes necessary to examine the nature of the issue presented and the evidence found in the record in support of plaintiff's case.

The ground on which plaintiff predicates his right of recovery, as alleged in his declaration, is quite definite and certain. It is neither that defendant sold his shares through Erickson, cashier, to the Bank, in violation of the provisions of section 5201, Rev. St. (U. S. Comp. St. 1901, p. 3494), which, in substance, provides: No association shall be the purchaser of any shares of its capital stock unless the purchase be necessary to prevent loss upon a debt previously con-

tracted; nor that defendant practiced any fraud or deceit upon or made any misrepresentation of facts to Erickson, the purchaser, but it is that defendant, a director of the Bank, sold his shares to Erickson, who was cashier, and knowingly received payment therefor from funds of the Bank misappropriated by Erickson for that purpose. While the statute does prohibit any national banking association from becoming the purchaser of shares issued by it unless necessary to prevent loss upon a debt previously contracted, because such transaction would, in effect, work an impairment of its capital, prohibited by law, yet there is no prohibition resting on the cashier of such association which prevents him from becoming the purchaser or owner of such shares, or from acting as the agent or representative of others desiring to either purchase or sell their shares. Mr. Justice Field, delivering the opinion of the court in *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532, said:

"The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. The power of attorney indorsed on the certificate is usually written or printed, with a space in blank for the name of the attorney to be inserted, for the accommodation of the purchaser. * * * The validity of a sale and its completeness must be determined by the relation which the contracting parties at the time openly bear to each other.

"Of course, the whole case here would be changed if the sale by Laffin had not been made in good faith, but was made merely to evade his just responsibility as a stockholder, or to work a fraud upon other stockholders or creditors of the bank."

Therefore, in order that plaintiff should show himself entitled to a recovery in this case, it is incumbent on him to prove defendant made a sale of his shares, or those of his associates, not through Erickson, as cashier of the Bank, to another, but to Erickson, cashier, individually; and also to further prove the payment of the purchase price was made by Erickson out of the funds of the Bank misappropriated and misapplied to that purpose, either with the actual knowledge of defendant or under such circumstances as would impute knowledge to him.

The question here presented is: Has the plaintiff by the evidence found in the record discharged the burden so assumed? As has been seen by the statement made, although the cashier, Erickson, was not authorized to bind Parker by the contract made with defendant for the purchase of his shares, and those of his associates, at \$125 per share, yet, as he assumed to so act for Parker, defendant was justified in the belief he was making the sale to Parker, and not to Erickson. And, as Erickson possessed the power as an officer to bind the Bank to the payment of the draft for \$500 drawn on its correspondent at the time this contract was entered into, there was nothing in that transaction which would impute notice to defendant that Parker was not purchasing the shares, or that Erickson was not representing him in the execution and delivery of the draft. At this time defendant, having, as he believed, concluded a sale of his stock to Parker, tendered his resignation as an officer of the Bank, and it is not shown he was thereafter familiar with its business affairs. When on October 27th defendant made delivery of certificates for 55 shares, properly

assigned, at the Bank, he received from Parker in payment his check for the full purchase price named in the contract of sale, \$125 per share, which fact warranted him in believing the written contract of sale theretofore made, and its terms and conditions were known to and being performed by Parker. While the evidence does disclose there was a secret understanding between Parker and Erickson that Parker was to pay but \$120 per share of the purchase price of defendant's stock, and that Erickson was to pay \$5 per share of the purchase price of defendant's stock, or, in the aggregate \$325, which was not paid personally by Erickson, but was paid by the Bank and charged to its profit and loss account; and while the evidence further shows the draft for \$500 was in the first instance drawn on and paid out of the funds of the Bank, and although the certificates for the 20 shares last delivered were transmitted to Erickson and the account settled by draft drawn by him on funds of his Bank, yet in so far as the stock of defendant himself is concerned from the fact that an examination of the stock ledger and stock register of the Bank leaves no doubt that the defendant's stock was legally transferred on the books of the Bank to Parker, and from the further fact that thereafter Parker received the dividend declared by the Bank on the full number of shares sold by defendant on his personal account, as stock purchased by him from defendant, which fact would estop him from contending as against any one claiming through the Bank that he was not the purchaser and owner thereof, we are inclined to the opinion there is no sufficient evidence found in the record to have warranted the jury in finding any part of defendant's shares was sold to Erickson on his individual account and not to Parker, and, of necessity, knowledge of that which did not exist cannot be imputed to defendant.

In so far as the 10 shares owned by Hull and Hackett are concerned, the case is less clear, for the books of the Bank fail to disclose who purchased these shares or to whom they were transferred on the books if at all. From the fact, as appears from the evidence, that the purchase price of these shares was charged to the account of Slocum, a depositor in and director of the Bank, on the same date the purchase price of ten other shares was so charged, which charge created an overdraft in that account, and from the manner in which this overdraft was carried on the books until covered by the uncollected promissory note of Slocum or his wife, small margin for doubt remains but that Erickson, the cashier, was dealing in the shares with the funds of the Bank. However, the question here presented as to the liability of defendant must be determined not so much by the actual state of the facts as by what defendant either knew or should have known from all the circumstances surrounding the sale. And in determining this question the entire stock transaction had by defendant with Parker or with or through Erickson must be viewed as a whole. And, thus viewed, the question is: Does the record contain any sufficient evidence to sustain a finding that defendant knew or had reasonable cause to believe he was disposing of the Hull and Hackett shares to Erickson, and that payment therefor was being made by him from the funds of the Bank in violation of the law?

As has been seen from all the evidence, defendant undoubtedly believed he was disposing of his own shares to Parker, and, had any suspicious circumstance which occurred put him on inquiry as to the true state of the case, an examination of the books of the Bank, an interview with Erickson, or even information solicited from Parker himself, would have but confirmed his belief in this respect. At the time Erickson wrote defendant to forward his remaining 10 shares no mention was made in the letter of the Hull and Hackett shares. Although at this time defendant knew the contract he had made with Parker through Erickson for the sale of all the shares of himself and his associates was not authorized by or binding on Parker, yet Parker had apparently acquiesced therein, and, in so far as indicated by appearances, was carrying out that contract as to defendant's personal shares. Erickson had informed defendant he could not purchase and did not intend to purchase any shares because not financially able; that he desired the shares purchased and held in Minot, the home of the Bank; that certain citizens of that place, including Slocum, would purchase the shares. In this state of affairs, although not requested by Erickson in his letter, yet in response thereto, defendant inclosed the Hull and Hackett certificates as well as his own undelivered shares and requested Erickson to forward a draft to balance the account as stated therein, which was done, and the transaction closed.

Can it be said this state of facts furnished evidence of a sale by defendant of the Hull and Hackett shares to Erickson, or furnished such reasonable grounds for so believing as should have put defendant on inquiry into the true state of the facts? If, so, what would such inquiry have disclosed? While an examination of the records of the Bank would have shown a regular transfer of defendant's individual shares to Parker, they would not have shown any transfer of the Hull and Hackett shares to any one. The books of account in the Bank would have shown the purchase price of defendant's personal shares transmitted with the Hull and Hackett certificates, charged to the account of Parker, and the purchase price of the Hull and Hackett shares charged to the account of Slocum, and presumably with his knowledge and consent, as he was not only a depositor with but an officer of the Bank, and a man of affairs. This charge was thereafter acquiesced in by him because it was covered by the promissory note of himself or wife.

In the light of these facts, and all other facts and circumstances in evidence in this case, aided by the presumption that Erickson, an officer of the Bank, would have been presumed, by any one making an investigation, to have acted neither in violation of the law in purchasing the shares on his own account with funds embezzled from the Bank, nor to have charged the purchase price of the shares to the account of a depositor and director of the Bank without authority to so do, we are inclined to the opinion on the whole case the direction of the trial court to return a verdict in favor of defendant was right, and must be affirmed.

It is so ordered.

CHICAGO, R. I. & P. RY. CO. v. CHICKASHA NAT. BANK. †

(Circuit Court of Appeals, Eighth Circuit. November 5, 1909.)

No. 3,023.

1. PRINCIPAL AND AGENT (§§ 106, 108*)—GENERAL AGENT—IMPLIED AUTHORITY.

An agent authorized to purchase cotton for his principals in a particular locality from any persons having the same for sale and at any price agreed on between them was a general agent with implied authority to bind his principals by any contract for the purchase of cotton in that locality, but such implied authority did not extend to the opening of an account with a bank in the name of his principals, borrowing money, and pledging their securities as collateral therefor, where the same was not a necessary incident to the business of purchasing cotton, such power being an unusual one to be conferred on an agent, and not to be implied whether his agency is general or special, unless the very nature of his business requires its exercise.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. §§ 106, 108.*]

2. PRINCIPAL AND AGENT (§ 122*)—EVIDENCE OF AGENCY AND AUTHORITY—DECLARATIONS OF AGENT.

The acts and declarations of an agent are incompetent to prove the extent and scope of his power to bind his principals.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 416-419; Dec. Dig. § 122.*]

3. EVIDENCE (§ 89*)—ACTUAL NOTICE—PRESUMPTION FROM MAILING OF LETTER.

Proof of the mailing of a letter addressed to a firm and directed generally to "St. Louis, Missouri," containing no specific address or statement of the firm's business, is not sufficient to charge the firm with notice of its contents against their denial of any knowledge of it.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 89.*]

4. PRINCIPAL AND AGENT (§ 166*)—RATIFICATION BY PRINCIPAL OF ACTS OF AGENT—KNOWLEDGE OF FACTS.

In an action of replevin against a railroad company to recover cotton represented by bills of lading which had been pledged to plaintiff by an agent of the owners who made the indebtedness in the name of his principals and pledged the collateral therefor without authority to establish a ratification which would sustain the action, it was incumbent on plaintiff to prove that, at the time of the alleged ratification, the principals had knowledge, not only of the indebtedness, but also of the pledge.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 627-633; Dec. Dig. § 166.*]

5. TENDER (§ 19*)—OPERATION AND EFFECT—EFFECT AS ADMISSION.

The rule that a plea of tender entitles plaintiff to judgment for at least the sum tendered is based not on the act of tender, but on the admission it carries with it, and applies only where the tender was unconditional, and not to a tender made under protest to secure the release of collateral, where both the written tender and the pleading deny liability.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 59-64; Dec. Dig. § 19.*]

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma.

Action by the Chickasha National Bank against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 16, 1910.

F. M. Etheridge (Homer B. Low, Charles M. Fechheimer, and J. M. McCormick, on the brief), for plaintiff in error.

Warren K. Snyder (F. E. Riddle, on the brief), for defendant in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge. This was an action in the nature of replevin brought by the Chickasha National Bank of Chickasha, in the Indian country, now Oklahoma (hereinafter called the "Bank"), against the Chicago, Rock Island & Pacific Railway Company (hereinafter called the "Railway Company"), to recover possession of 1,041 bales of cotton, or, in lieu thereof, a judgment against defendant for the amount or value of the special interest therein claimed by the Bank.

The facts necessary to a decision of the questions presented in this record are these:

In the autumn of 1906 a copartnership, composed of A. L. Wolff, Maurice Stern, and Bertholf Stern, of St. Louis, Mo., doing a cotton merchant business in the firm name of A. L. Wolff & Co. (hereinafter called "Wolff & Co."), sent as their agents into the then Indian country in the neighborhood of Chickasha one E. G. Carter, one H. C. Ryan, and others to purchase cotton on behalf of the firm. From the manner of conducting this business, as employed by Wolff & Co., the agents were intrusted with the custody and expenditure of no money whatever except such small sums as were necessary to pay personal expenses. On the contrary, when a purchase of cotton was made by the agent from the owner, a bill of lading was procured by the owner from the railway company for the cotton so purchased, in which bill of lading was stated the number of bales purchased, on whose account, and the cotton was consigned to Wolff & Co., Chickasha, or on shipper's order, with directions to notify Wolff & Co. This was done in order that the cotton might be assembled at Chickasha for the purpose of being compressed; there being a compress plant at that place. A draft was then drawn by the agent on Wolff & Co. at St. Louis or the city of Oklahoma City, in favor of the vendor of the cotton, who attached to the draft the bill of lading, and this draft, with bill of lading, was forwarded through regular commercial channels to Wolff & Co. at the city of St. Louis or Oklahoma City, where the draft was presented, accepted, and paid by Wolff & Co. The bills of lading when received were detached from the drafts and returned to the agent at Chickasha for the purpose of procuring a delivery of the cotton from the Railway Company to the compress company, and, when compressed, was reconsigned as the owners might direct. As shown by the record, the sole authority conferred by Wolff & Co. on their agents in the purchase of cotton in their name and on their behalf was to conduct the business in the manner above stated.

However, Carter, as agent for Wolff & Co., in transacting the business of his principals, did not confine his operations to the method adopted by them, but, on the contrary, he agreed with the president of the Bank to open an account therein in the name of his principals;

that drafts and checks drawn by him on his principals should be cashed by the Bank and charged to such account; that exchange should be paid the Bank by his principals and charged to this account; that his principals would pay interest on any overdraft created in such account at the rate of 10 per cent. per annum; and that collateral securities would be pledged the Bank for the repayment of any money advanced by way of overdraft on such account.

In pursuance of this arrangement with the Bank, an account was opened therein in the name of Wolff & Co., September 26, 1906. This account was thereafter debited and credited with many amounts until about December 7th thereafter. The agent, Carter, also opened an individual account with the Bank. Thereafter Carter proceeded with the prosecution of the business of buying cotton for his principals and assembling the same at Chickasha, executing and delivering to the vendors of the cotton drafts payable to their order, or in some cases to the Bank, drawn on his principals, which were attached to bills of lading issued by the Railway Company for the cotton purchased, stating the number of bales so purchased, in consecutive order, the weight, how marked, from whom purchased, consigned to Chickasha, either to Wolff & Co. or to shipper's order, notify Wolff & Co. The drafts so issued and delivered with bills of lading attached were received by the Bank and charged on its books against the account of Wolff & Co. opened therein by Carter, and the drafts with bills of lading attached were forwarded through regular commercial channels, presented to and paid by Wolff & Co., either at their place of business in the city of St. Louis or Oklahoma City, Okl. When paid the proceeds were, through the regular commercial channels, remitted and paid to the owner of the draft, as such owner might appear. The bills of lading accompanying the drafts so received by Wolff & Co. upon the payment of the drafts were returned to the agent Carter that delivery of the cotton might be made to the compress company at Chickasha, and compress company receipts obtained therefor, that the cotton might, when compressed, be again reconsigned as the owners might direct.

In this manner the 1,041 bales of cotton in controversy in this action were purchased by agents Carter, Ryan, and others, and in this manner drafts covering the purchase price of each and every of such bales of cotton, with bills of lading attached, were forwarded to, accepted, and paid by Wolff & Co. and the bills of lading returned to the purchasing agent Carter. After the return of such bills of lading to Carter, he having for his own benefit and advantage by the issue of checks on the account of Wolff & Co. with the Bank overdrawn such account, 23 of such bills of lading were delivered by Carter to the Bank as collateral security for repayment to the Bank for any sums of money due the Bank on such account. Thereupon Carter left the country.

Thereafter, and on December 10, 1906, Wolff & Co., learning the situation at Chickasha, made demand in writing of the Bank, as follows:

"Oklahoma City, O. T. Dec. 10, 1906.

"Chickasha National Bank, Chickasha, I. T.—Gentlemen: We demand that you forthwith deliver to Mr. Z. M. Lehman, as our agent, all our property in

your possession, consisting of divers and sundry bills of lading for divers and sundry bales of cotton, aggregating some 1,769 bales, together with all our compress tickets or receipts therefor or pertaining thereto, and as part of this letter, we attach hereto as Exhibit A. detail statement of such bills of lading, as we now recall, with the actual invoiced price of the cotton, plus exchange, set opposite thereto, same aggregating \$87,313.26. The actual value therefor is largely in excess of that sum.

"We request a prompt and definite written response to this, our demand."

This demand was refused by the Bank except on condition of payment by Wolff & Co. of the amount claimed by the Bank on the account opened in their name by Carter in amount \$6,834.54. Thereupon Wolff & Co. made the following tender in writing:

"Oklahoma City, O. T. Dec. 10, 1906.

"Chickasha National Bank, Chickasha, I. T.—Gentlemen: You illegally detain certain bales of cotton and certain documentary evidence of our ownership therefor, as more particularly set forth in our former letter to you of this date, and you refuse to comply with our demand that you surrender the custody thereof, to which we are entitled, and we therefor under protest and for the purpose of reclaiming the possession of said property, which you unlawfully withhold from us, and for the purpose of avoiding the great probability of further damages in the premises, herewith tender you the sum of \$6,834.54 same being the amount, for which as we understand, you illegally detain our said property, conditioned of course, that you forthwith surrender said property, and all of said documents, specified in our former letter to you of this date."

This tender was refused by the Bank on the ground it was not an unconditional offer to pay the amount claimed by the Bank and absolve the Bank from all further liability, and because not authorized by the agent of Wolff & Co., Carter, who had placed the collateral with the Bank.

Thereafter the Bank tendered the railway company the amount of its lawful freight and storage charges and demanded possession of the 1,041 bales of cotton in controversy in this action, which tender and demand was refused by the Railway Company, acting in that respect in behalf of Wolff & Co. Thereupon this action was brought. Although not admitted as a defendant in the litigation, Wolff & Co. assumed the defense for the Railway Company, and defended against the action of the Bank on the strength of their title to and ownership of the cotton involved. From a verdict and judgment in favor of the Bank the Railway Company brings error.

The principal claims of error presented and relied on to work a reversal of the judgment rendered are: (1) The trial court erred in permitting the Bank to prove, through its president, Dwyer, the agreement of Carter that his principals, Wolff & Co., would open the account with the bank, would purchase and pay for exchange, would pay 10 per cent. interest on money borrowed on overdrafts, and would pledge collateral security to the Bank, in the absence of any proof tending to show Carter's authority to bind his principals by such agreement except the acts and declarations of the agent Carter himself. (2) The court erred in denying the request made by defendant to instruct a verdict in favor of defendant on the following grounds: (a) Because on the whole case there was no evidence sufficient to support a verdict or judgment in favor of the Bank; (b) because on the

undisputed evidence the tender made the bank by Wolff & Co. was sufficient, should have been accepted by the Bank, and it should have delivered the documentary evidences of the ownership of the cotton to Wolff & Co., and the court should have so declared as a matter of law.

An examination of the record in this case discloses no controversy whatever as to the extent of the power conferred by Wolff & Co. on its agents, Carter, Ryan, and others, who purchased the cotton in controversy for them. The full extent and scope of the authority and power of such agents was, as has been seen, to make contracts of purchase of cotton from the owners thereof, have it assembled at the compress station of Chickasha by bills of lading issued by the Railway Company, and payment made of the purchase price by drafts attached, in the manner above stated, and the undisputed evidence is all the cotton involved in this controversy was so purchased and so paid for by Wolff & Co.

In this condition of the record it is earnestly insisted by counsel for the Railway Company palpable error was committed by the trial court in permitting the Bank to prove through its president, Dwyer, over the repeated protests and objections of defendant, the verbal agreement made with the Bank by Carter assuming to represent Wolff & Co., which culminated in the opening of the account by Carter in the name of Wolff & Co. with the Bank, the creation by Carter of an overdraft on this account, and the pledging of the bills of lading relied upon by the Bank in this case, without any showing that Carter, the agent, had authority to bind his principals by the contract so made.

The contention made by counsel for the Bank is not that the agent, Carter, possessed any express authority from his principals to bind them by the agreement made or his transactions had with the Bank, but it is contended, as Carter was the general agent of Wolff & Co. in the purchase of cotton in the then Indian country in the neighborhood of Chickasha, that he possessed the implied authority to bind his principals by his contract made and transactions had with the Bank.

Again, it is further insisted, even if Carter be found not to have possessed the power in the first instance to bind his principals by his agreement and transactions with the Bank, yet that Wolff & Co., with full knowledge of such unauthorized acts of its agent, ratified and approved them, and hence are estopped and concluded thereby.

From the undisputed evidence found in the record Carter, as agent for Wolff & Co., possessed the undoubted power to purchase cotton in their names and on their account, not from any particular person or persons, but from owners of cotton in general, at such price as he might offer, and in so acting bind his principals. He was therefore in the purchase of the cotton in dispute the general agent for that firm. Mr. Justice Strong, delivering the opinion of the Court in *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822, said:

"The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a per-

son named, is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents—one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only. Whether, therefore, an agency is general or special, is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restricted by instructions or conditions imposed by the principal relative to the mode of its exercise."

If, therefore, the question here in dispute arose out of any contract made by Carter with the owner of cotton for its purchase, or the terms of any such contract of purchase, the authority of the agent, Carter, to bind his principals, would be clear, although he might have violated secret instructions from his principals in the making of such contract.

However, the question here presented is: Did Carter, the general agent of Wolff & Co., for the purpose of buying cotton on their account in the neighborhood of Chickasha, possess the implied authority to make the contract he did make with the Bank, and on the strength of this contract bind his principals either to the repayment of money borrowed by him from the Bank, or by his act in pledging the evidences of the ownership of the cotton in dispute as collateral security for such repayment? Independently of any claim of ratification made by the Bank, it is apparent the true solution of this problem must depend, not on the extent of the power possessed by the agent to bind his principals by his contracts for the purchase of cotton at all, for his acts in that regard were clearly within the scope of his employment as contemplated by the parties, but it must depend on whether the borrowing of money on account of his principals, and the pledging of their securities for its repayment, was a necessary incident to the business of purchasing the cotton. If so, the authority will be implied from the general grant of power conferred, and the principals will be held to have contemplated it when the agency was formed, and to be bound by its exercise by the agent because within the scope or the apparent scope of the employment of the agent, and the Bank would be justified in dealing with Carter as it did in this case.

As shown by the evidence, the only warrant of authority claimed by the Bank to bind Wolff & Co. by the agreement made and transactions had with Carter were his acts done and declarations made to the Bank, and the apparent authority with which he acted in the business of his principals. The Bank did not, as it might have done for its protection, first learn the full extent of the power possessed by Carter from his principals, but, on the contrary, assumed to engage in the business without any investigation and in reliance on appearances and the word of the agent; hence, if loss befall it, such loss must be attributed to its neglect to properly advise itself before engaging in the business.

It is well settled in law the acts and declarations of an agent are incompetent to prove the extent and scope of his power to bind his principals. Story on Agency (9th Ed.) § 83; Mechem on Agency, §

395; *Walmsley v. Quigley*, 129 Fed. 583, 64 C. C. A. 151; *Union Guaranty & Trust Co. v. Robinson*, 79 Fed. 420, 24 C. C. A. 650; *Merchants' Nat. Bank v. Nichols & Shepard Co.*, 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752; *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438; *Consolidated National Bank v. Pacific Coast S. S. Co.*, 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85; *Whitan v. Dubuque & S. C. R. Co.*, 96 Iowa, 737, 65 N. W. 403; *Bacon v. Johnson*, 56 Mich. 182, 22 N. W. 276. The granting of power to an agent to borrow money on account of his principals, and to pledge their property as security for its repayment, is an unusual confidence to repose in the discretion of an agent, and being a grant of unusual power, to establish its existence, either express authority from the principals must be shown, or the very nature of the business to be transacted by the agent must require the exercise of such extraordinary authority, and this is true whether the agency be general or special in character.

Mr. Story in his work on Agency (9th Ed.) § 83, says:

"If the authority is special, it is construed to include only the usual means appropriate to the end. If the authority is general, it is still construed to be limited to the usual means to accomplish the end. Even if a general discretion is vested in the agent, it is not deemed to be unlimited; but it must be exercised in a reasonable manner, and cannot be resorted to in order to justify acts which the principal could not be presumed to intend."

This court in *Pacific Lumber Co. v. Moffat*, 134 Fed. 836, 67 C. C. A. 442, said:

"Vreeland's authority as agent to purchase and sell lumber and shingles and to manage that business for defendant, however general, did not authorize him to obligate and bind his principal to pay the debt of another. *Mechem on Agency*, §§ 307, 313, 392, 400."

Ruger, Chief Justice, delivering the opinion of the Court of Appeals of New York in *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438, very clearly stated the rule which we conceive applicable to the facts of this case, in the following language:

"The plaintiff has been allowed to recover in the action upon the theory that the borrowing in question was within the apparent scope of the agent's authority, and this question was left, as one of fact, to be determined by the jury. We are of the opinion that the court erred in this respect, and that there was no evidence in the case authorizing a verdict for the plaintiff. The apparent authority in this case was precisely coextensive with the actual authority. The agent's real authority was confined to the duty of receiving consignments from the Meniers, storing and caring for them, and, after paying the expenses of the business from the receipts, to remit the balance to the Meniers. If the transaction of this business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment; but it does not afford a sufficient ground for the inference of such a power to say that the act proposed was convenient or advantageous, or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated, in order to justify its inference from the original employment."

In *Merchants' Nat. Bank v. Nichols & Shepard Co.*, 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752, Cartwright, Justice, delivering the opinion for the Supreme Court of Illinois, said:

"The source of authority is the principal, and the power of the agent can only be proved by tracing it to that source in some word or act of the alleged

principal. In this case there was no evidence tending to prove that the power to borrow money was an incident of the agency. For such an act as that an agent must have express authority, or some power must be expressly conferred upon him which cannot be otherwise executed."

See, also, *Ricker National Bank v. Stone*, 21 Okl. 833, 97 Pac. 577; *National Loan & Investment Co. v. Bleasdale* (Iowa) 119 N. W. 77.

As has been seen, Carter possessed no express authority from his principals except to purchase cotton on their account and draw on them with bills of lading attached in payment therefor. In this manner the cotton in question was purchased. In the performance of this service for his principals there was no necessity for Carter to open an account in the name of his principals with the Bank, borrow money therefrom, and pledge the property of his principals in payment. Not only is this so, but the very method employed in the transaction of the business, which was open and known to the Bank, precludes the Bank in this case from assuming or believing the transactions had by Carter with the Bank were within the scope of his authority as agent. Therefore, the objections taken on the trial to the evidence of the witness Dwyer wherein he detailed a conversation with the agent Carter, in which it was agreed by Carter the account of Wolff & Co. with the Bank should be opened, was opened, and which resulted in Carter borrowing money therefrom on his own account and pledging the bills of lading, the property of his principals, as collateral security therefor, in advance of any showing of authority on the part of Carter of his right to bind his principals by such agreement, and in advance of any evidence showing or tending to show his principals, Wolff & Co., with full knowledge of the unauthorized acts of their agent had ratified them, were well taken and should have been sustained, and the trial court erred in not so holding and ruling.

But it is further contended by the Bank, even though the agent Carter possessed no authority in the first instance to bind his principals by his dealings with it, yet his principals with full knowledge of his unauthorized acts ratified and approved the same and are bound thereby. This theory of the case is based principally upon a communication claimed to have been written by the president of the Bank to Wolff & Co., concerning which the following evidence of the president of the Bank is found in the record.

"Q. Mr. Dwyer, I wish you would please state to the jury whether or not you ever notified A. L. Wolff & Co. at any time, during the time this account was carried in his name at your bank, of any overdraft due at the bank on the account? A. Yes, sir. Q. About what date, if you remember? A. I think it was close of business for the month of October. Q. At what place did you notify them, Oklahoma City, St. Louis, or what place? A. St. Louis. Q. In what manner, Mr. Dwyer, did you give him this notice? A. Took off the average overdraft for the month of October and figured the interest on it and put it in the copy book and figured it out, and mailed it to them at St. Louis; I did myself. Copy of it is in the letter book here. Q. In the regular course of mail or otherwise? A. Regular course of mail. Q. To whom was the letter addressed? A. A. L. Wolff & Co., St. Louis, Mo. Q. Was it or was it not mailed in the regular course of the mail? A. It was mailed in the regular course of mail. Q. And the regular United States stamp or postage put on it? A. Yes, sir."

To our minds this evidence falls far short of establishing such a ratification by Wolff & Co. of the unauthorized acts of the agent

Carter with the Bank as will permit a recovery in this case, and for many reasons. While it is true in most instances that proof of the writing and posting of a letter properly addressed, in the absence of further evidence, raises a presumption of the delivery of such letter to the person to whom it is addressed, yet this presumption can have but little if any probative force in this case, and for this reason. To raise the presumption of delivery, it must be shown as a fact the letter was properly addressed. The firm here addressed transacted business in a large and populous city. The address is to the city generally, and is not specific either as to the street number or building in which the business is conducted, or as to the nature of business conducted by the firm. In such case the letter was not properly addressed. There may be many firms of the same name engaged in business in a city the size of St. Louis. A letter so addressed may or may not have come into the hands of the firm. *Fleming & Ayrest Co. v. Evans*, 9 Kan. App. 858, 61 Pac. 503. In this case the evidence discloses the firm disclaimed all knowledge of such letter and a diligent search failed to discover it among their files.

Again, the claim of the Bank in this case is based on the pledge of collateral made by Carter to secure any overdraft in the Bank, and not to recover the amount of such overdraft. This action was brought against the Railway Company and not against Wolff & Co. To recover in this case the Bank must establish the existence and validity of the pledge made to it of the collateral by Carter as agent. Mr. Justice Peckham, delivering the opinion of the court in *United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563, said:

"Where an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual. Knowledge is necessary in any event. Story on Agency (9th Ed.) § 239, notes 1 and 2. If there be want of it, though such want arises from the neglect of the principal, no ratification can be based upon any act of his. Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them."

Therefore, in this present case, even should it be presumed the letter claimed to have been written by the president of the Bank was received by Wolff & Co., it would have conveyed no intelligence to Wolff & Co. that Carter had assumed to pledge their property to the Bank as collateral for money borrowed on their account. Manifestly, therefore, the existence and validity of the pledge claimed in this case by the Bank, and which it must establish or fail to recover, cannot be made out on the theory of ratification because it is not shown Wolff & Co. had any knowledge of its existence until about December 10th when it was promptly repudiated and its authority denied.

The only question remaining for disposition is that of the sufficiency and effect of the tender made the Bank by Wells, the representative of Wolff & Co., as pleaded in this case.

At the time of the making of this tender, the officer of the Bank to whom made refused to accept it and turn over the evidence of the ownership of the cotton in its possession for two reasons: (1) Because the tender was unaccompanied by the written consent of Carter,

the agent who had made the pledge with the Bank; (2) because Wolff & Co. in making the tender refused to pay the amount tendered the Bank, and relieve it from all further liability in the premises.

In this connection it is the claim of plaintiff in error as the amount tendered was in the full amount claimed by the Bank, and, as the grounds on which it placed its refusal are claimed to be untenable, the court should have directed the verdict for the Railway Company requested by it on the trial. On the contrary, it is the contention of the Bank, as the tender made was not unconditional, the Bank had the right to reject it when made; and, further, it is contended such tender and the act of the Railway Company in pleading it as a defense to this action constitute such an admission of liability on the part of Wolff & Co. to the Bank as will conclude the Railway Company and entitle the Bank to a judgment for the amount tendered.

In the view we have taken of the case, as above stated, it becomes necessary to consider only the claim made by the Bank. In this connection it is proper to state the insistence of the Bank is not that the tender itself is such an admission of liability as will preclude the maker thereof from disputing the amount tendered to be due, but the fact that the tender made was pleaded as a defense to an action arising out of the transaction in which the tender was made. And in support of this contention the general rule, as stated by Mr. Hunt in his work on Tender, § 401, is relied on, as follows:

"A plea of tender is an unequivocal admission of the justice of the plaintiff's claim to the extent of the sum tendered. So conclusive is the admission that if the tender is refused, and the parties proceed to trial, and it shall turn out that the plaintiff was not legally entitled to anything, the plaintiff shall have a verdict for the sum tendered."

However, in our opinion there is no room for the application of this general rule to the facts of this case, and for this reason: The rule as stated has application to such unconditional tenders as contain solemn admissions made of record. It is not the act of tender, but the admission of the party making it, made indisputable by his bringing it on the record by his plea and demanding relief of the court because of his admission, that binds and concludes the party making it. Therefore a plea or so-called plea of tender which contains no admission of the party making it is not a good plea, for it neither admits any right in the party to whom made nor estops the party making it. It therefore becomes essential in the determination of the question presented to examine the tender made and pleaded in this case.

The written demand of Wolff & Co. to which reference is made in the offer of tender, and the tender itself, as above set forth, must be construed together as one transaction. So construed, the situation of the parties was this: The Bank was in possession of the indicia of ownership of cotton, aggregating almost \$90,000 in value, which belonged to Wolff & Co., and was in the actual possession of the Railway Company. By reason of such possession the Bank asserted a lien on the cotton to secure the comparatively small sum of \$6,834.54. Wolff & Co., claiming to be the absolute owners of the cotton, demanded the surrender of the evidences of ownership in order to en-

able them to demand the cotton from the Railway Company. This demand was refused by the Bank. Thereupon Wolff & Co. reasserting their absolute ownership of the cotton and their right to the documentary evidence of such ownership in possession of the Bank, and denying any and all claim of the Bank thereto, under protest made offer to the Bank of the amount claimed by it to protect themselves against further loss by being thus deprived of the actual possession of perishable personal property of large value. And this offer so made to the Bank is that pleaded by the Railway Company in defense of this action brought by the Bank to secure the actual delivery of the cotton to it, or in case such actual delivery could not be adjudged by the Court, to recover the value of its special interest claimed therein.

It is thus seen neither by the form of the offer made by Wolff & Co. to the Bank, nor that pleaded by the Railway Company in defense of this action, was the validity or the amount of any claim asserted by the Bank recognized or admitted by Wolff & Co. or the Railway Company. On the contrary, it was at all times by them denied and disputed, and, as shown by the record, this fact is recognized by the Bank throughout this entire litigation, for that it both moved to strike and demurred to the plea of tender interposed by the Railway Company for this reason; and, further, by its reply, challenged the sufficiency of the plea of tender made on this very ground and now insist the tender was properly rejected by the Bank because not an unconditional admission of liability by Wolff & Co.

As neither the offer made to the Bank nor the plea interposed by the Railway Company in defense to this action contains any admission of the validity of the claim of the Bank to the cotton in any amount, it must be held the Bank was not entitled in any event to a judgment in its favor for the amount offered, under protest, to obtain the release of the cotton.

It follows judgment must be reversed, and the case remanded for a new trial.

It is so ordered.

GUNTER v. GUNTER.

(Circuit Court of Appeals, Fifth Circuit. November 23, 1909.)

No. 1,975.

EVIDENCE (§ 271*)—WILLS (§ 58*)—HEARSAY—SELF-SERVING STATEMENTS.

In an action against an executrix to recover on an alleged agreement by the testator to make a bequest to a nephew in consideration of an indebtedness to him for services and advances, where there was evidence tending to support such allegation, and it was admitted that it was the intention of the testator for some time prior to and up to the time of his death to change his will and make such bequest, the only issue being as to whether the promise was based on a valuable consideration, it was error to admit testimony offered by defendant that, in statements made by the testator to friends many years before of his intention to provide for his nephew in his will, he did not mention any indebtedness to him, or that, in more recent financial statements made for the purpose of credit, he did not mention it; such testimony being not only hearsay and of self-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

serving statements, but also irrelevant and misleading, since the indebtedness may have arisen after the former statements were made, and there was no occasion to mention it in credit statements, if, as alleged by plaintiff, it was to be settled by bequest in his will.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 271; * Wills, Dec. Dig. § 58.*]

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action by Jule Gunter against Roxanna Gunter. Judgment for defendant, and plaintiff brings error. Reversed.

W. O. Davis, for plaintiff in error.

Don A. Bliss and C. L. Gallaway, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The petition in this case alleges, in substance: That Jule Gunter, plaintiff, is a citizen of the state of Oklahoma. That Mrs. Roxanna Gunter, the defendant, is a citizen of the state of Texas, and is the surviving wife and sole devisee of Jot Gunter, deceased, who was a citizen of Texas in his lifetime, but who departed this life therein during the month of April, 1907, possessed of an estate exceeding \$500,000 in value. That Nat Gunter was a brother of the plaintiff, and a nephew of Jot Gunter, and was a citizen of the state of Texas, and departed this life testate, leaving a will in his own handwriting, by which he bequeathed to the plaintiff all of his property, real, personal, or mixed, of whatever kind and wherever situated, in fee simple and without condition, which was duly probated and is now in full force and effect. That there is no administration upon the estate of Nat Gunter, or necessity therefor; all of his debts having been paid. That Jot Gunter in his lifetime had large business interests throughout Texas, and about 15 years ago owned a large body of land, consisting of several thousand acres, situated in Grayson county, Tex., and, while the title thereto was in the name of Jot Gunter, Nat Gunter and one Hardy each had an interest therein to the extent of one-third of all profits to arise therefrom; and previous thereto Nat Gunter had turned over and delivered to Jot Gunter the sum of \$12,000, or some such large sum, the exact amount of which the plaintiff does not know, to be used in real estate speculation in the city of Dallas, Tex., on their joint account, and which was so used. That about 15 years ago, while Nat Gunter and Hardy were interested as aforesaid in the Grayson county lands, and while the land was of the value of about \$20 an acre, but was incumbered by mortgage to the extent of about \$4 an acre, Jot Gunter, becoming financially embarrassed and threatened with bankruptcy, in order to relieve his financial embarrassment and to prevent bankruptcy, desired to execute a new mortgage upon the lands and to raise a large sum of money thereon to be used in tiding over his financial embarrassment, and Nat Gunter thereupon, at the request of Jot Gunter, executed a release to his interest in the lands with the understanding then and there had between them that, as soon as Jot Gunter recovered from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his financial embarrassment, he would pay Nat Gunter either for his interest in said land, which was worth many thousand dollars, or he would execute a valid will in favor of Nat Gunter, whereby he would devise and bequeath to Nat Gunter a sufficient sum to compensate him for money advanced, services rendered, or otherwise. And that soon thereafter Jot Gunter did write and execute a will in conformity with law, whereby he devised and bequeathed to Nat Gunter a one-tenth interest in his estate, which interest was admitted to be about the sum of \$40,000. That for a period of at least 20 years Nat Gunter served Jot Gunter in superintending his ranches, cattle, and various other interests, without salary and compensation, and the will above mentioned was in existence for many years, but Jot Gunter, some time thereafter, executed another will, whereby he bequeathed to his wife, the defendant, Roxanna Gunter, his entire estate, making her the independent executrix of the will, and directing that no action should be had in the county court with reference to his estate, which will was duly probated after the death of Jot Gunter, and the defendant thereunder is now in possession of his estate as independent executrix. That, at the time of the execution of the will, Jot Gunter had no intention of repudiating or denying his obligation to Nat Gunter, but intended to otherwise compensate Nat Gunter, or else he had an understanding and agreement with his wife that she should do so. That afterwards, during the spring of 1907, and shortly before the death of Jot Gunter, it was agreed between Jot Gunter and Nat Gunter that Jot Gunter was indebted to Nat Gunter in the sum of \$40,000 on account of interest of Nat Gunter in the Grayson county lands, and for the various services which Nat Gunter had rendered to Jot Gunter, and Jot Gunter then agreed that for the consideration aforesaid he would execute a will in favor of Nat Gunter, whereby he would devise and bequeath to Nat Gunter the sum of \$50,000, \$40,000 of which should belong absolutely and unconditionally to Nat Gunter, the remaining \$10,000 to be held and used in trust, but the necessity for such trust does not now exist. That, pursuant to the agreement, Jot Gunter entered upon the execution of his will, and instructed his attorney to write and prepare a will in accordance with the agreement, and therein to bequeath and devise to Nat Gunter the sum of \$50,000, \$10,000 of which was to be in secret trust as aforesaid, though not to be specified. That pursuant to that agreement and the instruction of Jot Gunter, the attorney was engaged in the preparation of the will, when Jot Gunter became suddenly ill and unable to proceed with said will, and died without completing the same. That the agreement of Jot Gunter to execute the will in favor of Nat Gunter was made upon a valuable consideration and is enforceable in law, notwithstanding which, the defendant, since the death of Jot Gunter, has refused and still refuses to recognize the agreement, and refused to pay Nat Gunter, although often thereto requested, the sum of \$40,000, and, since the death of Nat Gunter, has refused and still refuses to recognize the agreement, the defendant has refused to pay to plaintiff the said sum or any other sum in satisfaction of said agreement. That the plaintiff concedes that he is morally, though not legally, indebted to the estate of Jot Gunter in the sum of \$15,000, which sum he is

willing to have deducted from whatever judgment he may recover in this case.

The defendant pleaded the general issue and, for special answer, the statutes of limitation of two and four years, and that the defendant does not deny, but expressly admits, that Jot Gunter repeatedly stated that he intended to make a provision for Nat Gunter in his will; and "this defendant further expressly admits that Jot Gunter had the intention to make a provision for Nat Gunter by his will up to the time of his death, but this was not on account of any debt or obligation that he owed Nat Gunter, but on account of the love and affection he had for Nat Gunter." The other pleas are not necessary to notice.

There was a verdict and judgment in favor of the defendant. The bill of exceptions shows that on the trial the plaintiff introduced evidence tending to sustain the allegations in his petition, and tending to show that Jot Gunter, in consideration of rights surrendered to him by Nat Gunter, money advanced, and services rendered, agreed with and promised Nat Gunter to execute a will in his favor, thereby devising to him \$50,000, \$40,000 of this to be the absolute property of Nat Gunter, the remainder to be upon trust, the necessity for which no longer exists. It shows that, on the other hand, the defendant introduced testimony to show that Jot Gunter was not indebted to Nat Gunter, and was under no pecuniary obligation to him, but that whatever promise, if any, was made by Jot Gunter to Nat Gunter to provide for him by will, was in consideration of love and affection, and a mere gratuity. The bill of exceptions further shows that W. W. Gunter, the father of Nat Gunter and a brother of Jot Gunter, had raised Jot Gunter as one of his own family from the time he was a small boy and educated and provided for him as his own son, without charge; and that Jot Gunter, soon after his marriage, took Nat Gunter when he was a small boy and raised him as one of his family, and educated him as he would his own son, without charge. It then shows that, during the introduction of the testimony in behalf of the defendant, the following, among other proceedings, were had:

First. Judge T. J. Brown, being a witness in behalf of defendant, and having testified that he was well acquainted with Jot Gunter in his lifetime, and in like manner with Nat Gunter in his lifetime, and that for several years Nat Gunter was his partner in the practice of law, was permitted to testify, over the objection of plaintiff, that the same was hearsay and self-serving, that Jot Gunter told him more than once that he intended to provide for Nat Gunter in his will. To which the plaintiff then and there excepted.

Second. Dr. Amos Graves, a witness in behalf of defendant, after having testified that he was intimately acquainted with Jot Gunter for 12 years preceding his death, and that he and Jot Gunter were close, intimate, and confidential friends, and that Jot Gunter had discussed his private affairs and his indebtedness and property matters with him, and told him of his debts, was permitted to testify, over the objection of the plaintiff, that the same was hearsay and self-serving: "I never did hear Jot Gunter say anything about owing Nat Gunter anything. He told me he owed \$160,000. I was trying to get him to do business at Sullivan's bank, instead of at Ft. Worth. I repeated his affairs to Sullivan and told Sullivan who he was and what debts he owed." Which objection was overruled by the court and said evidence permitted to go to the jury. To which the plaintiff then and there excepted.

Third. Don A. Bliss, a witness in behalf of defendant, after having testified that he was the attorney of Jot Gunter, that he and Jot Gunter were as close and confidential as any two men ever get to be, that their intimacy was such

that Jot Gunter would disclose to him his private business, indebtedness, and property matters, and everything pertaining to his private business, was permitted to testify, over the objection of the plaintiff, that the same was hearsay and self-serving, in substance as follows: "Jot Gunter never did mention to me any pecuniary obligation to Nat Gunter. I would like to make that clear. I will state that the last time he went over that was in San Antonio in 1896. I prepared a statement myself when he was seeking to get credit, a full statement of his assets and all of his liabilities, with the proposition that he was to swear to it." Which objection was overruled by the court, and said testimony permitted to go to the jury. To which the plaintiff then and there excepted.

Fourth. And further, while Don Bliss was testifying in behalf of defendant, and after he had stated that Nat Gunter was at San Antonio and with Jot Gunter at the time of his death, he was permitted to testify, over the objection of the plaintiff, that it was irrelevant, immaterial, hearsay, and self-serving, in substance as follows: "In March, 1906, Jot Gunter spoke to me about writing his will. He told me he wanted to make a provision for Nat Gunter. I asked him to dictate the kind of a will he wanted to make. He replied: 'I have not made up my mind exactly how I want to leave it to him and how much, and I want to study over that.' This same matter was talked over between us from time to time up to the time of his death. He would sometimes bring it up himself and sometimes I would mention it, and every time he expressed the intention of providing for Nat Gunter, and the last time he mentioned it he said: 'We must get together some time when nobody will interrupt us, and I want to go over the whole thing. I want us to get together and frame that provision for Nat. I want to see him provided for and taken care of the balance of his life. I am likely to forget that.' He always put it off and never did do it. Soon after Jot Gunter's death, while Nat Gunter was in San Antonio, I told Nat these things. I further informed Nat that in 1886 Jot Gunter stated to me that he made a will, and that Jot Gunter said Judge Bryant drew the will, and in that will he had bequeathed to him (Nat) 10 per cent. of his half of the property, not to exceed \$50,000, and the balance he had left to his daughter, Eula." Which objection was overruled by the court and said testimony permitted to go to the jury. To which the plaintiff then and there excepted.

The assignment of errors presents, in substance, that the court erred in admitting, over the objection of the plaintiff, the testimony of T. J. Brown, Dr. Amos Graves, and Don A. Bliss, as just above recited from the bill of exceptions; and that the court erred in refusing certain requested charges tendered by the plaintiff. We are of the opinion that the court did err in admitting the testimony referred to in the assignment of errors.

It is clear from the bill of exceptions that the plaintiff introduced evidence tending to show that Jot Gunter had promised and agreed to make a will in favor of his nephew, Nat Gunter. The real issue was and is whether Jot Gunter was under such pecuniary obligation to Nat Gunter as to render this promise enforceable in law. In other words, the issue is whether Jot Gunter was under any pecuniary obligation to Nat Gunter. The counsel for the plaintiff in error, who was also counsel for the plaintiff below, suggests, with much probability: That it was many years ago that Judge T. J. Brown, now and for the last 20 years on the Supreme Bench of Texas, was in partnership with Nat Gunter, and it was doubtless about that time that Jot Gunter told Judge Brown that he intended to provide for Nat Gunter in his will, and that the judge's evidence was introduced for the purpose of showing that Jot Gunter, prior to the time when he could have been indebted to Nat Gunter, contemplated making a will in his favor, and that it was thus sought to indirectly show by Jot

Gunter's declarations that there was no consideration for his future promise to make a will. That the introduction of Dr. Graves' testimony had the same purpose, and being that Jot Gunter made a statement of his indebtedness to Sullivan's bank and in that statement did not mention any indebtedness to Nat Gunter, which statement was made in the absence of Nat Gunter, is a self-serving statement of an interested party, and that it was to the highest degree lacking in probative force. That the statements of Jot Gunter and Don A. Bliss are of the same character. That by the evidence of these witnesses the inference is sought to be drawn that if Jot Gunter had been indebted to Nat Gunter he would have mentioned that fact, while the truth is that Jot Gunter would not have regarded his obligation to Nat Gunter as a debt affecting his credit, for this obligation to Nat Gunter was to be provided for in his will, or at least postponed until his other debts were paid. For the error of the court in admitting this evidence, the judgment must be reversed.

As to the other error assigned, we think that the refused charges embraced one pertinent feature which is at least not expressed with sufficient clearness in the charge given by the court. The element to which we allude is indicated in these words of the first requested charge:

"Even though you should believe that said Jot Gunter may have been partly influenced by love and affection for said Nat Gunter."

With the exception of the principle indicated by the language just quoted from the rejected charge, the substance of the request is sufficiently embraced in the charge of the court. We incline to the opinion that, if the competent testimony given on another trial is substantially the same as that which was properly admitted on this trial, the doctrine indicated in the language quoted from the rejected charge should be given in the instructions of the court to the jury.

Reversed and remanded.

HERR v. ST. LOUIS & S. F. R. CO.

(Circuit Court of Appeals, Fifth Circuit. December 7, 1909.)

No. 1,891.

1. APPEAL AND ERROR (§ 395*)—GROUNDS FOR DISMISSAL OF WRIT OF ERROR—FAILURE TO FILE COST BOND.

Where a petition in error was duly allowed by the trial court, and the proceedings were in all respects regular, except that no cost bond was given, and such a bond, approved by the court below, is tendered in the appellate court, the case will not be dismissed, but the bond will be allowed to be filed to take effect as though given at the beginning of the proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2064-2070, 3127; Dec. Dig. § 395.*]

2. MASTER AND SERVANT (§ 248*)—ACTION FOR DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE—INJURY AVOIDABLE BY PROPER CARE.

In an action against a railroad company under the statute of Mississippi to recover for the death of a freight conductor who was killed by the engine of a following train which ran into his caboose while his train was standing on the main track, the direction of a verdict for de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant on the ground that deceased was chargeable with contributory negligence in stopping his train where he did *held* error, where there was evidence which would have justified a finding that notwithstanding such contributory negligence, if it existed, the engineer of the following train, who, under Const. Miss. 1890, § 193, was not a fellow servant of deceased, by the exercise of reasonable care could have stopped his train and prevented the injury after he was signaled by a flagman and could see the standing train ahead.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 248.*]

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

Action by W. A. Herr, administrator, against the St. Louis & San Francisco Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

James Stone (Smith & Totten, on the brief), for plaintiff in error.

J. W. Buchanan (W. F. Evans and S. W. Jones, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action by W. A. Herr, as the administrator of E. J. Herr, deceased, against the St. Louis & San Francisco Railroad Company, in which the plaintiff claims damages for the negligence of the defendant in causing the death of E. J. Herr. The case was begun in a state court, and was duly removed, on the ground of diverse citizenship, to the circuit court. The defenses presented were a denial of negligence by the defendant, and contributory negligence on the part of the deceased. After all the evidence had been presented, the trial court, on motion of the defendant, directed a verdict for the defendant. On such verdict being returned, judgment was entered for the defendant, and the plaintiff brings the case here, assigning as error the action of the court in directing the verdict.

Before considering the case on its merits, there are two motions to be disposed of.

The petition for writ of error filed in the court below prayed that the writ might be allowed "in forma pauperis." The order granting the writ was made in the usual form, but no bond was given as required by law. After this court acquired jurisdiction of the case and the record was filed and printed, the defendant in error, on February 2, 1909, moved to dismiss the case because the writ was prosecuted "in forma pauperis." The plaintiff in error moved for leave to file a proper bond for costs and presented one approved by the judge who presided in the court below, which was filed in that court February 16, 1909. It appeared that the plaintiff in error had advanced the costs for the printing of the record in this court. The position of the defendant in error is correct, that an appeal or writ of error cannot be prosecuted in this court in forma pauperis. But we hold that, the proceedings in all respects being regular, except the failure to give bond, and such bond being now tendered and in fact approved by the trial judge, the case should not be dismissed. The bond may

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be filed now to take effect as if it had been presented at the beginning of the appellate proceedings. It was held, in *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495, that the signing of a citation returnable to the proper term of the Supreme Court, but without acceptance of security, constituted the allowance of an appeal which enabled the court to take jurisdiction, and to afford the appellants an opportunity to furnish the requisite security in the appellate court.

The motion to dismiss is overruled, and the motion to be allowed to file bond for costs is granted.

This being an action for negligence causing death, it is, of course, dependent on a statute, as no action for death lies at common law. The action is authorized generally in Mississippi under circumstances where, if the death of the injured had not ensued, he would have had the right to sue. Code Miss. 1906, § 721. The action is allowed by the husband or wife of the person killed, or by named kindred (Id. § 721); or it may be brought by the "legal or personal representative of the person injured" (Id. § 4056). It will be well to note that the "fellow servant rule" at common law has been so modified in Mississippi that it offers no impediment to the plaintiff's recovery. By constitutional provision it is declared that:

"Every employé of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employes, as are allowed by law to other persons not employes where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work." Const. Miss. 1890, § 193.

And this provision is extended to the legal or personal representative of the person injured where death ensues from the injury. These constitutional provisions are confirmed by statute. Code Miss. 1906, § 4056.

On the 23d day of September, 1907—the day he was killed—E. J. Herr was a conductor of the defendant railroad company. On that day he was ordered to run a freight train, known as "extra No. 2690," from Holly Springs, Miss., to Memphis, Tenn., having brought his train on that morning from Memphis to Holly Springs as a local freight. At the town of Byhalia, on his trip from Memphis to Holly Springs, he received the following order:

"Engine No. 2690, Herr, will run Extra from Holly Springs to Memphis."

At the same time and place he received the following order:

"No. 256, Engine 736, will run four hours late from Tupelo to Redbanks, and three hours and thirty minutes late Redbanks to Memphis."

At Holly Springs Herr received instructions to unload certain cars of stone at a place one and a quarter miles west of Redbanks, a station eight or nine miles west of Holly Springs and between that place and Memphis. Herr left Holly Springs going northwest with his extra train at 3:25 p. m., and arrived at Redbanks at 3:50 p. m., at

which place he did some unloading and took the siding to allow a train to pass. After a conference with the engineer of his train, it was determined that they would proceed to the place where the stone was to be unloaded. They, accordingly, left Redbanks with their train at 4:17 p. m., and proceeded to the place designated for the unloading of the stone, and there the extra train was stopped to be unloaded; it being understood, as some of the evidence tends to show, that the flagman was to be left at the west end of the switch at Redbanks to protect this extra train against train No. 256. The rules of the company require the flagman when his train is stopped on the main line, to go back immediately and protect the train with a flag. When the extra train stopped, the flagman, Flint, states that the deceased called to him and said, "Kid, we have 25 minutes to unload"; and that he went back to flag and soon heard the approach of train No. 256; that he started on a run up the track towards Redbanks, and had run as far back as 10 telegraph poles when he saw the smoke of train No. 256 as it came out of Redbanks; that he then ran an additional 3 telegraph poles, giving the emergency signal, when he was answered by the engineer of train No. 256; that this made the distance of train No. 256 from the caboose of the extra train, when the engineer of No. 256 answered the emergency signal, 16 telegraph poles, or 3,360 feet, there being 210 feet between each telegraph pole. Train No. 256 was not stopped in time to avoid the collision. It ran into the caboose of the extra train No. 2690, and killed E. J. Herr, who was in the caboose.

Smith, the engineer of train No. 256, although answering the emergency signal of the flagman, Flint, 16 telegraph poles from the point of the accident, did not put on the emergency brake, stating that he supposed that he had the usual time and distance in which to stop, as provided by the rules in cases of being flagged. This witness testified that he knew it was customary for flagmen to flag trains in less distance than required by the rules of the company; that he was on the right side of his engine in the proper place, but did not see the caboose into which he ran until his attention was called to it by a brakeman riding on the tender of his engine when he was only 300 or 400 feet from the caboose; that he was going only about 6 miles an hour when he struck the caboose, having reduced the speed of his train from 30 miles an hour to 6 miles an hour at the time of the accident. He said that he was prevented from seeing the train in front of him by a curve in the road; that in an emergency he could stop that train going 30 miles an hour in 1,800 feet; that he tried to make the stop in this case when about 1,400 feet from Herr's caboose; that in 400 feet more he could have stopped the train and avoided the accident.

The rules of the company require flagmen to go back from the rear of the train, when stopped on the main line, 21 telegraph poles, and place one torpedo on the rail on the engineer's side. He must continue to go back at least 25 telegraph poles from the rear of the train and place two torpedoes on the rail on the engineer's side 90 feet apart, when he must return to a point 20 telegraph poles from the rear of his train and remain until the approaching train has stopped or he is recalled by the whistle of his engine.

Mason testifies that, according to his theory of the rules, Herr had no right to leave Redbanks with his train under any condition. But there was evidence tending to show that this rule was not without exception and may be violated when it is safe to do so by protecting the train with a flag; that Conductor Herr and Engineer Mee thought it was safe to violate that rule on this occasion; that the rule requiring the flagman to go back 25 telegraph poles is directory, and the employes have discretion as to how far it is necessary for a flagman to go, being governed in each case by the situation of the exposed train, and the flagman has some discretion about hurrying back; and that the conductor is not required to follow the flagman to see that he performs his duty.

W. B. Bradbury testified that he was on the rear of a train that had backed out of the west end of this switch and saw a passenger train which had passed while his train was on the switch, a distance of one mile, going in the direction of the place of the accident, and that from this point he saw a train a half mile beyond the signal board, the point of the accident; that his train was headed east; and that he was looking west from the rear end of the passenger train that he was riding on.

L. J. McCombs testified that he had lived one-half mile west of Redbanks all his life and was perfectly familiar with the railroad at that point and at the place of the accident; that on leaving Redbanks, going northwest, the railroad runs about 15 or 20 rails in a cut; that, after leaving this cut, it is open all the way to where Mr. Herr was killed; that he was killed near a milepost, meaning the station post; that from the northwest end of the cut at Redbanks to the point of the accident it is something over 800 yards; that he could stand at the northwest end of the switch and see a freight train down to its doors passing the place of accident; that he could see this looking west from the mouth of the cut; that if a person was on an engine he could see further; that the place of the accident was an open field; that a person standing at the northwest end of the cut had an unobstructed view of the railway for a mile or a mile and a half; that the switch is a quarter of a mile on section 12, and the railroad runs through sections 11 and 12, and one could see halfway on section 11; that from the west end of the switch to the point of the accident is 92 rails; that standing at the mouth of the cut looking west he could see a man walking over the distance of a mile; that he saw two boys walk that distance while he was standing at the switch west of Redbanks a short time after the accident; that these boys got on the railroad beyond the place of the accident and walked to the switch; that from the northwest end of the switch to the place of the accident is an open field with no obstructions to the sight.

J. E. Crook testified practically to the same state of facts as were testified to by McCombs.

Underwood testified that he rode on an engine from Redbanks to Byhalia over the ground of the accident; that, after going four telegraph poles from Redbanks, he could see 16 telegraph poles, or three-quarters of a mile.

Witness Herr testified that he made observations of trains going east and of trains going west; that he stood in the middle of the cut outside of Redbanks and saw a train coming towards him from the northwest fully $1\frac{1}{2}$ miles; that he could see it all the way coming from the point of the accident to the mouth of the cut; that there are no obstructions to the view along the track, which lays through an open field; that he stood at the place of the accident, and looked east towards Redbanks; and that he saw a train come out at the north end of the cut, and as it came out he could see the engineer sitting in his engine. He estimates the distance to be three-quarters of a mile from the mouth of the cut to the place of the accident.

The statute which is made applicable to both passengers and employés provides that:

"In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury." Code Miss. 1906, § 1985.

It seems clear, in view of the foregoing, that the learned trial court must have directed the verdict for the defendant upon the theory that the deceased, E. J. Herr, was, as matter of law, guilty of contributory negligence which barred a recovery by his administrator. There is much evidence in the record which is referred to as bearing on the question of the contributory negligence of the deceased. As the case must be tried again, we do not deem it advisable to comment on this evidence, involving as it does the conduct of the deceased and his flagman, and the rules of the defendant company, and whether or not they were generally enforced or often disregarded with the company's knowledge and acquiescence. For the purposes of this decision we may assume—a fact that we do not decide—that the evidence was sufficient to justify the court in holding, or the jury in finding, that Herr was negligent in his conduct. Such holding or finding would not, in our opinion, be conclusive of the case. If Smith, the engineer in charge of the engine attached to train No. 256, did see, or could, by the exercise of ordinary or reasonable care, have seen, standing on the track, the caboose in which Herr sat and on which he was killed, far enough before striking it to have avoided the collision by stopping his train, the plaintiff would be entitled to recover, notwithstanding the previous negligence of Herr. The rule seems to be unquestioned that notwithstanding the person injured was guilty of negligence in exposing himself to an injury at the hands of the defendant, yet, if the defendant discovered the exposed situation of the person in time by the exercise of ordinary or reasonable care after so discovering it to have avoided the injury, and nevertheless failed to do so, the contributory negligence of the person injured does not bar a recovery of damages from the defendant. *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; 1 *Thompson on Negligence*, §§ 237, 238, 239.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

LAKE SHORE & M. S. RY. CO. v. EDER.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1909.)

No. 1,948.

1. COURTS (§ 314*)—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF CORPORATION.

A corporation incorporated in several states, including the one in which suit is brought against it, must be regarded as a citizen of the latter state for the purpose of determining the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 314.*]

Diverse citizenship as a ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. COURTS (§ 269*)—JURISDICTION OF FEDERAL COURTS.

In a transitory action in a federal court, as for a tort, the jurisdiction of the court is not affected by the fact that the cause of action arose in another state of which plaintiff is a citizen.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 269.*]

3. APPEAL AND ERROR (§ 273*)—EXCEPTIONS.

Where pending an action at law and before trial on the merits an issue as to the validity of a settlement is by stipulation submitted to the court to determine both the facts and law, a general exception to its finding which does not indicate the ground on which it is based does not present any question for review by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620-1630; Dec. Dig. § 273.*]

4. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

Evidence on behalf of the plaintiff in an action against a railroad company for an injury to an employé held sufficient to justify the submission of the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

5. APPEAL AND ERROR (§ 231*)—REVIEW—RULINGS ON ADMISSION OF EVIDENCE—OBJECTIONS.

Objections to the admission of evidence which do not state the grounds on which they are based will not support exceptions to the rulings thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.* Trial, Cent. Dig. §§ 194-210.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action by John Eder, Jr., against the Lake Shore & Michigan Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. S. McGowan, for plaintiff in error.

Anderson, Anderson & Barnum, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff in this case was a brakeman in the employment of the defendant, and on August 22, 1907, was in service on a freight train running on the road of the defendant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

near Stoneboro, Pa., when from accident resulting, as he says, from the negligence of the defendant in failing to keep its roadbed in order and its ties and rails in proper order and position, the train ran off the track and he was severely injured. He brought this suit to recover damages in the Circuit Court for the Northern District of Ohio and obtained a verdict and judgment therefor. There are three leading questions raised and there are also miscellaneous points, some of which are of sufficient importance to be considered.

The first question is one which relates to the jurisdiction of the Circuit Court. The plaintiff is a citizen of Pennsylvania. The defendant is a constituent of a company consisting of several companies incorporated in each of the states of Ohio and Pennsylvania and still others. The division of its road on which the accident occurred is partly in each of the above-named states, extending from Ashtabula, Ohio, to Stoneboro. The defendant by proper plea interposed the defense that the requisite diversity of citizenship did not exist. The plea was overruled and the jurisdiction sustained. It was there, and is here, contended that, as the defendant is a citizen of Pennsylvania as well as of Ohio, the plaintiff could not maintain a suit against the company in a federal court in the state of Ohio for a cause of action arising in his own state, or, as otherwise stated, that, the plaintiff and the defendant being both citizens of Pennsylvania, there could be no federal jurisdiction there or elsewhere. This contention is plausible, but not sound. The cause of action was transitory, and a suit upon it might be brought in the courts of any state where proper service of process could be had and it could be brought in any federal court where diversity of citizenship existed. The circumstance that the cause of action arose in Pennsylvania is wholly immaterial. The court below whose jurisdiction was invoked was administering the law of Ohio, and that law regards the corporation sued as the one of its own creation, and it is indifferent to the fact, if it exists, that some other state has incorporated it, or suffered it to be incorporated. Although for some purposes a body incorporated in several states may be regarded as an entity, it is not so for all. It is likely to have different attributes in each state arising from different laws which affect it. It might acquire franchises in one state which it does not possess in others. An incorporation by one state of the same individuals is not the adoption of the corporation of another state. These considerations furnish a reason why it is that, where a corporation of a state is sued in its own courts, regard is had to it only as a creation of that state for all purposes of jurisdiction. Business enterprises in which a combination of such corporations may engage, create common rights, and entail joint liabilities. These, however, concern the activities of the corporations, and not their essential character. When the idea is grasped that whenever a corporation is sued in a state by whose laws it has been created and the question of its citizenship is involved, the court will regard the corporation intended as defendant as the one created and existing by the laws of that state, we have the key to the solution of the inquiry. The laws of the state are the mould in which the corporation is cast and continues to exist. It derives its faculties from those laws; and the fact that it may be allowed to exercise those faculties in another state, how-

ever freely or with whatever limitations, does not alter its essential character in the state of its creation. It is a citizen of that state and of no other, whatever privileges it may there be permitted to enjoy, even though they be identical with those it enjoys at its home. But we have dwelt long enough upon the reasons upon which we conceive the doctrine relating to this subject rests. We have done this in response to suggestions and arguments advanced for the plaintiff in error. The question itself is, we think, settled for us by the authority of decisions of the Supreme Court as well as of a decision of our own. *Railroad Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Nashua & Lowell R. Co. v. Boston & Lowell R. Co.*, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Patch v. Wabash R. Co.*, 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204; *Williamson v. Krohn*, 66 Fed. 656, 13 C. C. A. 668.

In *Nashua, etc., R. Co. v. Boston, etc., R. Co.*, the suit was brought by one constituent of a combination against the other in the federal Circuit Court in Massachusetts. The combination bore the name of the complainant which was incorporated in New Hampshire. The defendant was a Massachusetts corporation. But by the reciprocal legislation of both states they had been united for the purposes of management and operation and their stock had been fused; and the property of each corporation was declared to be the joint property of the stockholders of both. This legislation had been accepted by the stockholders of both corporations, and a single board of directors had managed the property as a unit for more than forty years. The plea that there was no diversity of citizenship was overruled, and the jurisdiction was sustained.

In the case of *Patch v. Wabash R. Co.* the suit was brought by a citizen of Illinois in a court of the state of Illinois against a corporation which was consolidated under the several laws of Illinois and several other states. The petition for removal alleged that the plaintiff was a citizen of Illinois, and that the defendant was a corporation organized under the laws of Ohio and was a citizen of that state; and, upon these bare facts, sufficient grounds for removal were stated. But, on the case coming into the federal court, the plaintiff filed a plea setting forth that the defendant was not only a citizen of Ohio as the petition for removal alleged it to be, but was also a citizen of Illinois and still other states. This method of raising an issue upon the validity of a removal is one recognized by the courts. The defendant demurred to this plea. The plea was overruled, and the cause proceeded to judgment in the federal court. Eventually the judge made a certificate that the judgment was based solely on the ground that the controversy was one between citizens of different states, and that in his opinion the defendant was not a citizen or resident of Illinois. The question of jurisdiction was brought to the Supreme Court by the plaintiff, who had been defeated, on a writ of error and the judge's certificate which came with it. The Supreme Court, speaking by Mr. Justice Holmes, stated the question to be whether in view of the facts alleged in the plea the opinion of the lower court that the defendant was not a citizen of Illinois was correct. And it was held not to be, and the result was that both the parties were citizens of Illinois. The

judgment was reversed with a direction to remand the cause to the state court. In the opinion Mr. Justice Holmes said:

"The defendant exists in Illinois by virtue of the laws of Illinois. It is alleged to have incurred a liability under the laws of the same state and is sued in that state. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere."

In that case the liability was incurred in the state of Illinois and the learned justice recites that fact. But we conceive that the statement would be equally true if it had characterized the liability as being one which the defendant had incurred in any state to whose laws it was amenable, the right of action being transitory, as we have observed. We are therefore of opinion that the court below did not err in holding that it had jurisdiction.

It is next insisted that the court erred in not holding a certain alleged compromise and settlement between the parties to be a valid bar to the further prosecution of the action. The facts upon which this insistence is made were as follows: The petition in this case was filed November 7, 1907; and on the same day on a showing the court made an order that the plaintiff be allowed to prosecute his action in forma pauperis. But the court made a further order relative thereto, as follows:

"And it is further ordered that any sum received in this case by judgment or otherwise be paid by the defendant into the registry of the court, there to abide the further orders of the court. And it is ordered that a copy of this order be furnished attorneys for both parties."

On December 7th following the defendant filed its answer joining issues on the petition. On January 16, 1908, the defendant filed a stipulation for a settlement between the parties for the sum of \$500, alleged to have been made on the 27th of November preceding; and on March 4, 1908, filed an amended answer setting up the settlement and an agreement to dismiss the case. To so much of the answer as related to the agreement for a settlement the plaintiff replied by a general denial. The case coming on for trial the parties stipulated in writing that the issue concerning the settlement should be first tried by the court without a jury; and the trial on the merits was suspended until this was done. The plaintiff's contention was that the agreement for a settlement, which was in writing, was obtained from him by fraudulent practices of the defendant's agents and particularly that it was obtained from him while he was intoxicated to such an extent that he was not conscious of what he was doing, and that the defendant's agents knew of his condition and took advantage of it. Some of the evidence had a tendency to prove these facts. The defendant objected that, by delaying for several months to repudiate the settlement and return the \$500, the plaintiff had confirmed the agreement. There were circumstances explanatory of the failure of the plaintiff to return the money. The defendant paid the money to the plaintiff in disregard of the order of the court. The plaintiff deposited it in a bank, and after the trial of this issue and the decision of the court upon it, but before the trial of the principal case before the jury, the money was

paid into court pursuant to the order of the court. But we need not dwell upon these particulars. The law and the facts were submitted to the court upon the evidence, and the court holding the settlement invalid set it aside. Apparently this decision was final, and not reviewable. But the defendant filed a general exception, which did not indicate any particular ruling as a ground of exception, whether it was to the finding of the court that the plaintiff was incompetent at the time of the settlement, whether it was that the court found the plaintiff had not lost his right to disaffirm it by his delay, whether it was that the defendant had not paid the money into court as had been ordered, or whether it was that the court held that the money might still be refunded by payment into court as should have been done when the money was received. We think no question was preserved by the exception. Besides, the court was sitting to determine whether the contract should be rescinded. It was a question of an equitable nature which would have furnished the ground for the filing of a bill; and courts of law have held that, where such a question arises incidentally, the court may itself settle it on the principles of equity. But equity would say that the court might be satisfied if the money was brought into court at any time before final judgment. We think that, for the reasons we have stated, this assignment of error should be overruled.

At the close of the evidence, the defendant requested the court to instruct the jury that the plaintiff was not entitled to recover. This the court declined to do, and the defendant excepted. The evidence is all in the record. We have read it attentively with a view to the criticisms of counsel for the defendant, and are quite convinced that there is not enough of substance in them to require a discussion of the testimony in detail. This being so, it must suffice to say that there was testimony amply sufficient, if the jury believed it, to support the petition; that the evidence tended to show that at the time and place of the accident the roadbed was not so firm and rigid as to properly hold the ties in place; that the ties were some of them rotten; and that the rails were not properly secured to the ties, and that these conditions led to the derailment of the train from which the plaintiff's injury happened.

The brief of counsel refers to several rulings of the court on the admission of testimony and to which the defendant objected and excepted. But the reasons for the objections were not stated, and the exceptions will not be considered. The charge of the court was full and fair and quite adequate to instruct the jury upon all the relevant questions of law.

The refusal of the court to grant a new trial is not, as we have many times repeated, subject to review in this court.

The judgment will be affirmed, with costs.

BOARD OF DIRECTORS OF PLUM BAYOU LEVEE DIST. v. ROACH et al.†

(Circuit Court of Appeals, Eighth Circuit. November 19, 1909.)

No. 3,031.

1. **LEVEES (§ 16*)—CONTRACT FOR CONSTRUCTING LEVEE—ACTION FOR BREACH.**

In a contract with the directors of a levee district for the construction of a levee by plaintiffs along the front of the Arkansas river, as shown on maps and profiles made by the board's engineer, to be paid for in accordance with his measurement of the work, a provision that any change in the alignment of the levee made by the engineer should not entitle plaintiffs to any allowance beyond the final measurement of the work did not cover a change from the original line along the bank of the river on dry ground to a course half a mile back on swampy ground; and where such change was agreed to by plaintiffs on agreement by the engineer that the board should obtain right of way for a ditch to drain the swamp, for the construction of which plaintiffs were to receive under the contract the same pay as for moving the same quantity of earth on the levee, which agreement was not kept, and by reason thereof the cost of the work in the new location was doubled, plaintiffs were entitled to recover such extra cost as damages for breach of the agreement.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 16.*]

2. **LEVEES (§ 16*)—CONTRACT FOR CONSTRUCTION OF LEVEE—POWERS OF ENGINEER.**

Where plaintiffs contracted with defendant, a levee board, to construct a levee, defendant to procure right of way for the levee and all necessary borrow pits and drainage ditches, the contract providing that defendant's engineer should have supervision of the work with authority to make changes in the alignment on his making a considerable change which made it necessary for the proper prosecution of the work that a ditch should be made to drain a swamp through which the new route passed, his agreement that defendant would procure right of way therefor was within his powers and bound defendant, and was not a new contract within a by-law of defendant requiring construction contracts to be in writing.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 6; Dec. Dig. § 16.*]

3. **DAMAGES (§ 125*)—BREACH OF CONTRACT TO PAY MONEY—MEASURE OF DAMAGES.**

Where a levee board was unable to make payments on a contract for the construction of a levee when they matured, but issued to the contractors certificates of indebtedness bearing interest which the contractors sold at a discount, they were not entitled to recover from the board as damages for breach of the contract the amount of such discount; the measure of such damages being the interest which was provided for in the certificates.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 340; Dec. Dig. § 125.*]

4. **WORDS AND PHRASES—"ALIGNMENT."**

The word "alignment" used with reference to a system of drainage means the ground plan of the work.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 307.]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by M. J. Roach and Walker Stansell, partners, as Roach & Stansell, against the Board of Directors of the Plum Bayou Levee District. Judgment for plaintiffs, and defendant brings error. Affirmed on condition.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 4, 1910.

Charles T. Coleman (George W. Murphy, William F. Coleman, and W. M. Lewis, on the brief), for plaintiff in error.

W. B. Smith (J. M. Moore and J. Merrick Moore, on the brief), for defendants in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. For convenience in the statement of this case, plaintiff in error will be called defendant and defendants in error plaintiffs.

The defendant, Plum Bayou Levee District, was created by an act of the General Assembly of the state of Arkansas (Laws 1905, p. 83), entitled:

"An act to lay off and establish parts of Pulaski, Lonoke and Jefferson counties, Arkansas, into a levee district, to be known as the Plum Bayou Levee District, for the erection and maintenance of a levee in said district, to incorporate a board of levee directors for said district, and for other purposes."

Said act became effective February, 13, 1905. The act named the individuals who should compose the first board of directors.

It was also provided that:

"The directors herein named and their successors in office shall constitute, and are hereby declared to be, a body politic and corporate, by the name and style of Board of Directors of Plum Bayou Levee District, and by that name may sue and be sued, plead and be impleaded."

By the act it was provided:

"Said board of levee directors hereby created shall organize by electing a president, vice president, a secretary, a treasurer, a chief engineer, and such other officers as may be necessary to carry out the purpose of this act, and prescribe the duties and fix the salaries of said officers."

The act not only empowered the board of directors, but made it their duty, to levee the Arkansas river front between certain points in the act named, and they were authorized to exercise the right of eminent domain for the purpose of building, erecting, and maintaining a levee through, over, and across the land of any individual, firm, or corporation in said district. All contracts for the construction of levees were to be let to the lowest responsible bidder after advertising for 30 days, except in case of a break in the levee or a break threatened by a caving bank or for other cause demanding immediate attention. The act provided that all work let or contracted for by the board as therein provided for, excepting emergency work, should be executed according to the plans and specifications furnished by said board and made a part of the contract, and should be performed under the supervision and to the satisfaction of the chief engineer.

The board organized as provided by the act, and elected, among other officers, a chief engineer, adopted by-laws, one defining the duties of the engineer as follows:

"Supervision of all service, locations, maps, and profiles and estimates of all construction, and such other duties as may properly come within his department."

Another by-law, No. 9, was as follows:

"All contracts made by the president or other officers or other agents of the board shall be in writing; otherwise of no legal effect."

On the 23d day of March, 1905, the board of directors of defendant, having theretofore advertised for bids for the purpose, entered into a contract with plaintiffs to construct some 18 miles of levee, as shown by maps and profiles then in the office of said board of directors, at the agreed price of 12 $\frac{1}{4}$ cents per cubic yard, the work to be constructed and finished as described in the specifications attached to and made a part of the contract, and agreeably to the direction from time to time of the chief engineer and his assistants. The contract provided that, if plaintiffs should refuse or neglect to prosecute the work with force sufficient in the opinion of the chief engineer for its completion within the time specified in the agreement, the engineer was authorized to employ such force as in his opinion might be necessary to insure the completion of the work within the time limited, at such wages as he might find it necessary or expedient to give, at the expense of plaintiffs, or the chief engineer might declare the contract, or any portion or section embraced therein, forfeited.

The contract contained also the following provision:

"It is expressly understood that the prices herein stipulated to be paid refer to final and accurate measurement of the work embraced in this contract, and it is further understood that the quantities and values of work embraced in this contract, at the date of its ratification, as shown on the plans and profiles, are only approximate, and no subsequent diminution or increase in the amount of work that may arise either from error in the original estimate, or from any change that may be made in the gradients or alignment, shall entitle the parties of the second part to any allowance whatever beyond the final measurement of the work."

The contract provided that:

"Between the 1st and 5th of each month during the progress of this work, or as near thereafter as possible, an estimate shall be made of the quantity and relative value of the work done by the chief engineer and furnished to the president, who shall pay to the parties of the second part eighty-five per cent. of the estimate in cash, the fifteen per cent. being retained to guarantee the prompt and proper completion of the work."

In the specifications it was provided:

"That drains, ditches, and channels for streams, when necessary for the proper execution of the work, must be made by the contractor, as directed by the engineer."

"Excavation for drainage of borrow pits, when directed, shall be included in the estimate of yardage and paid for at the contract price."

"The engineer shall have power to designate the exact locality at which the work shall be prosecuted."

"This agreement is made with the understanding that the right of way and earth for constructing the levee will be furnished by the Board of Directors of the Plum Bayou Levee District, but no claim for damage or expense is to be made by the contractor on account of delay or failure in securing such right of way. In case of such delay or failure to secure the right of way, recommendation for proper extension of the contract will be made in the discretion of the party of the first part."

"The specifications, if not understood, will be fully explained by the chief engineer."

"The decision of the engineer, officer in charge, as to the quality and quantity shall be final."

During the progress of the work it was concluded that at a point where the line of the levee, as shown on the map and profile, ran along the river bank in front of a cypress brake, a change should be made. This brake comprised from 10 to 15 acres. The chief engineer at first thought that the line ought to be changed and constructed through the brake. This was objected to on the part of plaintiffs because of the large quantity of water within the brake. They suggested and thought the change could be made so as to have the levee run around and back of the brake. It was finally agreed that the location of the levee at this point should be changed so as to run back of the brake a distance of 2,600 feet at the farthest point from the line of original location, as shown on the maps and profile mentioned in the contract, and plaintiffs agreed to such change on condition that defendant would provide for the construction of a drainage ditch to drain the brake to the river, some 400 or 500 feet in length. This the chief engineer agreed should be done, and plaintiff agreed to construct the ditch at the same price per cubic yard, and the engineer agreed to procure the right of way. Plaintiffs then constructed the levee as definitely fixed by the engineer in the rear of the brake.

In May, 1905, the defendant was unable, on account of lack of funds, to make cash payment of the 85 per cent. of the work as it progressed, and it was agreed between the plaintiffs and defendant that defendant would give notes for the amount, which should draw interest at 8 per cent.; and plaintiffs agreed to accept such notes in lieu of the cash, they having arranged with a bank to discount the notes at par, if they drew interest at 8 per cent., such fact being known to defendant.

Thereafter the Supreme Court of the state rendered a decision to the effect that the defendant was empowered to issue certificates of indebtedness for work done, but that such certificates could only draw interest at the rate of 6 per cent., and defendant issued to plaintiffs, in lieu of cash, certificates drawing 6 per cent. interest, which certificates plaintiffs were required to discount at less than the face value to procure the money with which to continue the work. Defendant was unable to, or did not, procure the right of way for the drainage ditch to the river from the owner of the land through which it should pass, and such ditch was not constructed. The failure to have the drainage ditch caused plaintiffs considerable extra expense and damage to construct the levee over the changed route, the evidence showing it cost some \$17,000 more than it would have cost had the ditch been constructed. This action was brought to recover damages which plaintiffs sustained by reason of defendant's failure to provide said drainage ditch, and also for the difference between the face value of the certificates and the amount plaintiffs realized upon their sale. On the trial a verdict and judgment was rendered in favor of plaintiffs and defendant brings the case here by writ of error.

The principal contentions are based upon the assertion that, under the contract, it was the duty of plaintiffs to construct all necessary drains and ditches; that the change in the location of the levee from the river front to the rear of the brake was only a change in the alignment, which the contract provided should be made without any allowance to plaintiffs beyond the final measurement of the work; and that

it was not within the authority of the engineer to modify the contract or make a new one in respect to these matters.

While the word "alignment" means the ground plan of a work, yet, when used in a contract for the construction of such work, to determine the meaning as used and understood by the parties, resort must be had to the entire terms and parts of the agreement. The agreement in question was to construct a levee along the front of the Arkansas river, as shown on maps and profiles, prepared by the defendant. The alignment thus shown was subject to changes within such reasonable limits as might be found desirable as the work progressed, and which would not materially change the character and cost of the work. It did not, however, contemplate a radical change from dry ground, as the evidence established that was where the line was located, as shown on the profile, to a place 2,600 feet distant, where the character of the ground was wet, the earth placed in the embankment retaining the moisture, and the cost of construction increased nearly double. *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637; *Wood v. Wayne*, 119 U. S. 312, 7 Sup. Ct. 219, 30 L. Ed. 416; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934. Such radical change would have entitled plaintiffs to recover as damages the entire increased cost of construction. They, however, waived that by consenting to the change upon condition that a ditch would be constructed to drain the brake. It is for a breach of the agreement to cause such drainage upon which plaintiffs found their first cause of action for damages, which we think, under the law and evidence, they are entitled to maintain.

The necessary drains and ditches which the contract provided the plaintiffs should construct were only such drains and ditches as might be required or rendered necessary had the levee been constructed in substantial conformity with the specifications embraced in the contract, and for which defendant should procure the right of way.

The contract empowered the engineer to designate the exact location at which the work was to be prosecuted. He was to explain the specifications when not fully understood by plaintiffs, and the whole work was to be performed under the supervision and to the satisfaction of the chief engineer. Under the by-laws he was given, as we have seen, "supervision of all service, locations, maps and profiles, and estimates of all construction, and such other duties as may properly come within his department." His authority was very broad. He, in fact, stood practically in the place of the board of directors after the contract had been let. Changes in alignment, such as the progress of the work should indicate as necessary or desirable, he was fully authorized to make, and, if emergency required that at some point more extensive drainage was necessary for the proper and successful construction of the work than would have been required had no change in alignment been made, he had full power and authority to provide for the same. While this particular work was not, strictly speaking, required according to the original plans and specifications, it was done in harmony therewith, and was such as the exigencies of the occasion required. It is, however, said that, while the original contract provided that the board of directors should procure the right of way and

earth for constructing the levee, it also provided that "no claim for damage or expense is to be made by the contractor on account of delay or failure in securing such right of way." We think this provision had reference to damages and expense incurred by reason of the contractor's inability to perform the whole work contracted for, on account of delay or failure to procure right of way upon which the levee was to be constructed, and for borrow pits from which the earth could be taken, and does not refer to damages for failure to procure the right of way for such drainage as was required and rendered necessary in this case by reason of the change in alignment. This is apparent when we consider the last clause of the agreement, providing for an extension of time to complete the work upon failure to procure the right of way. It certainly has no application in this case where, as shown by the evidence, notwithstanding plaintiffs had constantly and repeatedly demanded of the engineer that the ditch be located and its construction permitted, the president of the defendant wrote plaintiffs during the progress of this particular work to the effect that, if they did not put on more force and complete that work without unusual delay, the defendant would do so at the expense of plaintiffs. Plaintiffs were thus required to, and did, complete the work at a large increase in the cost.

It is, however, urged that the agreement of the engineer to procure the right of way for this drainage ditch was a new independent agreement, and, as it was not in writing, as required by the by-law of the board, it had no legal effect. We do not think the agreement to procure the right of way such a contract as contemplated by the by-law. The defendant in the contract agreed to procure and furnish all necessary right of way. It was the province of the engineer to determine when and what right of way was required in the proper construction of the work; and, having determined that the change in alignment was necessary and that, because thereof, drainage of the brake was required, his agreeing that the right of way would be procured, was but stating what the specifications required defendant to do, and by the contract he was designated as the person to interpret the specifications. His agreement, then, to procure this right of way for the drainage ditch, was but an assertion that defendant would perform the contract on its part. In doing this he made no new or additional contract, and the by-law referred to had no application to the case.

Again, it is said that, upon the completion of the work, the parties had a full settlement, and that final payment was made and accepted as such. We need not review the conflicting evidence in this regard, as that question was submitted to the jury under proper instructions by the court, and we see no just grounds to disturb their finding.

The court instructed the jury that plaintiffs, under their second cause of action, were entitled to recover the difference between the face value of the certificates and the amount for which they were able to sell them in the market, with interest thereon. This was erroneous. In all contracts for the payment of money the only damages recoverable for a breach of payment within the time specified is interest. Besides, plaintiffs having sold the certificates, the holders are entitled to receive the whole face value from defendant, and plaintiffs cannot,

therefore, recover the discount. Such was the holding in *Looney v. District of Columbia*, 113 U. S. 258, 5 Sup. Ct. 463, 28 L. Ed. 974. See, also, *Savage v. United States*, 92 U. S. 382, 23 L. Ed. 660; *Insurance Co. v. Piaggio*, 16 Wall. 378, 21 L. Ed. 358.

As the amount of the discount was shown to have been \$3,333.87, it will not be necessary to reverse the case if a remittitur is entered. The order, therefore, is that, if the plaintiffs shall enter a remittitur upon the record in the court below within 60 days from the filing of this opinion in the sum of \$3,333.87, with interest at 6 per cent. from August 25, 1906, and file a copy of the remittitur in this court, the judgment will be affirmed. If such remittitur is not so entered, the judgment will stand reversed, and a new trial granted.

DULUTH ELEVATOR CO. V. WALLIN.

(Circuit Court of Appeals, Eighth Circuit. November 26, 1909.)

No. 3,049.

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

A grain elevator owned by defendant, when filled with grain, settled and sagged over, causing a belt conveyor, which extended from the ground through the center, to tear loose some of the boards and shingles from the roof. Plaintiff, with others, was employed to load a car with grain on the south side of the building while a strong wind was blowing from the north, and was struck and injured by a board which fell upon him. There was evidence tending to show that when the men went to work there was a loose board on the roof flapping in the wind, and that it was seen by defendant's superintendent. *Held*, that such evidence warranted the submission to the jury of the question of defendant's negligence in allowing such board to remain after the men were set at work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 217*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

In such case plaintiff cannot be held to have assumed the risk; it not appearing that he saw or knew of the loose board, or that it was plainly observable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Ivar Wallin against the Duluth Elevator Company. Judgment for plaintiff, and defendant brings error. Affirmed.

In November, 1905, at a siding on the line of the Great Northern Railway in the county of Kittson, Minn., called Chatham, plaintiff in error (hereinafter called the "elevator company") had constructed, owned, and operated a frame elevator about 30 feet square and about 60 feet in height. On the top of this elevator building, running east and west its entire length, there was what is called a "cupola," about 8 feet in width and height, roofed with shingles on inch boards nailed to 2x4-inch rafters. Extending from the ground

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

up through the building, and into the cupola, near the center, there was what is termed a "leg," through which a conveyor belt, employed in carrying the grain in the elevator, passed. This leg was in the nature of a wooden chimney about 18 inches in thickness north and south, and 48 inches in width east and west, set rigidly in a steel plate on the ground, and was not fastened to the building.

On the 14th of November, 1905, the elevator being filled with grain, and the foundation thereunder being weak on account of the wet ground on which it was located, settled under the weight, and in settling inclined to the west over the side track on which it was located to such an extent that the rigid leg, not inclining with the building, protruded through the roof of the cupola, tearing loose some of the rafters, boards, and shingles. In order to prevent the building from collapse, two holes were cut in the south side of it which permitted the grain to run out on the ground. A car was placed on the side track at the southwest corner of the building, and the superintendent of the elevator company, W. L. Beaton, went about 8 miles to a place called "Hallock," and employed a number of persons to assist in loading the grain from the ground into the car. Among the persons so employed who came to Chatham was James Wallin, a minor, about the age of 18 years. The persons so employed reached Chatham about the noon hour and soon thereafter commenced loading the grain into the car. About 3 o'clock in the afternoon, as young Wallin was engaged in carrying grain in a basket from the ground to the car, and when about 20 feet south of the elevator building, he was struck on the head, knocked senseless, and severely injured by the falling of a board, variously estimated by the witnesses at from 2½ to 5 feet in length, about 12 inches wide, with shingles and a 2x4 nailed to it. The superintendent had been at the elevator about 10 o'clock in the forenoon before going to Hallock to employ the men. Had noticed the manner in which the leg had protruded through the roof of the cupola, tearing it loose, and had instructed an employé to go on the roof and remove the loosened portions, because, as he testified, he thought them dangerous to those working around the building. Gettormson, the employé so instructed, did go to the roof of the cupola and throw down all the boards he discovered to be loose. At the time the accident occurred the wind was blowing a heavy gale from the north or west of north. There is a conflict in the evidence as to whether the superintendent returned from Hallock to Chatham in the same conveyance with the men employed to load the grain, and also as to whether any loose board or boards were known by him to remain on top of the building after Gettormson had removed those he discovered. However, there is evidence in the record, if believed by the jury, from which it was warranted in finding there was a loose board on top of the elevator flapping in the wind at the time the men from Hallock drove up to the building; that the attention of Superintendent Beaton was called to it, who remarked it was dangerous. After the accident this loose board was not seen on the top of the building.

The action was brought by the father of the injured boy to recover damages for the injury so sustained by his son, as may be done under the statutes of the state of Minnesota.

From a judgment in favor of the plaintiff, the elevator company brings error.

Morton Barrows, for plaintiff in error.

Charles Loring (H. Steenerson, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge (after stating the facts as above). The sole ground relied on for reversal is the refusal of the trial court to instruct a verdict for the elevator company. In support of this ground of error three contentions are presented: (1) That the evidence shows no negligence on the part of the elevator company; (2) if any such

negligence be shown from the evidence, it was not further shown to have been the proximate cause of the injury; (3) that the injured boy assumed the risk of the injury received by him.

While some claim is made in argument that the evidence fails to disclose from whence the falling board came which caused the injury, yet there can be but little, if any, doubt, from a consideration of all the evidence found in the record, it was a part of the roof of the cupola torn loose or partially loose by the action of the elevator in sinking downward and inclining to the west, pushing the leg through the roof of the cupola, tearing and breaking it. And from the position which Wallin occupied at the south of the building, and the direction from whence the wind was blowing at the time, the jury was fully warranted in finding the board came from the broken roof of the building by the action of the wind.

Again, while the evidence is conflicting, we are of the opinion the jury was warranted in finding the dangerous position in which young Wallin was placed at the work of carrying the grain into the car was known to the elevator company prior to the happening of the accident, and in the exercise of due diligence this danger should have been obviated or some precaution taken to avert it. The defendant company knew the torn and broken condition of the roof by reason of the rigid leg breaking through, and knew in such condition it was dangerous, for the representative of the company so admits in his evidence, and he also gave direction to have it remedied. From all of which it is conclusively shown the elevator company knew prior to the injury which befell young Wallin that with the wind blowing from the north an injury might befall any one working on the south side of the elevator if the portions of the roof broken and torn loose by the rigid leg pushing through were not removed.

The single question, therefore, on this branch of the case, was: Did the elevator company, through its representatives, know a broken and loose board remained on top of the elevator which might be blown therefrom after young Wallin was placed at work on the south side of the building prior to his injury? On this branch of the case the witness Saf testified as follows:

"Q. When you first came to the elevator, did you see Mr. Beaton just as you came up to the elevator? A. Yes, sir; I looked at the elevator going by there. Q. What did Mr. Beaton say about the elevator? A. He said there was a loose board on them. Q. Did you see it also? A. Yes. Q. Where was that loose board that he spoke of? A. Up on top—on top of the elevator. Q. Tell the jury what you saw about that—about the loose board. A. I saw there was a loose board, and Mr. Beaton says it was dangerous, he says— Q. Said what? A. Said it was dangerous. Q. And how was it loose? A. It was flapping in the wind. Q. What next was done after Beaton said that? A. He drove by the elevator on the south side—start to work. Q. Started to work? A. Yes, sir. Q. And what work did this James Wallin, the plaintiff's son, do? A. Carried the baskets."

The witness Nygaard testified as follows:

"Q. When you came to the elevator, what did you see? A. I see the roof was broken up on the top. Q. You saw the roof was broken on top? A. Yes. Q. What was it that was broken? Describe it, tell the jury what it was like. A. I see there was some boards sticking up there, didn't put close attention about it, but I saw that some board was sticking up there. Q. Were they fast

or loose? A. Well, sticking up there; I suppose they was loose. Q. And when was that that you saw that? A. It was just—we were coming from Hallock a little piece north of the elevator; it was pretty close to the elevator when I saw it. Q. And where did you go then? A. Well, I went over there to the south side, and I started to work * * * Q. You stated, in your direct examination, that you saw a piece sticking up? A. Yes. Q. And when you went around, after the accident, did you or did you not see that piece then, or was it gone—the one that was sticking up when you first saw it? What about that piece, was it sticking up after the accident, or was it gone? A. It was gone then."

On cross-examination the same witness testified as follows:

"Q. As you came down east you saw this piece sticking up in the roof when you were quite a distance off? A. Yes, sir. Q. Therefore you saw it on the north side of the roof? A. Yes. You see, that top on the south side was sticking up like that (indicating). Q. You mean— A. You see, that piece was broken off on the south side. Q. Was sticking up from the south side, but sticking up so you could see over the top. * * * Q. And you could see it sticking up over the peak of the roof? A. Yes. Q. That is right? A. Yes, sir."

While it is true this testimony was denied by the superintendent of the elevator company, and while the witness Gettormson testified he removed all of the loosened portions of the roof before the arrival of the men from Hallock, yet the weight of the evidence and the credibility of the witnesses was for the consideration of the jury under proper instructions. As no complaint is made of the charge given, in this respect, in the light of the foregoing evidence, it must be held the verdict returned is supported by the evidence and must stand unless overthrown on other grounds.

Again, it is contended the injured boy by his contract of employment assumed the ordinary risks incident to his employment; therefore even if it should be admitted or determined his injury came from a source of danger of which the principal was advised, yet there may be no recovery in this case. The argument made in this behalf is: As the grain which young Wallin was employed to assist in placing in the car was let out on the ground for the purpose of relieving the structure from the heavy weight which had caused it to sink and incline, and to prevent it from entire collapse, the injured boy will be presumed to have known its dangerous and defective condition and to have assumed the risk of working where he knew or should have known of the dangers to be encountered, and *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440, and kindred cases, are cited in support of the contention made. In that case, Mr. Justice Gray, delivering the opinion of the court, said:

"The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are engaged in erecting, in a safe condition at every moment of their work, so far as the safety depends upon the due performance of that work by them and their fellows."

As young Wallin was employed to assist in removing the grain from the ground alongside the elevator into the car, and as this grain had been drawn from out the elevator onto the ground after it had sunk down and inclined to the west by reason of the great weight therein, and as this was done to prevent the entire collapse and falling of the

building, had the injury received by Wallin occurred on account of the collapse of the building, in the absence of any assurance on the part of the elevator company of its safe condition, the doctrine contended for might apply, for the condition of the building in this respect was open and obvious to all, and the very necessity which gave rise to the employment of young Wallin arose out of this weakened and falling condition of the building; therefore he might be presumed to have known the defective condition of the building and the risk incurred by him in there working. However, it is not shown in this case he either knew of the damaged condition of the roof, or that such condition was plainly observable, or that from any cause he should have apprehended danger from that source. Whereas, on the other hand, the elevator company knew of the threatened danger and failed to warn him or take any precaution to protect him therefrom.

Mr. Justice Day, delivering the opinion of the court in *Choctaw Oklahoma, etc., R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, in speaking of the doctrine of assumption of risk, said:

"Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employé. *Texas & Pacific Ry. v. Archibald*, 170 U. S. 665 [18 Sup. Ct. 777, 42 L. Ed. 1188]."

While, as has been said, the evidence in this case is conflicting, yet, as there is found in the record sufficient, if believed by the jury, to warrant the finding made that the board which injured young Wallin in falling was loose on top of the cupola prior to the accident, which fact was known to the elevator company and unknown to Wallin, and as the wind was blowing hard from a direction which would place one working on the south side of the building, where he was directed to work, in a position to receive injury from such loosened board, and as a result of his working in such position of danger he was struck and severely injured by the board, it must be held the elevator company was negligent, that such negligence was the proximate cause of the injury sustained, and that young Wallin did not by his contract of employment assume the risk of such injury coming to him, as it did, from a source of danger of which he had no knowledge or warning, and which was not apparent or obvious to him, but was known to the elevator company.

It follows the judgment must be affirmed.

LOMAX v. FOSTER LUMBER CO. et al.†

(Circuit Court of Appeals, Fifth Circuit. December 14, 1909.)

No. 1,937.

1. REMOVAL OF CAUSES (§ 52*)—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

An action of trespass to try title brought in a Texas court under the statute of that state, in which, as permitted by Rev. St. Tex. 1895, art. 5255, different persons each claiming title to the same tract of land are made parties and answer setting up their respective claims, some of said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied January 4, 1910.

defendants as well as the plaintiff being citizens of the state while others are citizens of another state, does not involve a separable controversy between citizens of different states which render it removable by a nonresident defendant.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 52.*

Separable controversy, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

2. REMOVAL OF CAUSES (§ 106*)—REMAND—WAIVER OF RIGHT.

Where a federal court does not acquire jurisdiction by the removal of a cause, it cannot be conferred by any subsequent proceedings by consent or otherwise.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 106.*]

In Error to the Circuit Court of the United States for the Southern District of Texas.

Action by Annie T. Lomax against the Foster Lumber Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

On October 27, 1906, the plaintiff in error, Annie T. Lomax, filed in the district court of Liberty county, Tex., her original petition against the Foster Lumber Company and the Trinity River Lumber Company. The petition was in the form of trespass to try title, as required by the Texas statutes. On January 10, 1907, she filed in said court her first amended original petition, which is in every respect the same as her original petition, with the exception that, in addition to the Foster Lumber Company and the Trinity River Lumber Company, she complains of and makes parties L. H. Perry and J. B. Mann of Harris county, Tex.

The plaintiff alleged that she resided in Harris county, Tex., and that the defendant the Foster Lumber Company is a corporation duly incorporated under and by virtue of the laws of the state of Missouri, and doing business in the state of Texas under and by virtue of a permit from the state to do business therein, and that the defendant the Trinity River Lumber Company is a corporation duly incorporated under and by virtue of the laws of the state of Texas, and the plaintiff further shows that it is necessary to make L. H. Perry and J. B. Mann, of Harris county, Tex., parties to this suit, and this plaintiff, now complains of all of the parties above mentioned as defendants herein, and shows the court that the defendants the Foster Lumber Company and the Trinity River Lumber Company have been heretofore duly served with citation, and plaintiff prays for citation for the newly made defendants L. H. Perry and J. B. Mann. This plaintiff shows to the court: That she is the legal owner in fee simple of the tract of land hereinafter fully described. That on or about the 22d day of October, 1906, and long prior to said date, she was in peaceable and adverse possession of said property hereinafter described, using, cultivating, and enjoying the same through her tenant, who was actually occupying the same. That on or about the 22d day of October, 1906, the defendants and each of them unlawfully entered upon said land, and ejected the plaintiff therefrom, and now unlawfully withhold from the plaintiff the possession thereof, to her damage in the sum of \$20,000. That the land so unlawfully entered upon by the defendants and now unlawfully withheld from the possession of this plaintiff is described as follows, to wit: Being 1,476 acres of land in Liberty county, Tex., what is known as the David Rankin survey, and the same land that was patented to David Rankin on the 30th day of August, 1849, by patent No. 25, volume 9, which said land is more accurately described by metes and bounds as follows, to wit: Then follows description by metes and bounds. On January 10, 1907, the defendant L. H. Perry filed as an answer in said cause a general demurrer, general denial, and a special plea setting up the fact that he was the owner of one-half of the David Rankin one-third of a league of land, and that his codefendant, the Foster Lumber Company, is the owner of the remaining one-half thereof, and is asserting title

to the entire survey. And he filed a cross-bill against the plaintiff and all his codefendants, praying for judgment for one-half the land and a partition between himself and the Foster Lumber Company. On February 18, 1907, the defendant, John Mann, filed in the district court of Liberty county, Tex., his answer, consisting of a general demurrer and general denial.

On February 18, 1907, the defendant the Trinity River Lumber Company filed in the district court of Liberty county, Tex., its answer, alleging that: "It is not a corporation or a partnership, and that, in fact, it had no legal identity, but that all the property held by it belongs to and is the property of the defendant the Foster Lumber Company, and further represents to the court that it makes no claim to the property sued for, except such as may be held by it for the use and benefit of the Foster Lumber Company, and except for the rights so held it disclaims any interest or title in the land sued for, and asks that the case may be dismissed so far as it is concerned." On February, 18, 1907, the defendant the Foster Lumber Company filed its answer, consisting of a general demurrer, general denial, and plea of the statutes of three, five, and ten years' limitation, and a plea in reconvention, alleging that "it is a corporation organized under the laws of the state of Missouri, and as such is a resident citizen of said last-named state, with authority to take, own, and hold timber and timber lands for the purpose of such organization, and has a permit to do business in the state of Texas with the authority aforesaid; that the plaintiff, Annie T. Lomax, is a resident citizen of the county of Harris, state of Texas; that the value of the property in controversy exceeds the sum of \$2,000, exclusive of interest and costs." This defendant further alleges and represents to the court "that it is the owner and entitled to the immediate possession of the property hereinafter described, and that on or about the 13th day of November, 1906, the said plaintiff wrongfully and forcibly took possession of said property and withholds the same from this defendant, and is now wrongfully and unlawfully withholding said possession from this defendant, to its damage in the sum of \$5,000. The property so wrongfully taken and withheld from this defendant is described as being 1,476 acres of land in Liberty county, Tex., known as the 'David Rankin survey,' being the whole of said survey, which land was patented to David Rankin by the state of Texas August 30, 1849, by patent No. 25, volume 9, being the same land described by plaintiff in her said petition. Wherefore, premises considered, this defendant demands that said cause be dismissed and it go hence without day, and that judgment be entered decreeing the title and writ of possession in said land in this defendant for the recovery of costs, and for general and special relief."

And on February 18, 1909, the Foster Lumber Company filed in the district court of Liberty county, Tex., its petition and bond for the removal of said cause to the Circuit Court of the United States in and for the Eastern District of Texas at Beaumont, as follows: "In the District Court of Liberty County, Texas. Annie Thompson Lomax v. Foster Lumber Company et al. No. 3977. Petition for Removal. To the Honorable L. B. Hightower, Judge of said Court: Your petitioner, Foster Lumber Company, defendant in the above styled and numbered cause, respectfully shows to this honorable court that the matter and amount in controversy exceeds the sum of two thousand dollars (\$2,000.00), exclusive of interest and costs, and said suit is of a civil nature; that the controversy in this suit is, and at the time of the commencement of this suit was, between citizens of different states, and that your petitioner was at the time of the commencement of this suit, and still is, a corporation organized under the laws of the state of Missouri, with its principal office in the city of Kansas City, in said state, and as such is a resident and citizen of the said state of Missouri, and a nonresident of the state of Texas; that the plaintiff, Annie Thompson Lomax, was at the time of the commencement of this suit, and still is, a resident and citizen of the county of Harris, state of Texas, and is and was at the time aforesaid a nonresident of the state of Missouri; that the defendant L. H. Perry was at the commencement of this suit, and still is, a resident and citizen of the county of Harris, state of Texas, and is, and was at the time aforesaid, a nonresident of the state of Missouri; that the defendant J. B. Mann was at the commencement of this

suit, and still is, a resident and citizen of the county of Harris, state of Texas, and is, and was at the time aforesaid, a nonresident of the state of Missouri. Your petitioner further shows to this honorable court that there is in said suit a controversy which is only between citizens of different states, and which can be fully determined as between them, to wit, a controversy between your said petitioner, which avers that it was and is a corporation and citizen as hereinbefore alleged, and the said plaintiff, who your petitioner avers was then and still is a resident and citizen as hereinbefore alleged; that the said controversy is of the following nature: The said plaintiff claims to be the owner of and is herein suing for the title and possession of the property described in her petition, and your petitioner claims to be the owner of and entitled to the possession of the whole of said land, and that your petitioner and the said plaintiff are both actually interested in said controversy, and that your petitioner desires to remove this suit before the trial hereof into the next Circuit Court of the United States to be held in and for the Eastern District of Texas at Beaumont. Your petitioner alleges that the defendant called the Trinity River Lumber Company is neither a partnership nor a corporation, and, in fact, has no legal identity, and is only a name by which your petitioner the Foster Lumber Company, conducts a part of its business, and that it in fact is the Foster Lumber Company, and whatever titles or property stands in its name is in fact property of the Foster Lumber Company. The defendant L. H. Perry is in no wise interested in said property or the title or possession thereof with your petitioner, and, if he has any interest, claim, or right in or to said property, such interest, claim, or right is distinct from and independent of the right and title of your petitioner, and any claim or right that he may assert therein is independent and distinct from the controversy existing herein between the plaintiff and this defendant, and any controversy that the said plaintiff may have with L. H. Perry is separate and distinct from the controversy existing in said suit between said plaintiff and your petitioner. The defendant J. B. Mann is in no wise interested in said property or the title or possession thereof with your petitioner, and, if he has any interest, claim, or right in or to said property, such interest, claim, or right is distinct from and independent of the right and title of your petitioner, and any claim or right that he may assert therein is independent and distinct from the controversy existing herein between the plaintiff and this defendant, and any controversy that the said plaintiff may have with J. B. Mann is separate and distinct from the controversy existing in said suit between said plaintiff and your petitioner. Your petitioner therefore avers that this suit is one in which there can be a final determination of the controversy between it and the plaintiff without the presence of any of the other defendants as parties in the cause. Your petitioner offers herewith a bond with good and sufficient security for its entering in the Circuit Court of the United States for the Beaumont Division of the Eastern District of Texas on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said court should hold that this suit was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said suit if special bail was originally requisite therein. And your petitioner prays this honorable court to proceed no further except to take the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Eastern District of Texas at Beaumont, and it will ever pray."

On February 21, 1907, the plaintiff below filed in the district court of Liberty county, Tex., an answer and exceptions to the sufficiency of the petition of the Foster Lumber Company for the removal of said cause to the Circuit Court of the United States, and in said answer pointed out why said cause should not be removed. On February 21, 1907, the defendant L. H. Perry filed in the district court of Liberty county, Tex., a reply to the petition of the Foster Lumber Company to remove said cause to the federal court, setting up and pointing out to said court the reasons why said cause should not be removed, and objecting to the removal thereof. On the 28th day of February, 1907, the district court of Liberty county, Tex., entered an order directing the removal

of said cause from said court to the Circuit Court of the United States in and for the Eastern District of Texas. On April 1, 1907, the plaintiff in error, Annie T. Lomax, filed a motion in the Circuit Court for the Eastern District of Texas, to remand said cause to the District Court of Liberty county, Tex., and on April 2, 1907, the defendant L. H. Perry filed a like motion to remand. Thereafter, by an agreement of counsel representing the plaintiff and each of the defendants, the cause was transferred from the Circuit Court of the Eastern District of Texas at Beaumont to the Circuit Court of the Southern District of Texas, at Houston, Tex. On November 16, 1908, the cause was called for trial in the Circuit Court of the United States for the Southern District of Texas at Houston, Tex., and was tried by jury, who returned the following verdict: "We, the jury, find for the defendants."

The trial court on this general verdict, and without submitting the issue to the jury, found that the defendant the Foster Lumber Company "is entitled to recover the title and possession of the land in controversy from John Mann and Trinity Lumber Company," and on this finding rendered judgment in favor of said defendant Foster Lumber Company against the plaintiff and the above-mentioned defendants on the cross-bill filed herein by said defendant for the 1,476 acres of land involved in this suit. Before the submission of this controversy to the jury, it was agreed in open court by the Foster Lumber Company and the defendant L. H. Perry that the issue between the last-named parties should be submitted to a determination by the court without the intervention of a jury on the evidence offered in the case, and that for the determination of those issues a trial by jury was expressly waived. The trial court found in favor of the defendant the Foster Lumber Company and against the defendant L. H. Perry on the issues between them, and especially found that A. J. Butler, the grantor of L. H. Perry, obtained no vested right or title to the land in controversy or any part thereof by virtue of the power of attorney given by John J. Rankin to said Butler dated January 13, 1888, and recorded in volume H, p. 398, of the Deed Records of Liberty County, Tex., and the deed from said A. J. Butler to the defendant L. H. Perry, dated December 3, 1906, conveyed no title to the last-named defendant, and it was agreed that L. H. Perry take nothing by his reconvention against the defendant the Foster Lumber Company, and that the defendant the Foster Lumber Company recover against L. H. Perry on his plea and reconvention the title and possession of said land. After this verdict the plaintiff in error renewed her motion to remand the cause to the district court of Liberty county for the reason that the federal court has no jurisdiction thereof.

The trial court overruled said motion by the following order, to wit: "In the United States Circuit Court for the Southern District of Texas, at Houston. *Annie Thompson Lomax v. Foster Lumber Company et al.* No. 155 C. L. On this the 21st day of November A. D. 1908, came on to be heard the plaintiff's motion to remand the above entitled and numbered cause to the Ninth Judicial District Court of Liberty county, Tex., that being the court in which said cause was by the plaintiff originally filed, and it appearing to the court that a motion to remand said cause had been previously made by the plaintiff while the same was pending in the United States Circuit Court for the Eastern District of Texas, at Beaumont, and was by said court overruled, and it further appearing to the court that the motion to remand said cause was not renewed by the plaintiff in this court until after the verdict of the jury was rendered in said cause, it is therefore ordered that said motion be, and the same is, hereby overruled. To which action of the court in overruling said motion the plaintiff, Annie Thompson Lomax, then and there in open court excepted." The plaintiff in error deraigned title through the wife and heirs of the David Rankin, who died in Gonzales county, Tex., in 1885. The Foster Lumber Company deraigned title through and from the David Rankin, who lived in Harris county, Tex., and died about 1860. L. H. Perry claimed title through and from the David Rankin, who died in Harris county, Tex. The record does not show with which David Rankin John Mann aligned himself, and he has made no appearance in this court.

The plaintiff below, Annie T. Lomax, sued out this writ of error, bringing all parties before this court.

Jacob C. Baldwin, for plaintiff in error.
F. D. Minor, Newton C. Abbott, and J. F. Dabney, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The paramount question is the jurisdiction of the Circuit Court through the removal of the suit from the state court. The statutory action of "trespass to try title" was brought by the plaintiff in error in the district court of Liberty county, Tex., to recover one certain tract of land in said county, the David Rankin survey, patented August 30, 1849. By article 5255, Rev. St. Tex. 1895, controlling proceedings in such actions:

"The plaintiff may join as a defendant with the person in possession any other person who, as landlord, remainderman, reversioner or otherwise, may claim title to the premises or any part thereof adversely to the plaintiff."

Under the right thus given, the plaintiff, a citizen of Hill county, Tex., joined as defendants with the Foster Lumber Company a corporation duly incorporated by virtue of the laws of Missouri, the Trinity River Lumber Company, alleged to be a corporation duly incorporated under and by virtue of the laws of the state of Texas with a main office in Harris county, Tex., and L. H. Perry and J. B. Mann, both of Harris county, Tex.

An inspection of the original petitions in connection with the petition for removal shows clearly that the case was not removable solely on the ground of diverse citizenship. If the case was removable at all, it was under that provision of section 1, judiciary acts of 1887 and 1888 (Act March 3, 1887, c. 373, 24 Stat. 552; Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509]), and which reads:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove such suit into the Circuit Court of the United States for the proper district."

The question then is whether the petition for removal filed by the Foster Lumber Company in connection with the pleadings then on file in the state district court shows a separable controversy within the meaning of the statute above quoted.

The status of the Trinity River Lumber Company in this case is important as well as peculiar. Its answer is to the effect that it was neither a corporation nor partnership, had no legal identity, all its property belongs to the Foster Lumber Company, and, except for the rights held for the Foster Lumber Company, disclaims any interest or title to the land sued for, and asks to be dismissed. The petition for removal says that the Trinity River Lumber Company is neither a partnership nor corporation, and, in fact, has no legal identity, and is only a name by which the Foster Lumber Company conducts a part of its business, and that, in fact, it is the Foster Lumber Company, and whatever titles or property stands in its name is in fact property of the Foster Lumber Company. The Trinity River Lumber Company

was not dismissed from the case, but (represented by counsel) continued therein until the final trial, and then judgment was specifically rendered in favor of the Foster Lumber Company against it, and it is a defendant in error in this court. If we take its answer, it has no legal identity, which may mean no capacity to sue or be sued, but it holds property for the Foster Lumber Company and it makes no full disclaimer. By the petition for removal the Trinity River Lumber Company has no identity, but is a business name for and it is the Foster Lumber Company. If these claims for the Trinity River Lumber Company are true, it is difficult to understand why it was not dismissed from the case. If the Trinity River Lumber Company was an entity, capable of being sued, then it was a proper party and its qualified disclaimer would not take it out of the case; and with it in the case, in the attitude given it by the petition for removal, there was clearly no separable controversy.

The defendant Perry was a proper party to the suit. In his answer, filed in the state court prior to the petition for removal, he claims that he owns one-half of the land in controversy, and that the Foster Lumber Company owns the other half, and asks judgment against the plaintiff and his codefendant, the Foster Lumber Company. As to Perry, the petition for removal denies his interest with the petitioner, asserts that, if he has any interest, it is distinct and independent from the controversy between the plaintiff and petitioner. And as to Mann the same averments are made, but Mann pleads only the general issue, and we cannot say under which Rankin or against which parties other than the plaintiff he claims. If Perry's answer controls as to interest and attitude, then, as between the plaintiff below and the Foster Lumber Company, there was no separable controversy.

The petition for removal avers that in the suit there is a controversy between citizens of different states—i. e., the plaintiff and petitioner—which can be fully determined between them without the presence of other parties, but this is a conclusion of the petitioner not borne out by the record. And so it seems that neither in the pleadings in the state court prior to the petition for removal nor in the petition for removal in connection therewith can we find a separable controversy within the meaning of section 1 of the acts of 1887 and 1888 warranting the removal of this case to the Circuit Court. If we look to the entire record before us and into the case as actually tried in the court below, we find that the only separable controversy in the case was between the Foster Lumber Company and defendant Perry, in which trial by jury was waived and the separate issue tried by the court. As the suit brought by the plaintiff in error was an action of trespass to try title under the Texas statute wherein the recovery of one tract only was involved and wherein the plaintiff under the state statute could join all parties who claimed adverse interests as defendant, it is doubtful whether any defendant or defendants could under any circumstances make out a case of separable controversy therein which would warrant removal of the case to the Circuit Court of the United States.

In *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528, which was a case arising under the more liberal judiciary act of 1875

(Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), the Supreme Court said:

"By section 2 of that act, as heretofore construed by this court, whenever, in any suit of a civil nature in a state court, where the matter in dispute exceeds the sum or value of \$500, 'there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them,' any one of those interested in that controversy may remove the whole case into the Circuit Court of the United States. 18 Stat. 470, 471; *Barney v. Latham*, 103 U. S. 205 [26 L. Ed. 514]; *Brooks v. Clark*, 119 U. S. 502 [7 Sup. Ct. 301, 30 L. Ed. 482]. But, in order to justify such removal, on the ground of a separate controversy between citizens of different states, there must by the very terms of the statute be a controversy 'which can be fully determined as between them'; and by the settled construction of this section the whole subject-matter of the suit must be capable of being finally determined as between them and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit. *Hyde v. Ruble*, 104 U. S. 407 [26 L. Ed. 823]; *Corbin v. Van Brunt*, 105 U. S. 576 [26 L. Ed. 1176]; *Fraser v. Jennison*, 106 U. S. 191 [1 Sup. Ct. 171, 27 L. Ed. 131]; *Winchester v. Loud*, 108 U. S. 130 [2 Sup. Ct. 311, 26 L. Ed. 677]; *Shainwald v. Lewis*, 108 U. S. 158 [2 Sup. Ct. 385, 27 L. Ed. 691]; *Ayres v. Wiswall*, 112 U. S. 187 [5 Sup. Ct. 90, 28 L. Ed. 693]; *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280 [6 Sup. Ct. 733, 29 L. Ed. 898]; *Graves v. Corbin*, 132 U. S. 571 [10 Sup. Ct. 196, 33 L. Ed. 462]; *Brown v. Trousdale*, 138 U. S. 389 [11 Sup. Ct. 308, 34 L. Ed. 987]. As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' *Louisville & Nashville Railroad v. Ide*, 114 U. S. 52, 56 [5 Sup. Ct. 735, 737 (29 L. Ed. 63)]; *Pirie v. Tvedt*, 115 U. S. 41, 43 [5 Sup. Ct. 1034, 1161, 29 L. Ed. 331]; *Sloane v. Anderson*, 117 U. S. 275 [6 Sup. Ct. 730, 29 L. Ed. 899]; *Little v. Giles*, 118 U. S. 596, 601, 602 [7 Sup. Ct. 32, 30 L. Ed. 269]; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535 [7 Sup. Ct. 1265, 30 L. Ed. 1235]."

In *Bellaire v. Baltimore & O. R. Co.*, 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910, a case arising under the act of 1887 now in force—*Torrence v. Shedd*—was cited with approval. In *Wilson v. Oswego Township*, 151 U. S. 67, 14 Sup. Ct. 264 (38 L. Ed. 70), the court, quoting from *Torrence v. Shedd*, reiterates:

"By the settled construction of this section referring to separable controversies the whole subject-matter of the suit must be capable of being finally determined as between them (the parties seeking removal), and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit."

In *Powers v. Chesapeake & O. Railway Co.*, 169 U. S. 97, 18 Sup. Ct. 265 (42 L. Ed. 673), in which the question of separable controversy giving the right to remove was involved, the court, citing numerous authorities, said:

"It is well settled that an action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up dif-

ferent defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings."

For a full review of the adjudicated cases on the subject, see *Moon on Removal of Causes*, § 138 et seq. As this present case was wrongfully removed from the state court to the Circuit Court for the Eastern District of Texas, that court was without jurisdiction and no subsequent proceedings by consent or otherwise could give jurisdiction, and it follows that the Circuit Court for the Southern District of Texas, to which by consent the case was removed for convenience of trial, was without jurisdiction in the premises.

The judgment of the Circuit Court is reversed and the cause is remanded, with instructions to remand the same to the district court of Liberty county, Tex., all at the costs of the Foster Lumber Company.

BROWN v. PILLOW (BACON et al., Garnishees).

(Circuit Court of Appeals, Second Circuit. December 7, 1909.)

No. 61.

1. DAMAGES (§ 18*)—INTERRUPTION OF BUSINESS—RE MOTENESS.

A respondent, who, under a claim of ownership made in good faith, took possession of a dredge being operated by libelant, cannot be held liable in damages on the ground that by reason of such action libelant's employes on the dredge left his service in violation of their contracts, and he was delayed in his work until he could find new men, although he at once retook possession of the dredge; such damages not being the direct and proximate result of respondent's claim but remote and speculative.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 37; Dec. Dig. § 18.*]

2. GARNISHMENT (§ 162*)—PROCEEDINGS TO SUPPORT—BURDEN OF PROOF.

Where a garnishee prior to service of citation on him had mailed a check to respondent for the amount in his hands belonging to respondent, which check had been transferred to a third person, the burden rested upon libelant, in order to charge the garnishee, to show that the transferee of the check was not a bona fide holder for value.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 300; Dec. Dig. § 162.*]

3. GARNISHMENT (§ 164*)—PROCEEDINGS TO SUPPORT—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* insufficient to charge garnishees as debtors of a respondent.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 302; Dec. Dig. § 164.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Isaac T. Brown against Robert L. Pillow. Decree for respondent, and libelant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following is the report of the commissioner:

A citation and an alias citation were issued in this action with a clause of foreign attachment, and the marshal made return that he was unable to find the respondent, Pillow, in the district, but had attached moneys of his in the hands of Alexander S. Bacon and the Trust Company of America, garnishees. Respondent, Pillow, having made default in appearing, an interlocutory decree was entered July 3, 1908, whereby it was decreed that Pillow pay libellant's demands out of the property attached, and it was ordered that it be referred to me, as commissioner, to ascertain the damages, and whether in fact and in law Bacon and the Trust Company of America, or either of them, had any property of Pillow in their possession or under their control at the time of the service of the citations on them, respectively.

I hereby report that before me appeared Mr. Walter H. Thacher, proctor for libellant, and Mr. D. Roger Englar, of counsel for libellant, Mr. Alexander S. Bacon, garnishee, on his own behalf, Mr. Morton Stein, also on behalf of Mr. Bacon, and Mr. H. W. Clark, representing Messrs. O'Brien, Boardman, Platt & Littleton, proctors for the Trust Company of America; and I also report that testimony was offered on behalf of libellant and of the garnishee Bacon, which testimony, with the exhibits, is filed herewith; and I further report as follows:

Libellant is a contractor, residing in New York, and respondent, Pillow, is a resident of Texas. From August 29, 1902, until June, 1903, libellant was performing a contract with the Kansas City Southern Railroad Company to deepen a ship canal at Port Arthur, Tex., and in doing the work used a hydraulic dredge, with pontoons, piping and other adjuncts. Libellant testifies that the dredge had a 12-inch hydraulic discharge, was about 80 feet long, was capable of discharging 35,000 cubic yards of material a month, and had a captain, a mate, an engineer, a fireman, a leverman, four deck hands, a cook, and a watchman. The dredge belonged to Auchincloss Bros. of New York, and libellant testifies that he was using it under an agreement with them that they should have one-half the compensation received for the work over and above the running expenses, which were paid by Auchincloss Bros.

The libel alleges: That on or about September 1, 1902, Pillow wrongfully boarded the dredge, took forcible possession of it under a claim of absolute ownership, notified the crew that they were not entitled to hold it for libellant, induced members of the crew to leave it and libellant's employment "by various false claims and threats," and issued orders to the other members of the crew to prevent libellant from resuming possession, "which orders were obeyed for a considerable length of time, until the libellant finally resumed possession of the said dredge by force"; that thereafter Pillow libeled the dredge in the United States District Court for the Eastern District of Texas, and under the process of that court the marshal seized the dredge and held possession until libellant bonded some 24 hours later; that subsequently Pillow withdrew his suit without going to trial, and abandoned all attempts to establish his claim to the dredge; that by reason of Pillow's "interference with and demoralization of the crew of the said dredge, and the total destruction of all discipline among the crew thereof, and particularly by reason of the loss of the master thereof, who was an expert dredge operator, obtained by libellant with great difficulty and at great expense and who had been driven from the said dredge and induced to leave the libellant's employ by the threats and other wrongful conduct of the respondent above mentioned, the libellant was unable to operate the said dredge for over a month after the abandonment by the respondent of his alleged claim as aforesaid"; and that because of all these matters the dredge "necessarily remained idle for a period of six weeks," exclusive of the period the marshal remained in possession, whereby libellant and Auchincloss Bros. suffered damage in the sum of \$3,500.

The libel also alleges, and it was proved, that prior to the commencement of the action, Auchincloss Bros. assigned to libellant all their interest in the claim and cause of action against Pillow.

1. Libellant was the only witness who testified as to Pillow's alleged seizure of the dredge. He testifies that on September 1, 1902, both Pillow and the dredge captain came to him and told him that, under a bill of sale of the dredge from the Morris & Cumings Dredging Company of New York to Pillow,

Pillow had gone aboard at 3 or 4 o'clock in the afternoon, dismissed the crew, put one of them in charge as his representative, and then left, and that the captain reproached libelant with not telling him of the sale of the dredge. The circumstances under which the bill of sale was made are not explained, but there is nothing to show that Pillow did not act in good faith, believing that he had obtained proper title. Libelant testifies that he said to Pillow, "You have bought a gold brick." Libelant also states that after Pillow had taken this action, and on the same day, libelant himself, after consulting counsel, procured two Texans with warlike records, both "armed to the teeth," as he expresses it, put them aboard, and instructed them to "bear out" their records, and repel Pillow at all hazards. According to libelant, he paid one of these men \$150 a month and the other \$115, and one remained aboard one month, and the other two months. Apparently there was no necessity for such drastic measures. It does not appear that Pillow had used any violence, intimidation, or threats, and his custodian seems to have done nothing to assert his principal's rights, real or supposed, and left the next day, according to libelant. Pillow never went aboard again, and this was the beginning and the end of his disturbance of libelant's possession, except that towards the end of the month the United States marshal arrested the dredge in an admiralty action brought by him, and libelant bonded within 24 hours. Libelant himself went aboard the dredge in the evening of the same day Pillow boarded it, he says, and told the man Pillow had put in charge that Pillow had no right to the dredge. Libelant states that the captain was "in a very sad state" when he reported Pillow's action, and the same night libelant paid him off, and the next day paid off such of the crew as had left. Libelant says that the mate, engineer, fireman, leverman, and deck hands deserted him, in addition to the captain. Although libelant explained to them all that Pillow had no right to the dredge, and no right to discharge them, he states that they said they had seen the bill of sale, and this appeared to them to be decisive. Libelant also testifies that because he had surrendered the plant, instead of defending it, he did not ask the captain to stay, and he did not ask the other men either, because he "could not argue with them, could not reason with them. They did not consider I had anything to do with the dredge."

He also says that, when the marshal came aboard, it "upset everything and made it worse than ever," that "things looked tougher than ever." But it is clear that no such damages as libelant claims can be recovered for the marshal's seizure, since the recovery would be limited to the taxable costs and disbursements in that suit (*Henderson v. 300 Tons of Iron Ore* [C. C.] 38 Fed. 36). He says that work with the dredge stopped, because he was "down and out" by reason of the loss of his captain and principal men, its operation was not resumed until the 5th or 10th of October, that it was idle about 30 days, during which time he received nothing under his contract, and that then the railroad company, which had built a dredge that was not a success, turned over its captain and crew to him. He testifies that in the interval he made all reasonable efforts to obtain a crew, but without success. He admits that he had continuous possession of the dredge, and states that his inability to work it arose solely from his inability to get men familiar with the operation of a hydraulic dredge. He says that the affair was "the talk of the town and the newspapers," and competent men would tell him he did not own the dredge, that Pillow owned it, "and any argument on my part was just waste of time, because I could not work them around." He also says that, being unable to get men at Port Arthur, he wrote and telegraphed to Tampa for them, went to New Orleans, and put advertisements in the New York Herald and the Engineering News, calling for men of the class required; but elsewhere he says that he did not go to New Orleans, although he "was moving all the time, used to go to Beaumont and hunt up men anywhere I could land some. At that time levermen were a very scarce article." He was called upon to produce the advertisements, but at a subsequent hearing said that he could find nothing but a memorandum of the expense of the telegram to Tampa, but that the advertisements appeared between the 5th and 10th of September, although he had not examined the files of the Herald and the Engineering News to find them.

Under his contract with the railroad company, libelant was to receive 12 cents a cubic yard for material dredged, and the work was to be completed by

November 20, 1902. He says that the railroad company paid him in full for the dredging, although he did not complete until June, 1903, having obtained "an indefinite extension." He claims that he would have earned \$4,200 for the month the dredge was out of use, this being at the agreed rate for 3,500 yards, which he says was the engineer's estimate for the preceding period. But he produced a statement which he testifies the railroad company furnished him for the period between October, 1902, and April, 1903, both inclusive. Omitting October, when the amount of material dredged was 17,021 yards, the statement shows a monthly average of 26,558 yards for six months, and total gross earnings for that time, \$17,206.99, or \$2,867.83 a month. According to his testimony, the amount saved on wages and board of the men was \$340, \$200 for fuel, \$200 for water, and \$50 for repairs. These items amount to \$790, making the net earnings alleged to have been lost through Pillow's action \$2,077.83.

Assuming that work was suspended through the desertion of his men, and that he could not replace them with diligent effort, it is very doubtful, upon libellant's own testimony, that the desertion was brought about by Pillow's claim to the dredge. Libellant says that at that time the refiners were seeking skilled labor at Port Arthur for the oil fields, "they gobbled up" every man that appeared. "We hired them by the month, but you could not hold half of them half the time down there. They were always skipping off to those oil fields. That is what gives me all this trouble." He further says that his men would go into town at night and "get in with the crowd" from the oil wells, and drink more or less, although he adds that "with the good men, my engineer and fireman, they were only too glad to stay. They were paid pretty fair wages." If he was prepared to continue their wages, it is incomprehensible that they should have refused to remain merely because Pillow made a claim of ownership. But even if a man did leave because of Pillow's action, the loss libellant thereby suffered was not the natural and proximate result of Pillow's claim of title, and the damages sought to be recovered are remote and speculative. Libellant says that his men were hired by the month. If they left before the term of hiring had expired for the reason he asserts, his damages arose out of their breach of contract, not because Pillow asserted title to the dredge. Cases are cited by libellant's counsel to sustain the claim, among them *Aldridge v. Stuyvesant*, 1 Hall (N. Y.) 235, *Scidmore v. Smith*, 13 Johns. (N. Y.) 322, and *Covert v. Gray*, 34 How. Prac. (N. Y.) 450. The first was an action for wrongfully and maliciously disturbing plaintiff's tenants so that they left the premises. The second was an action for enticing away and harboring plaintiff's servant. The third was for enticing away plaintiff's son and inducing him to enlist in the army. *Lumley v. Guy*, 2 El. & B. 216, and *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230, are also cited. The last was an injunction suit brought against strikers. None of these cases apply. The act of the defendant in each was malicious, and the damages the direct and natural result. When viewed in the most favorable light, libellant's testimony would merely sustain a finding that his men deserted because they believed Pillow's assertion of ownership in preference to libellant's denial of it. In that event, the cause of action, if any, would be for slander of title to personal property, and such an action would not be recognizable in admiralty. Indeed, on the facts here it would appear that the absence of malice on the part of Pillow would be a fatal obstacle to the maintenance of the action even in a court of law. Like *v. McKinstry*, 3 Abb. Dec. (N. Y.) 62, 66; *Id.*, *43 N. Y. 397; *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. 119, 15 Am. Rep. 470; *Lovell Co. v. Houghton*, 116 N. Y. 520; 22 N. E. 1066, 6 L. R. A. 363. I do not agree with libellant that it is unnecessary to prove his cause of action. Pillow not having been personally served with process, it would seem that such proof should be made, as under the state practice in similar cases. Code Civ. Proc. § 1216.

Libellant never made a demand on Pillow before bringing suit nearly six years after the occurrence, when Mr. Bacon, as attorney, collected the amount of the judgment against the Morris & Cumings Dredging Company hereinafter mentioned. May 20, 1904, libellant wrote Pillow that he had decided to commence an action against the Morris & Cumings Dredging Company for damages in connection with the sale of the dredge, and he would like to know whether Pillow had settled his matters with them, adding, "It may be that we can aid one another."

2. Although I have found that libellant has proved no damages, and the opinion upon which the order of reference was entered does not require me to consider the questions presented as to the attachment unless I find that there is something due libellant, the order itself directs me to consider both matters, and the question whether the garnishees hold any property of the respondent Pillow will become important in the event of the court's not sustaining my conclusion as to the damages.

February 7, 1903, Pillow made a written assignment to James A. Dumont, Jr., of all his right, title, and interest in a claim against the Morris & Cumings Dredging Company, for failure to deliver the dredge, for work, labor, and services, and for money paid at that company's request for its use and benefit, and he authorized Dumont to bring suit therefor. This suit was brought in the New York Supreme Court, Westchester county, and resulted in a judgment for Dumont which was subsequently affirmed by the Appellate Division¹ and the New York Court of Appeals.² This judgment was paid to Mr. Bacon, who was the plaintiff's attorney in the action, May 26, 1903, by a check of the Morris & Cumings Company for about \$10,000 to the order of its attorney in the action, and indorsed by him to Mr. Bacon; the amount of the check covering the damages, interest, and costs. Mr. Bacon had this check certified, indorsed it, deposited it in his personal account with the Trust Company of America, and on the 29th day of May drew and mailed to Pillow at Galveston, Tex., his check on the Trust Company of America for \$6,000 to the order of Pillow. On June 1st Mr. Bacon was served with the citation in the present action, directing the marshal, in case Pillow could not be found, to attach his credits and effects to the amount of \$3,500, in the hands of Dumont, the Morris & Cumings Company, and Mr. Bacon, and on June 4th an alias citation was served on the Trust Company of America, directing the attachment of Mr. Bacon's account to the same amount; the citation stating that moneys in that account belonged to Pillow. Mr. Bacon's check represented the amount of the collection he made, over and above his fees and disbursements. Pillow deposited Mr. Bacon's check with Hutchings, Sealy & Co., Bankers, at Galveston, on June 4th, the sum of \$101.08 was drawn on it from the bankers, and the remainder was deposited in an account which was opened with them in the name of C. M. Pillow's wife, but which he states in a letter to Mr. Bacon was in fact his own account. The check was forwarded by the bankers to the City National Bank of this city for collection, and that bank presented it to the Trust Company for payment, June 8th.

The check bore the successive indorsements of Pillow and Hutchings, Sealy & Co., both under date of June 4th, and the National City Bank under date of June 8th; but payment was refused by the Trust Company because of the attachment, the check was protested for nonpayment, was returned to Hutchings, Sealy & Co., and by them charged against Mrs. Pillow's account.

The assignment to Dumont was made for the purpose of vesting the title to the cause of action in a resident of the state and of Westchester county to facilitate prosecution of the action against the Morris & Cumings Dredging Company, but Mr. Bacon was retained by Pillow, and the suit was prosecuted on behalf of Pillow, who was the real client and the real party in interest. The \$101.08 advanced by the Galveston bankers has been repaid to them, and on July 14th Mr. Bacon paid them \$2,500, apparently the balance of the \$6,000 over and above the \$3,500 attached, and it was indorsed on the check as a payment on account, and credited to the account of Mrs. Pillow. The sum of \$3,500 which was attached still remains in the trust company, but the check of Mr. Bacon was not certified or accepted by the trust company, and it owes nothing to either Pillow or his wife; if the attachment were withdrawn, and the Trust Company still refused to pay the check, neither Pillow nor his wife would have a right of action against it. In regard to Mr. Bacon, it is suggested by him that he was the debtor of Dumont, not of Pillow, and although he assumed that the proceeds of the judgment belonged to Pillow, and acted accordingly, this assumption would be no defense to an action brought against him by Dumont. But it sufficiently appears from Mr. Bacon's testimony that the money did not belong to Dumont, and, although the case is not one of fraudulent transfer of the garnishee's debt, I think that it comes within the principle of *Prentice v. U. S., etc., Co.* (D. C.) 78 Fed. 106. But if Mrs. Pillow was a bona fide holder

¹118 App. Div. 893, 103 N. Y. Supp. 1124.

²192 N. Y. 553, 85 N. E. 1108.

of the check for value, she could sue Mr. Bacon on it and recover the \$3,500, even if she should pay that sum into court under its order. She is not a party to this suit, or to the attachment proceeding, and would not be bound by the determination of the court in this action. Neither she nor Pillow has been examined, and she is not shown to have sanctioned or assented to the statement in Pillow's letter. As against her, there is nothing to show that she did not give full value for the check. As I view it, it devolves upon libelant to show that she is not a bona fide holder for value before Mr. Bacon can be required to pay over any part of the money attached in his hands. In the absence of anything concluding her, Mr. Bacon might be compelled to pay the money twice. In the case above cited, which involved the ownership of a note of the garnishee, Judge Brown imposed upon the garnishee the burden of meeting a situation analogous to this; but there the garnishee, as president of a company which was the payee of the note, apparently participated in the transfer of his note. As Mr. Bacon had nothing to do with the transfer of his check, or of the money represented by it, to Mrs. Pillow, and knew nothing about that transaction, there is no reason why he should be compelled to assume the burden. Libelant examined at Galveston one of the bankers with whom Mr. Bacon's check was deposited, but did not examine either Pillow or his wife, although the notice of examination served upon the garnishees named them both as witnesses to be examined.

Conclusions.

I therefore find:

1. That libelant has failed to prove any damages against respondent other than nominal damages.

2. That the Trust Company of America had no property of the respondent Pillow in its possession or under its control at the time the citation was served upon it.

3. That libelant has failed to prove that Alexander S. Bacon had any property of the respondent, Pillow, in his possession or under his control at the time the citation was served upon him.

All of which is respectfully submitted.

Walter H. Thacher (H. S. Harrington and D. Roger Englar, of counsel), for appellant.

Morton Stein (A. S. Bacon, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Decree affirmed on report of the commissioner.

KENNEDY et al. v. CUSTER et al.

(Circuit Court of Appeals, Eighth Circuit. November 29, 1900.)

No. 2,735.

1. HUSBAND AND WIFE (§ 34*)—MARRIAGE SETTLEMENTS—EVIDENCE.

Evidence held to sustain a finding that the making of an alleged antenuptial contract with reference to certain lands in controversy was not proved.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 34.*]

2. EQUITY (§ 345*)—ANSWER UNDER OATH—BURDEN OF PROOF.

Where a bill based upon an alleged antenuptial contract did not waive answer under oath, and the answer contained a sworn specific denial of the execution of the contract, the burden was on complainants to establish its execution by two witnesses, or by one witness with corroborating circumstances equivalent in weight to that of another.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 722; Dec. Dig. § 345.*]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Suit by Berney Kennedy and others against George W. Custer and another. Decree for defendants, and plaintiffs appeal. Affirmed.

Thomas A. Sherwood, Henry C. Young, and George B. Webster, for appellants.

Charles J. Wright (Edward M. Wright and James T. Blair, on the brief), for appellees.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. This was a suit by Berney Kennedy and Emma K. Hacker against Sallie B. Custer to establish that the title of Eva Richards Kennedy, deceased, to a lot in Springfield, Mo., was acquired and held by her in trust for them. Upon final hearing the Circuit Court dismissed the bill. The complainants appealed.

R. F. Kennedy, the father of complainants, was married three times. Mrs. Hacker was born of the first marriage, and Berney Kennedy of the second. The third wife, Eva Richards Kennedy, died childless, and the defendant Mrs. Custer is her sole heir. The second wife died seized of the property in 1884, and by the laws of Missouri it passed to Berney Kennedy in fee, subject to an estate for life by the curtesy in R. F. Kennedy, his father. There was also at the time a small incumbrance upon the property. The case of complainants depended upon proof of the charge in their bill that when their father was about to marry Eva Richards an antenuptial contract was entered into which provided that the incumbrance on the lot should be foreclosed, and that she should acquire title in her own name, and hold it for her own use during life, and then for complainants, her prospective stepchildren, if she died without issue and they survived her. The incumbrance was foreclosed. Eva Richards, having then become Mrs. Kennedy, acquired title in 1887. She died without issue in 1904, and complainants survived her. R. F. Kennedy died in 1898.

The existence of the antenuptial contract was denied by the defendant, and therefrom arose the principal controversy of fact in the case. No such contract was ever made of record or produced, or its absence accounted for, at the trial, and the only testimony that one was actually entered into came from one of complainants' counsel, who testified that 19 years previously he prepared it and saw it signed. The deed to Eva Richards Kennedy from the sheriff acting as trustee in the foreclosure proceeding, was recorded in 1887, and remained unchallenged until after her death in 1904. During this period the property was openly treated as hers absolutely, and while she was alive no one appears to have questioned her complete title, or to have asserted that upon her death it would not pass to her heirs in the usual way.

We agree with the trial court that the proof on behalf of complainants was not of that clear, plain, and convincing character as would justify a court of justice in disturbing a title absolute in form that remained unchallenged for so many years, especially when the attack

is by the oral assertion of a contract after those claimed to have been parties to it have died. The security of titles ought not to be made to rest upon such insecure foundations. *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027; *Coyle v. Davis*, 116 U. S. 108, 6 Sup. Ct. 314, 29 L. Ed. 583; *Moore v. Crawford*, 130 U. S. 122, 134, 9 Sup. Ct. 447, 32 L. Ed. 878; *Neely v. Boyd*, 76 C. C. A. 142, 145 Fed. 172. The rule in such cases is similar to that which applies when fraud is charged. *Mastin v. Noble*, 85 C. C. A. 98, 157 Fed. 506.

This conclusion upon the proofs is also fortified by the condition of the pleadings. By the bill of complaint answer under oath was not waived. By the answer a specific denial of the execution of the antenuptial contract was accordingly verified, and this cast upon the complainants the burden of establishing their charge by the testimony of two witnesses, or of one witness with corroborating circumstances equivalent in weight to that of another. *Vigel v. Hopp*, 104 U. S. 441, 26 L. Ed. 765; *Union Railroad Co. v. Dull*, 124 U. S. 173, 8 Sup. Ct. 433, 31 L. Ed. 417; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678. The burden was not sustained by complainants.

The decree is affirmed.

NOTE.—The following is the opinion of Phillips, District Judge, on the final hearing:

PHILIPS, District Judge. Simultaneously with the institution of this suit the complainant Emma K., then intermarried with Homer Sargent Hocker, instituted another suit in this court against said defendants, in which they seek to have reinstated a deed of trust executed to said Heffernan as trustee for said Emma K. Hocker, to secure a note of \$3,000, executed by said R. F. and Eva R. Kennedy to said Emma in 1887, which said deed of trust was released by a deed of quitclaim from said Emma in 1892, which quitclaim deed is by said suit sought to be vacated and set aside. In taking the proofs concurrently the evidence applicable to the two cases is so commingled as to render the separation of the facts applicable to each somewhat difficult. The right of recovery in the case here under consideration is made to depend upon the existence of said marriage contract. The proof of the execution of this contract depends entirely upon the oral testimony of the witness F. S. Heffernan, one of the counsel for complainants. The bill does not waive answer under oath, but demands that the defendants be required to appear and answer unto the bill of complaint. Accordingly the defendants have appeared and made answer under oath that the contents of the answer are known to be true, except as such facts as are alleged to be upon information and belief.

The allegations of the bill as to the making and execution of the marriage settlement contract are distinctly and specifically denied in the answer. The general rule of equity pleading is that such answer under oath overcomes the allegations of the bill, and puts upon the complainant the burden of sustaining its controverted averments by the testimony of two witnesses, or one witness supported by additional corroborating circumstances, which, in the judgment of the chancellor, may be the equivalent of an additional witness. *Carpenter v. Providence Washington Insurance Company*, 4 How. 185, 217, 218, 11 L. Ed. 931; *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169. This rule was applied by the Court of Appeals for the Fifth Circuit in *Peeler v. Lathrop*, 48 Fed. 780, 1 C. C. A. 93, to the instance where it was sought by the bill to affect an agent with a trust for rents collected, and the defendant answered under oath denying the essential averments of the bill. It was held that the answer was not overcome by the testimony of the complainants' solicitor, corroborated only by a letter from him to the defendant, not answered. The court said: "When the answer to a bill is required to be made,

and is made, under oath, and is responsive to the allegations of the bill, such allegations must, to entitle complainant to relief, be sustained by the testimony of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to the testimony of another witness"—citing 2 Story, Eq. Jur. par. 1528; Vigel v. Hopp, 104 U. S. 446, 26 L. Ed. 765; Railroad Company v. Dull, 124 U. S. 175, 8 Sup. Ct. 433, 31 L. Ed. 417; Development Co. v. Silva, 125 U. S. 249, 8 Sup. Ct. 881, 31 L. Ed. 678; Beals v. Railroad Co., 133 U. S. 295, 10 Sup. Ct. 314, 33 L. Ed. 608. See, also, Uri v. Hirsch (C. C.) 123 Fed. 568, 569, 570, 572.

It may be conceded that less proof may be required on behalf of the complainant where it appears from the oath to the answer that it is predicated of mere information and belief, or where it is apparent that the facts denied could not have been within the personal knowledge of the defendant. In such case very slight corroborative circumstances of the testimony of one witness may be accepted by the chancellor. But the situation and relation of the parties defendant in the case at bar to the Kennedys were of such character as to have enabled them to know much of their marital relations, justifying, perhaps, an affirmative oath to the answer denying the making of such contract.

The first question to be decided is: Was Heffernan a competent witness in any event to testify respecting said marriage contract? The statute of Missouri (section 4659, Rev. St. 1899 [Ann. St. 1906, p. 2539]), in force when the transaction occurred, declares that: "The following persons shall be incompetent to testify: * * * Third, an attorney, concerning any communication made by him to his client in that relation, or his advice thereon, without the consent of such client." The affidavit made to the complaint by said Heffernan distinctly states that he was the counsel who wrote the marriage contract, and during all the times stated in the bill of complaint he was counsel for said R. F. Kennedy; and in his testimony he says that he was attorney for R. F. Kennedy and Hannah L. Kennedy; that he examined the abstract of title from Mitchell to Hannah, as to its sufficiency; and that he advised them respecting the advisability of said Hannah making a will to provide therein for her said child, Berney Kennedy, and that he advised in lieu thereof that she make a deed direct to him (Berney); that she and her said husband expressed a feeling that he (Berney), at his majority, would give his sister (Emma K.) a one-half interest; that at the time of said R. F. Kennedy's engagement to said Eva Richards said Heffernan was consulted in relation to the marriage contract in question; and that he accordingly wrote the contract, which was given to him by R. F. Kennedy, with instructions to put the same in his safe, and that he was going to send it to his daughter Emma. He then proceeded to state that the conditions of the marriage contract, as he recollected them, were substantially as alleged in the bill of complaint. No question, therefore, can be made but that the relation of attorney and client existed between said Heffernan and R. F. and Eva Kennedy in the transaction respecting the making of the alleged marriage contract during all the alleged conversations had between them touching the same.

In Johnson v. Sullivan, 23 Mo. 474, the court held that the attorney employed to draft a certain deed by them, afterwards attacked for fraud, was incompetent to testify to any communications made to him on the occasion respecting the transaction, and, further, that it was immaterial "that any judicial proceedings should have been commenced or contemplated. It is enough if the matter in hand, like every other human transaction, may by possibility become the subject of judicial inquiry." Then, quoting from Greenleaf on Evidence as follows: "The great object of the rule seems plainly to require that the entire professional intercourse between client and attorney, whatever it may have consisted in, should be protected by profound secrecy. It has, therefore, been held that the attorney is not bound to produce title deeds or other documents left with him by his client for professional advice, though he may be examined to the fact of their existence in order to let in secondary evidence of their contents, which must be from some other source than himself"—the opinion then continues: "In Cormack v. Heathcote, 2 Brod. & Bing. 4, an attorney was called on to draw an assignment of goods. He refused, and the deed was drawn by another. The validity of the deed being questioned afterwards on the ground of fraud, the court of common

pleas held that the communication made to the attorney first called on was professional, and that evidence of the fraud through him could not be given. In *Parker v. Carter, 4 Munf. (Va.) 286-287 (6 Am. Dec. 513)* the Court of Appeals of Virginia said: "This court understands it to be settled law that counsel and attorneys ought not to be permitted to give evidence of facts imparted to them by their clients when acting in their professional character; that they are considered as identified with their clients, and, of necessity, intrusted with their secrets, which, therefore, without a dangerous breach of confidence, cannot be revealed; and this obligation of secrecy continues always, and is the privilege of the client, and not of the attorney. The court is also of opinion that this restriction is not confined to the facts disclosed in relation to suits actually depending at the time, but extends to all cases in which a client applies to his counsel or attorney for his aid in the line of his profession. If the principle was confined to causes actually depending at the time, there would be no safety for a person consulting counsel as to the expediency of bringing a suit or of compromising one which is contemplated to be brought against him." See *Gray v. Fox, 43 Mo. 570, 97 Am. Dec. 416*.

In *Alexander v. United States, 138 U. S. 358, 11 Sup. Ct. 350, 34 L. Ed. 954*, the court, speaking to the question of the competency of an attorney to testify to communications made to him by his client, said: "If he consulted him in the capacity of an attorney, and the communication was in the course of his employment, and may be supposed to have been drawn out in consequence of the relations of the parties to each other, neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege. *Williams v. Fitch, 18 N. Y. 546; Britton v. Lorenz, 45 N. Y. 51; Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Andrews v. Simms, 33 Ark. 771*. In the language of Mr. Justice Story, speaking for this court in *Chirac v. Reinicker, 11 Wheat. 280, 294, 6 L. Ed. 474*: 'Whatever facts, therefore, are communicated by a client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.'"

To escape this dilemma the learned counsel for complainants invoke the rule that when the client applies to the attorney for advice intended to facilitate a crime or fraud, or to guide him therein, the attorney being aware of his purpose, such communication is not privileged. The attitude of Mr. Heffernan in this connection is novel, to say the least of it. Plainly stated it is this: He accepted employment and compensation from Kennedy to concoct a scheme to defraud his (Kennedy's) children. He then brings suit, on a conditional fee, for said children to undo the fraud he advised and advanced, and offers himself as a competent witness to support the action, on the ground that he was guilty of professional stultification in the first instance. He ought not to be surprised if the chancellor should say to him: "Call another witness." But, as will be shown further on, no sufficient allegation is made in the bill of complaint, and there is no evidence to support the imputation of fraud in the original transaction. If his competency as a witness were conceded, what corroborative testimony, or circumstance equal to that of another witness, is furnished by this record to support his testimony? The complainant Emma was introduced as a witness, over the objection of defendant's counsel. As she was introduced to obtain testimony respecting the marriage contract affecting the title to the land acquired by inheritance by the defendant Sallie R. Custer as heir under Eva R. Kennedy, which she claims was made in her favor, was she a competent witness therefor, the said Eva R. and R. F. Kennedy being dead?

The statute of Missouri (section 4652 [Ann. St. 1906, p. 2520]), declares that "In actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify, either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided, and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and com-

petent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator." The Supreme Court of Missouri, in construing this statute, has said: "The proposition may be taken as a general one that, where parties have contracted with each other, each may be supposed to have an equal knowledge of the transaction, and both, if living and sane, are allowed to testify; but if one is precluded by death or insanity, the other is not entitled to the undue advantage of being a witness in his own case." See *Fulkerson v. Thornton*, 68 Mo. 468; *Looker v. Davis*, 47 Mo. 140; *Stanton v. Ryan*, 41 Mo. 510; *Chapman v. Dougherty*, 87 Mo. 620-622, 56 Am. Rep. 469; *Meier v. Thieman*, 90 Mo. 442, 2 S. W. 435.

The reason of the rule would exclude the witness Emma K., as she is asserting a contract made by R. F. Kennedy and Eva R. Kennedy in her favor, as against the inheritor under the letter. On June 29, 1906, Congress by act (Act June 29, 1906, c. 3608, 34 Stat. 618 [U. S. Comp. St. Supp. 1909, p. 242]) amended section 858 of the Revised Statutes of the United States, so as to make it read as follows: "Sec. 858. The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held." The fact that under the conditions in which her testimony was taken she may have been a competent witness at the time is immaterial. The Supreme Court of this state, in construing said section of the state statute, holds that the witness' competency is to be determined by the law in force when the testimony is presented before the court at the hearing. *O'Bryan v. Allen*, 108 Mo. 227, 18 S. W. 892, 32 Am. St. Rep. 595; *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17. Under the order of this court designating George Pepperdine, Esq., as special master to take the testimony herein, he was only authorized to take and report the evidence. He was not empowered to pass on the competency of the witness or the admissibility of their testimony, or to make any findings of fact or conclusions of law. Not until the testimony was offered on the hearing before the court was there any one to entertain and pass upon such objections. Both in writing before the hearing, and at the hearing and in the brief of counsel for defendants, objection was made to the competency of the complainant as a witness. Even if the rule which has been applied elsewhere were recognized, that objections to the competency of witness should be made at the time of the taking of the testimony, which is predicated of the assumption that the matter of incompetency was then known to the adverse party, and, if not made, is deemed to have been waived, the rule would not apply to this instance, for the palpable reason that her disqualification did not then exist, but has supervened, and prior to the offer of her deposition in evidence.

The statute of Missouri (section 2906 [Ann. St. 1906, p. 1671]) provides that: "Every objection to the competency or credibility of a witness examined, or the competency or the relevancy of any question put to him, or of any answer given by him, may be made in the same manner and with the like effect as if such witness were personally present; and any failure to make such objection at the taking of the depositions, although the objecting party may be present, shall not [prejudice] his right to make such objection at the trial of the cause." Without determining whether the foregoing statute applies in this jurisdiction to testimony taken in the form of depositions in equity cases, I hold that the construction placed by the Supreme Court of the state on its statute, as to the time when the competency of a witness may be determined, controls this case.

If the competency of the complainant Emma K. as a witness be conceded, her testimony in respect of the marriage contract is ineffective. In violation of the rules governing the introduction of testimony, without any preceding question to disclose that she had any knowledge of the existence of the alleged marriage contract, her counsel bluntly asked her: "Now, did you learn of any marriage contract that was about to be made?" Over the objection that the question was leading, and that the witness was incompetent to testify, her testimony was substantially as follows: That she knew her father was conferring with Mr. Heffernan, but did not remember what kind of a contract he was conferring about. Then, without having the witness to state what the conversation she had was, she was asked if she learned from those conversations that any contract was to be written between her father and Eva Rich-

ards. The objection to this was not and could not be ruled upon by the special master. She answered that she did. She said that her conversation was with her father, and that she did not remember whether she had any conversation with Mr. Heffernan. She was then asked if she remembered anything her father told her he was going to put in that contract, and her answer was that she did not. She was then asked if she remembered that her father said he was going to have certain matters in that contract whether Eva liked it or not, or words to that effect. She answered, "Yes." She was then asked if they were talking about this contract, and she answered that she was talking to him about his marriage and about settling and dividing the property. She said that she did not remember to have seen any contract, and that she had made a search therefor but did not find any. From which it is apparent that, but for the suggestion conveyed in the question put by her counsel, it would not be shown even a marriage contract of any kind was suggested. We must, therefore, look alone to the testimony of Mr. Heffernan as to the making of any such contract, and what its terms and provisions were.

In all the correspondence that ensued between R. F. Kennedy and his children there is not a tangible reference to the existence of said marriage contract. There is no evidence that either of the parties to the contract ever made any statement to any one respecting its existence. After the marriage between R. F. Kennedy and Eva Richards they dealt with the property as the absolute owners. They borrowed money and executed a mortgage thereon to secure its payment. They mortgaged an undivided one-half of it to Emma, one of the complainants herein, to secure the sum of \$3,000, which in another suit, filed simultaneously herewith, she is seeking to enforce, thereby recognizing the title to be in the mortgagors.

If it were conceded that Heffernan was a competent witness, as the contract was not produced, and depended upon secondary evidence, resting in the memory of a single witness, who comes to speak of it about 19 years after the transaction, every consideration of justice demands that the complainants should be held to the proof of every essential particular and detail of the contract. The rule is aptly expressed in *Calhoun v. Calhoun*, 81 Ga. 91, 6 S. E., loc. cit. 913, as follows: "We think the proper rule in law in regard to the admissibility of secondary evidence is not only that plaintiff must show the existence of the deed, but he must show that it was properly executed. It is possible that the deed may have been written and signed by the grantor, and yet may never have been executed according to law." See, also, *Dasher v. Ellis*, 102 Ga. 830, 30 S. E. 544, 545; *Smith v. Smith*, 106 Ga. 303, 31 S. E. 762; *Helton v. Asher*, 103 Ky. 730, 46 S. W. 23, 82 Am. St. Rep. 601.

The statute of Missouri (section 4324, Rev. St. 1899 [Ann. St. 1906, p. 2373]), in force at the time this contract is alleged to have been made, declares that "all marriage contracts whereby any estate, real or personal, in this state, is intended to be secured or conveyed to any person or persons, or whereby such estate may be affected in law or equity, shall be in writing, sealed and acknowledged by each of the contracting parties, or proved by one or more subscribing witnesses." The relevant succeeding sections of this statute require that such contracts shall be acknowledged and proved in the same manner as deeds of conveyance for land, and that they shall be recorded with the certificate or proof of acknowledgment in the office of the recorder of the county where the land is situated, and when so recorded it shall, as to all property affected by it in the county, impart full notice to all persons of its contents, and no such contract shall be valid or affect any property except between the parties thereto and such as have actual notice thereof, until it shall be deposited for record, as therein prescribed. As it is not claimed that said contract was attested by two subscribing witnesses, it was invalid unless executed under seal of the parties. In *Harley v. Ransey*, 49 Mo. 309, 310, it was held that, under the statute requiring a deed to be made by a commissioner under seal, the unsealed writing was invalid. So in *State ex rel. West v. Thompson*, 49 Mo. 188, it is held that an attachment bond was invalid for want of a seal.

The entire statement of Mr. Heffernan in his testimony respecting this issue is as follows: "Finally both (meaning R. F. Kennedy and Eva Richards) came to the office, and I wrote a contract that at that time was signed by both of them, and acknowledged and delivered to me by Mr. Kennedy, I think with

instructions to put it in my safe, which I did after it was signed and acknowledged by them. He said he was going to send it [to] his daughter Emma." He further stated that some time afterwards Mr. Kennedy came to his office and got the contract, and that he had not seen it since, and had supposed until after the death of Eva Kennedy that Mr. Kennedy had sent it to his daughter. As the burden of proof in this case rested upon the complainants to make out by this secondary evidence a written contract in exact accordance with the requirements of the statute, no inference can be indulged that because the parties signed and acknowledged the contract it was under seal. The complainants' case, therefore, should fail on this ground alone.

Beyond all this, the alleged marriage contract, as stated in the bill of complaint and in the testimony of Mr. Heffernan, is as incredible as it is incomplete. The bill does not set out any marriage contract in terms between the parties. The only recitation made as to the terms and provisions of the contract is "that the deed of trust, which was then a lien on said premises," etc., "should be permitted to become forfeited for the nonpayment of \$235, the remaining amount due on same, and a sale was to be had thereunder," with a further recitation "that the property should be permitted to be sold under and by virtue of said deed of trust, by the sheriff of said county, as trustee, for the purpose of buying in said property in the name of Eva Richards, and the deed conveying the title to said real estate under said sale should be executed and delivered to the said Eva, who at said time would then become the wife of said R. F. Kennedy." It then proceeds to allege that it was further agreed "that, if children were born of said marriage, said children should inherit the property; but if there were no children born of said marriage, and the said Eva should survive Berney and Emma K. Morris, then the said property should be the property of said Eva absolutely, but if the said Berney and Emma K. survive the said Eva, then the title of said property should be vested in the complainants herein." In his testimony he only describes what the conditions of the marriage contract were, to the effect aforesaid. According to this version of the contract, it contained nothing but said conditions, without even stating that the consideration therefor was the contemplated marriage between the parties. If this marriage contract had been put to record, as it is described in the bill of complaint and in Heffernan's testimony, it would have been an anomaly, if not void for uncertainty.

The witness Heffernan testified that the reason assigned by R. F. Kennedy for not placing the marriage contract on record was that he did not want his creditors, in Indiana, to know that he had any interest in this property. Let us consider the reasonableness of this statement: At that time R. F. Kennedy had a life estate in this property by curtesy consummate as the surviving husband of Hannah. When she died, the record showed title vested in her. The estate in remainder then passed, as a vested estate, to Berney Kennedy. The life estate and the estate in remainder were an open book, accessible to any inquisitive creditor of R. F. Kennedy. How, therefore, would the recording of the marriage contract have made a creditor the wiser, or have increased the exposure to attack by any creditor? The marriage contract would give R. F. Kennedy no greater interest in the property. With or without the marriage contract a foreclosure of the mortgage and sale thereunder would extinguish any marital interest existing in R. F. Kennedy. Would not a lawyer have advised his client of all this? Is a chancellor to close up all the avenues of common sense, observation, and reasonable probability and sit like an automatic machine to register the "thus saith" the witness?

Another remarkable provision of the marriage contract, as described by Heffernan both in the bill and in his testimony, is the following: "If the said Berney and Emma K. survive the said Eva, then the title of said property shall be vested in the said complainants herein." According to this, to entitle the estate in remainder to pass from the line of descent under said Eva to the benefit of the complainants, it was made essential that both Berney and Emma K. should survive Eva. So that, if Eva had survived Emma, Berney would not get anything; or, if Eva survived Berney Emma would not get anything. It is incredible to the mind of a chancellor or to the common sense of a layman that a lawyer could have stood godfather to such an ill-shapen conception. As a posthumous creation of the mind it can easily be perceived,

when both Emma and Berney had survived Eva and the witness was intent on enabling both to recover, how he should have reproduced a contract conferring their right of action on the condition that both should survive Eva. But the natural antenuptial provision, readily occurring to the mind of a lawyer advising and drafting the instrument, would have been that if said Emma and Berney, or either of them, should survive the said Eva, then the title to said property should vest in the said survivors or survivor.

It is somewhat difficult, from the line of argument pursued by counsel for complainants, to comprehend precisely upon what theory they seek relief. Upon the theory of the execution of the marriage contract, and that in order to its effectiveness the mortgage on the lot in question should be foreclosed and bought in by said Eva, it would necessarily have to be affirmed that by virtue of the foreclosure sale and the sheriff's deed she acquired the title to the lot, which then became subject to the terms of the marriage contract; that by such foreclosure the estate of R. F. Kennedy, as a tenant by the curtesy consummate, was extinguished; and that, Eva dying without issue and being survived by the complainants, they became entitled, as the absolute owners, to the fee of the land. Therefore the proper allegation, in accord with that matter in the bill, would be that the marriage contract be established as a lost instrument, and the title affirmed in the complainants against the claim of the defendant, Sallie R. Custer as heir at law of the said Eva R. Kennedy, deceased. Under this theory it certainly would not lie in the mouth of the complainant Emma to impeach the validity of the foreclosure proceedings and the apparent title acquired thereunder by said Eva, as otherwise she could claim no interest whatever in the property. And as to Berney Kennedy, while the marriage contract without his acquiescence and claim thereunder could not affect his estate in remainder as the heir of his mother Hannah, he could, if he so elected, stand upon the assertion of such inheritance, subject to the validity of the title so acquired by said Eva as the purchaser at the foreclosure sale. In such choice of action he would have been in position to attack the validity of said foreclosure proceedings, but would have been subject to the defense that his right of action therefor was barred by the statute of limitation, which began to run against him in 1893, when he attained his majority. But he joins his co-complainant Emma in asserting a right to relief under the provisions of the alleged marriage contract, and is therefore equally estopped with her from asserting any invalidity under the foreclosure sale.

No relief is asked against the foreclosure sale, but only that the marriage contract be established, and for the possession of the premises, and an accounting for the rents received by the defendants since the death of Eva R. Kennedy. And yet, singularly enough, the bill avers that "the object of said marriage contract and said foreclosure of said deed of trust was to divest the title to said real estate out of said Berney Kennedy and vest the same in said Eva R. Kennedy, without his knowledge or consent, and with intent to defraud said Berney out of his just rights; * * * that pursuant to the terms of said marriage contract and the scheme of fraud aforesaid, therewith as aforesaid connected, the said R. F. Kennedy caused said deed of trust to be foreclosed and said property sold," etc.

The bill of complaint does not seek to set aside the order of the court directing the sheriff to sell the property or to the sale. It does not even charge that the complainant Emma had no notice of the foreclosure of said deed of trust and the sale thereunder, as well it might, for in her letter of May 15, 1892, to her father she said: "Berney feels that he should have been informed when the property was transferred. He does not understand at all how it could have been put in Eva's name without his knowledge. * * * You might just as well have explained things fully to him from the beginning, for he will know just how they stand." Berney Kennedy did not even testify in the case to establish his allegation that he had no notice of the foreclosure proceedings. But the deed from the sheriff to Eva R. Kennedy was of record, which imparted public notice of the foreclosure sale, and constituted the initial period for the running of the statute of limitations.

But how can the complainants be heard in a court of equity to demand the establishment of the marriage contract, made effective by the foreclosure proceedings, and at the same time allege that it was vitiated by fraud? "Equity suffers no person to approbate and reprobate the same deed." Without any

sufficient foundation laid therefor, without any specifications as the predicate for such evidence, counsel for complainants have argued: (1) That Heffernan is rendered a competent witness to testify about the making of the marriage contract because he had advised his clients in the preparation of a scheme to defraud Berney Kennedy; (2) that the foreclosure sale was void because the mortgage debt was satisfied when the sale was made; and (3) because R. F. Kennedy, without the knowledge and consent of the complainant Emma, had Heffernan in her name procure the order of the state circuit court empowering the sheriff to sell the property under the mortgage. All this, it must be conceded, is at variance with the theory of the recognition and enforcement of the marriage contract, and is without sufficient allegations in the bill to support such an issue.

By iteration and reiteration the courts have declared the law to be that the proofs must be in accordance with the issuable allegations of the bill, and that proofs which go to matters not so specifically alleged "the court cannot judicially act upon, for the pleadings do not put them in contestation. * * * A party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved." *Phelps v. Elliott* (C. C.) 35 Fed. 461. As said in *Newham v. Kenton*, 79 Mo. 382, 385: "A party is not entitled to a judgment on a finding of facts different from any theory of the case set up in the petition or answer." See, also, *Reed v. Bott*, 100 Mo. 66, 12 S. W. 347, 14 S. W. 1089; *Harrison v. Nixon*, 9 Pet. 503, 9 L. Ed. 201; *Boone v. Chiles*, 10 Pet. 209, 9 L. Ed. 388.

Equally well settled is it that the mere employment in a pleading of epithets imputing fraud is a mere brutum fulmen. The facts constituting the fraud must be specifically set forth so the court can see on the face of the bill whether or not, in contemplation of law, they constitute fraud, and whether or not the relief sought is predicable of them. This rule has been aptly stated by Judge Sherwood in *Hoester v. Sammelmann*, 101 Mo. 619, 624, 14 S. W. 728, 730, as follows: "General allegations of fraud, or other general allegations, no facts being stated, are but legal conclusions, and for that reason insufficient. To say that a man acted fraudulently or improperly, without specifying what he did, is equivalent to making the pleader the sole judge of the sufficiency of his pleadings, and substituting his judgment for that of the court. If the facts are stated, the legal conclusion follows as night follows day, and so no statement of what conclusion the law draws is necessary." See, also, *Cella v. Brown*, 144 Fed. 754, 75 C. C. A. 608.

The real predicate of the bill of complaint for relief is the existence of the alleged marriage contract and the right of the complainants to the property in question as the beneficiaries thereunder, claiming, necessarily, through the title acquired by Eva R. Kennedy under the sheriff's deed at the foreclosure sale, pursuant to the terms of the marriage contract. As that contract is not established by evidence to the satisfaction of the court, the bill of complaint must be dismissed. It is accordingly so ordered.

PITTSBURGH HARDWARE & HOME SUPPLY CO. v. BOWN.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 13.

CORPORATIONS (§ 121*)—SALE OF STOCK—BREACH OF CONTRACT—DAMAGES.

In an action for breach of contract for the sale of stock by which the seller was to be paid a specified sum for a specified block of stock, a transfer of which he tendered to the buyer, the measure of damages was the contract price, and not the difference between such price and the value of the stock at the time of the alleged breach of contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 505; Dec. Dig. § 121.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by David E. Bown against the Pittsburgh Hardware & Home Supply Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McCook & Jarrett, for plaintiff in error.

Shiras & Dickey and James G. Marks, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below David E. Bown sued and recovered judgment against the Pittsburgh Hardware & Home Supply Company for damages for breach of a written contract between them. Thereupon the latter sued out this writ, and the error now insisted upon is that the court allowed recovery of other than mere nominal damages.

The facts disclosed on the trial are these: In 1906 the hardware company bought from Bown a quantity of electrical goods, and in payment therefor issued to him 100 shares of its capital stock of the par value of \$10,000. On April 16, 1908, the hardware company, being desirous of repossessing this particular stock, made with Bown the contract sued upon, wherein it was agreed that on the making of this contract Bown should surrender to the hardware company 6 shares of his said 100, and it should then pay him \$600. This stock was surrendered and the money paid. The contract then provided Bown should within four months sell at wholesale jobbers' prices such portion of the electrical goods as remained on hand. If any thereof remained unsold at the end of that time, Bown was to take part of them at wholesale jobbers', and the rest at stipulated, prices. Whether he completed his contract in this regard was a contested issue in the court below, which the jury found in his favor. The contract further provided that, when Bown had disposed of the goods, the hardware company should assume payment of his demand note of \$4,000, which was owing to a trust company, and as collateral for which the latter held 70 of Bown's said shares of stock covered by this contract. The hardware company also agreed it would then pay Bown \$3,000 cash and \$2,400 in 12 monthly installments of \$200 each. This made up the \$10,000, distributed as follows:

Hand money.....	\$ 600
Assumption of Trust Co. note.....	4,000
Cash upon sale of electrical goods.....	3,000
Monthly installments, 12 @ \$200.....	2,400
	<hr/>
	\$10,000

The contract also provided Bown should "surrender to the said supply company the 94 shares of stock above mentioned, 70 shares of which are now pledged as security for said note of the Guaranty Title & Trust Company."

Alleging full performance of the contract on his part, Bown brought suit for the recovery of \$9,400 and before and on the trial tendered an assignment of the undelivered 94 shares of stock. On the trial the question arose as to the right of Bown to recover for the \$2,400 payable in monthly installments which were not due when the suit

was brought. Whereupon the plaintiff withdrew that part of his claim, and judgment was entered "without prejudice to the right of plaintiff to recover said sum of \$2,400 in any subsequent action or actions." This claim being withdrawn, the jury found a verdict for \$6,000, for some reason of which, however, Bown does not complain, cutting down his claim about \$1,000.

On the part of the hardware company, it is contended that the measure of damages was the difference between the contract price of the stock and its value at the time of the alleged breach of the contract, and that the plaintiff, having given no evidence of such value, was only entitled to nominal damages. In view of the provisions of this contract and of the acts of the parties in pursuance thereof, we are of opinion this contention cannot be sustained. The stock involved in this case was a specific lot of 100 shares owned by Bown. The proof was that the company wanted to buy Bown's stock, and so end his connection with the company as a stockholder, and the contract was made for that purpose. Moreover, that the company treated the contract as one whereby it acquired ownership of Bown's stock, and not a mere right to any stock was shown by the statement rendered to Bown a few days before suit brought, wherein he was given credit for his 100 shares of stock at \$10,000, which sum was alleged to be overpaid by the hardware company by some \$1,500. It is therefore clear that this was not the case of a sale of chattels of a general character, but was one whereby the vendor was to be paid a specified sum for a specified block of stock. On performance of the contract by him and default by the vendee, the contract price of the stock was the proper measure of his damages. *Reynolds v. Callender*, 19 Pa. Super. Ct. 610; *Williams Co. v. Cleaver*, 38 Pa. Super. Ct. 376; *Ballentine v. Robinson*, 46 Pa. 177; *Wilson v. Whittaker*, 49 Pa. 114; *Pearson v. Mason*, 120 Mass. 53.

We, accordingly, hold the judgment must be affirmed.

POTTHOFF et al. v. HANSON & VAN WINKLE CO.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 7.

PATENTS (§ 328*)—ANTICIPATION—BATH AND PROCESS FOR COATING METALS.

The Alexander reissue patent, No. 11,624 (original No. 563,723), for an electrolytic bath for coating metals and process of coating metals galvanically, is void for anticipation by the Falk German patent, No. 47,457, of December 3, 1887; also, *held* not infringed if conceded validity.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Suit in equity by Lewis Potthoff and the United States Electro Galvanizing Company against the Hanson & Van Winkle Company. Decree for defendant, and complainants appeal. Affirmed.

For opinion below, see 163 Fed. 56.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. V. Edwards, for appellants.

Harry E. Knight, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the court below, dismissing the bill of complaint, which charged the defendant with infringement of claims 1 and 3 of complainants' reissue letters patent No. 11,624. The complainants claimed title by assignment from the patentee, and the defenses interposed by defendant were, denials of complainants' title, of the validity of the patent, and of infringement, and the averment that the term of the patent had expired by reason of the expiration of the term of certain foreign patents. The bill was dismissed by the court below, on the ground that the defendants had not infringed the claims of the patent in suit.

The patent in suit is, as stated, a reissue patent, dated August 3, 1897. The original patent was dated July 14, 1896. The first paragraph of the specification of this original patent is as follows:

"Be it known that I, Hans Alexander, Ph. D., a subject of the Emperor of Germany, residing at Berlin, Kingdom of Prussia, Germany, have invented certain new and useful improvements in coating metals with zinc, tin, tin and zinc, also with nickel and with copper, (for which patents were granted to me in Germany May 13, 1887, No. 45,220, December 3, 1887, No. 47,457, and December 23, 1888, No. 49,826, and in Austria-Hungary October 4, 1890, Nos. 5,125 and 39,520,) and of these improvements the following is a full, clear, and exact specification, disclosing the process and also the means and materials used therein."

In the reissue patent, this recital of the foreign patents in the first paragraph of the specifications in the original letters patent, is omitted, as being an error or mistake made by the patentee, as averred in his sworn application to the Patent Office for a reissue, under the authority of section 4916 of the Revised Statutes (U. S. Comp. St. 1901, p. 3393). Claims 1 and 3 of the reissue patent, the only ones in controversy, are identical with those claims in the original patent. They are as follows:

"1. An electrolytic bath for coating metals, composed of a solution of from five to eight parts of commercial chlorid of aluminium containing free acid in one hundred parts of water and of so much of reguline coating metal, as will dissolve therein, while the bath is heated to the boiling-point, and from two-tenths to three-tenths of a part of chlorid of the coating metal."

"3. The process of coating galvanically metals, subjected to rapid oxidation, with metallic alloys, containing a small percentage aluminium, consisting in subjecting the metals to the action of an electric current in an electrolytic bath, composed of a solution of five to eight parts of commercial chlorid of aluminium, dissolved in one hundred parts of water and of so much of reguline metal as will dissolve therein, with some organic acid added to the bath, and using an anode, made of the metal, forming the principal component of the coating alloy."

The first claim is for a product, and the third is for the process of production.

The learned judge of the court below considered only the defense of noninfringement, saying:

"As I regard the case, however, it will be unnecessary to consider any of the defenses just suggested, further than to say that after a careful reading

of the testimony relating to the prior art, it is demonstrated, in my judgment, that if the patent in suit can be upheld, it can only be by giving the claims involved a literal rendering, since they cannot be interpreted broadly without destroying all pretense to novelty or invention. The patent is in no sense basic. With the claims then interpreted narrowly, as they must be, the defendant has not infringed."

In view of the elaborate and well-reasoned opinion which then follows (163 Fed. 56), in which the conclusion is reached that the defendant has not infringed the claims in question, it is necessary to say little else than that we agree both with the reasoning and conclusion arrived at by the court below. We think the expert testimony on behalf of the defendant clearly demonstrates the correctness of the opinion in this regard. This testimony is quite voluminous, but its weight clearly supports the learned judge of the court below, in saying:

"If, therefore, any one thing is made clearer thereby" (i. e. by the specifications) "than another, it is that the invention is characterized by the use of basic salts held in solution, as elsewhere stated, by the organic acid," and that "the specification * * * makes it clear that the bath of the patent is necessarily basic and was so intended. * * * It is the patentee's main object and consistent effort to produce a bath which is basic,—containing basic salts. He boils metal in a solution of salt until no more metal will dissolve. If by reason of expense he is driven to using an acid containing salt, his first care is to neutralize that acid or bind it." (This is the free acid contained in the commercial chloride of aluminium, mentioned in the claims.) "Acid is, so to speak, a bete noir to the inventor, but defendant deliberately and designedly chooses acid,—precisely what the inventor most carefully avoids; and not only so, but defendant maintains the acid condition of his bath, by addition of acid directly from time to time. In fact, defendant's bath won't work unless acid. But the bath of the patent will not work unless it is basic, and the patentee maintains its basicity with an organic or equivalent substance."

Or, as Dr. Chandler, the defendant's expert, says:

"He [the defendant] does not make basic salts, but he carefully adds sulphuric acid to his bath and keeps it supplied with sulphuric acid from time to time to prevent the formation of basic salts. * * * The bath of claim 1 has been boiled with metallic zinc for the purpose of creating basic salts of aluminium and zinc, while defendant's bath has never been boiled at all, and does not contain any basic salts of aluminium or zinc."

Not only do we have the positive testimony of Dr. Chandler, defendant's expert and chemist of long and unusual experience in the chemistry of this particular art, that the composition and process of the claims of the patent in suit necessarily result in these basic salts, but we have the distinct avowal in the first specification of the patent, that the patentee's invention "consists of a process wherein basic salts of aluminium, or a basic salt of the metal to be used for the coating or plating, are used in the bath." Further on in the specifications, the patentee, in speaking of the "equally thick and well adhering coat" of zinc or tin, with which, by his process, he is enabled to cover iron and steel, says:

"This I obtain principally by using in the bath basic salts of aluminium, by saturating the solution to its utmost capacity with the coating metal and adding to it some organic substance."

This last element is the organic acid mentioned in the third or process claim, and, as explained in the specifications, is added merely

to prevent precipitation of the basic salts of aluminium, which it is said are dissolved with difficulty in water. Without dwelling upon the other reasons given by the court below for its conclusion that the defendant does not infringe, we think the difference between complainants' and defendant's composition and process, to which we have just adverted, is too clearly established to admit of successful denial. A careful reading of the testimony given by complainants' expert does not satisfy us that he has met the reasoned opinion of Dr. Chandler on this point, viz., that the bath of the patent in suit is necessarily, and of purpose, made a bath of basic salts of aluminium, and that "defendant does not use basic salts of any kind in the preparation of his bath, does not produce basic salts in the preparation of his bath, and adds free acid from time to time to prevent the formation of basic salts." The absence in defendant's composition of this essential element of claim 1 of the patent in suit, to wit, basic salts, refutes the charge of infringement.

We think, however, we should go further and consider the testimony, expert and otherwise, bearing upon the question of the validity of the patent. A careful reading of this testimony on both sides clearly shows that the composition and process of the patent in suit are anticipated by the foreign patents cited by the patentee in the specification of his original patent, notably by the so-called German "Falk" patent, No. 47,457, granted December 3, 1887. We do not think the testimony in support of this contention should be overlooked, inasmuch as in the original patent, of which the patent in suit is a reissue, it is distinctly declared that this "Falk" patent, together with certain other foreign patents, were for improvements in coating metals identical with the improvements set forth in the specifications and claims of the patent in suit. It is true, that the patentee, in his petition for the reissue, sets forth his recital of these foreign patents, as being for the same improvements for which he had asked a patent from the United States, as a mistake on his part, by reason of which mistake he claimed the right to a reissue. Nevertheless, we have the categorical statement in the original patent, as above quoted, from which we must necessarily understand that, at the time it was made, the patentee himself believed that the improvements for which he asked a United States patent were identical with those for which the foreign patent had been issued. For this change in the belief of the patentee, no reason is given in his petition for reissue, except that the petitioner had discovered that the said recital would render the patent inoperative or invalid, a motive sufficiently strong without impugning the good faith of the applicant or his solicitor to stimulate the discriminative faculty of both to discover a difference which had formerly escaped the attention of the patentee.

We are not surprised, therefore, in turning to this "Falk" patent, to find that its specification opens with the statement that the invention therein described "concerns the production of galvanic deposits which consist of zinc, or zinc and tin, or tin, or copper, or nickel in combination with aluminium," the general description of the coating set forth in the patent in suit.

As set forth in the defendant's brief, this German patent, after explaining the supposed objections of a theretofore known zinc and

aluminium-containing bath, and the objections to both acid and alkaline baths, says:

"The inventor has now found that this evil may be remedied, if, for the production of a good, strong, homogeneous zinc deposit, an aluminium chloride solution be saturated with metal, whereby, on the one hand, a solution, rich in zinc, results in a good neutralization, and on the other hand, by the use of such a bath, an aluminium-containing metal deposit is obtained, which is improved by this addition."

This may well be called by defendant, a paraphrase of the language in lines 29 to 37, page 1 of the patent in suit, which is as follows:

"I have found that in plating of iron and steel (and also of other metals) with zinc, the best results are obtained when the bath is prepared by saturating a (heated) solution of chlorid of aluminium with reguline zinc, whereby a plating is obtained containing a small percentage of aluminium, this addition of aluminium rendering the plating more compact, smooth, and durable."

Dr. Chandler, the defendant's expert, in his testimony compares this Falk patent with the patent in suit, as follows:

"A. German patent 47,457, granted to Richard Falk, dated December 4, 1887, and published May 22, 1889.

"It is entitled 'process for the galvanic precipitation of zinc, tin, copper, and nickel.'

"The inventor first states that this invention relates to the preparation of galvanic precipitates; that is, coatings, which consist of zinc, or zinc and tin, or tin, or copper, or nickel in combination with aluminium.

"He then states that processes previously in use for the galvanic precipitation of zinc have employed either an acid sulphate of zinc solution, or an alkaline solution, and further that a solution of zinc hydrate in alum has been employed. He points out the disadvantages of these various solutions and then proceeds to describe his own invention. He says he has found that these evils can all be avoided when one employs an aluminium chloride solution saturated with metal, by which on the one hand a solution rich in zinc and well neutralized is obtained and a metallic precipitate or coating is secured containing aluminium, strong and uniform in character. The inventor then proceeds to describe several baths which he says are suitable for the galvanic depositing of zinc containing aluminium with or without metallic tin.

"First bath: This bath consists of a solution of aluminium chloride saturated by boiling with metallic zinc to which there is subsequently added some chloride of zinc and a small quantity of chloride of tin. * * *

"Third bath: In this bath the aluminium chloride is saturated with metallic magnesium or metallic aluminium instead of with zinc as in the first bath, or tin as in the second bath. There is subsequently added a quantity of chloride of zinc equal in weight to the chloride of aluminium employed, and also an amount of chloride of tin equal to five per cent. of the chloride of aluminium employed.

"For these above mentioned baths the inventor says that he employs advantageously an anode of metallic zinc or an anode composed of $\frac{1}{8}$ zinc and $\frac{3}{8}$ tin. * * *

"The inventor states that the product of the first bath will consist of zinc containing aluminium or zinc containing aluminium and tin, while the deposit of the second and third baths will consist of zinc containing aluminium and tin, and the product of the fourth bath will consist of zinc containing aluminium.

"The inventor further states that for the production of a galvanic deposit of copper, tin, or nickel, in combination with aluminium, he employs a solution of chloride of aluminium saturated hot with metallic magnesium or aluminium, or a sulphate of aluminium solution saturated with metallic magnesium in connection with an anode of the corresponding metal, copper, tin or nickel, and he further states that the deposit which results is on account of the aluminium

which it contains; hard bronze-like copper, or hard tin, easily polished or ductile while nickel.

"The first claim of the patent is for the process for producing galvanic deposits of zinc, tin and zinc, tin, nickel, or copper, durable and uniform, by the use with either of these metals of a basic salt of aluminium, free from alkali so that one may obtain a metallic deposit containing aluminium.

"Second claim is for the preparation of the bath described in the first claim and consists in using a solution of an aluminium salt which has been saturated by the aid of the electric current with a metal, such as zinc, tin, magnesium, or aluminium, and the subsequent addition of a salt of the metal to be deposited, either sulphate, nitrate, or haloid salt (chloride), in order that the bath for carrying out the process of claim 1 shall consist of a solution of a basic salt of aluminium and a salt of the metal to be deposited and shall be free from alkali.

"Third claim is for the use in the solution described in claim 2 as a galvanic bath of an anode of the metal to be deposited.

"It thus appears that the alleged novelties described and claimed in this patent for the production of metallic deposits or coatings by electric currents, consisting of zinc, tin and zinc, tin, nickel or copper, alloyed with metallic aluminium, are

"1. The employment in the bath of a basic salt of aluminium, the chloride or sulphate.

"2. The preparation of this basic salt by boiling a solution of chloride or sulphate of aluminium with either of the following metals: Zinc, tin, magnesium, or aluminium with or without the aid of electricity.

"3. The addition to the bath of a salt of the metal to be deposited; either the sulphate, the nitrate, or a haloid salt (chloride).

"4. A bath free from alkali.

"5. The use of an anode of the metal to be deposited.

"On comparing the invention described and claimed in this German patent of Falk, 47,457, with the patent in suit, I find that it embodies nearly all the essential features of the patent in suit:

"1. It employs basic salts of aluminium, as the foundation of the bath, as does the patent in suit.

"2. In order to produce the basic salts of aluminium it employs chloride of aluminium and saturates the same with zinc or aluminium with or without the aid of electricity, all of which is described and set forth in the patent in suit. The German patent suggests the use of sulphate of alumina instead of the chloride, which the patent in suit does not, and also suggests the use of tin or magnesium in addition to the use of zinc or aluminium for saturating the bath, which the patent in suit does not.

"3. The German patent directs the addition to the bath of a salt of the metal to be deposited, and in some cases chloride of tin also, which are also characteristic features of the patent in suit.

"4. The German patent directs the use of an anode composed of the metal to be deposited as does the patent in suit.

"In all these respects the directions of the patent in suit are fully stated clearly and distinctly in this German patent of 45,457, 1887, more fully and with greater variety in the choice of materials. There are some directions in the patent in suit which are not contained in this German patent.

"1. The German patent makes no reference whatever to the use of organic acids, such as citric or tartaric, or hydrates of carbon such as sugar, grape sugar or glucose, to prevent the precipitation of basic salts, as the patent in suit does.

"2. The German patent does not recommend the use of a salt of mercury to improve the character of the deposit as the patent in suit does.

"3. The German patent does not recommend the addition to the bath of an alkaline salt to improve the electrolytic conductivity."

The recommendation in the patent in suit of the use of a salt of mercury, to improve the character of the deposit, and the recommendation of an addition to the bath of an alkaline salt, to improve the electrolytic conductivity, clearly indicate merely permissible, and not es-

sential, ingredients of the bath of the patent in suit. The use of organic acids, to prevent precipitation of basic salts, as pointed out by Dr. Chandler, was old in the art. Their use is distinctly provided for in the German patent, 49,826, dated December 29, 1888, granted to Skagg and Falk, and in the Austrian patent of October 4, 1890, two of the patents recited in the specification of the original of the patent in suit. Also in the Jacoby and Klein (U. S.) patent of 1868, we find a weak organic acid is added to the bath, in order to prevent the precipitation of the salts of peroxide of iron.

Complainants, however, contend that these German, Austrian and Hungarian patents do not anticipate the patent in suit, because no mention is made therein of a mineral acid in the original aqueous solution of the aluminium salt in which the coating metal is dissolved; in other words, that none of them employs commercial aluminium sulphate containing free acid. The complainants' expert insists that this is the important difference between the patents referred to and the patent in suit. He says:

"The whole intention of the patent in suit is to provide a strongly metallic bath that will give a practicable coating. The baths heretofore invented including this bath of Falk, were all defective in this respect. They were not sufficiently charged with excess of metal in solution. The bath in Alexander's patent is made to contain more metal in solution by the simultaneous use of hydrochloric or sulphuric acid along with the chloride or sulphate of aluminium at the time the reguline metal is dissolved in the bath. The patentee distinctly states that he does not employ chemically pure chloride of aluminium, but such as contains some free acid. When metallic zinc is soaked in a solution of chemically pure sulphate or chloride of aluminium, a certain portion of this metallic zinc is dissolved and appears to go into solution without chemical change, just as salt dissolves in water. When, however, a small amount of sulphuric acid is added to the sulphate of aluminium solution, a much larger amount of zinc goes into solution. 'The increased amount which thus goes into solution is very much more than can be accounted for by the ordinary chemical action of the free sulphuric acid on the zinc plate.' This is a somewhat obscure phenomenon, but it is not at all unknown and has many counterparts in other chemical reactions of familiar occurrence."

But the reason given by the expert for the use of the chloride of aluminium, of some free acid, is not the reason given by the specifications of the patent in suit. In the third bath described in the specifications of the patent in suit (the one with which we are here concerned), the patentee says:

"In speaking of chloride of aluminium, I mean such chloride of aluminium as can be procured in the market at a reasonable price. This chloride of aluminium is not chemically pure, always containing some free acid, and the reguline metal is added to the bath in order to combine (neutralize) this free acid. Chemically pure chlorides of aluminium are so expensive that their use in this process would be impracticable for that reason."

The clearly expressed reason, therefore, for the presence of some free acid in the chloride of aluminium, is that, for practical use, commercial chloride of aluminium must be resorted to, containing some free acid, and this free acid is a thing to be gotten rid of or neutralized as stated in the specifications. It is absurd, therefore, as pointed out by the defendant's expert, to insist upon the unavoidable presence of some free acid in commercial aluminium salts, a presence to be gotten rid of by a special means suggested in the specification, as a substantial differentiation from the prior German Patents. No

other essential or important difference is pointed out by complainants' expert. Dr. Chandler thus testifies:

"The witness Horne, in his answer to Q. 16, lays great stress on the presence of free acid in the commercial chloride of aluminium employed in the patent in suit. He regards it of the utmost importance, and points it out as constituting a most important difference and distinction between the patent in suit and the prior patent of Falk taken out in Germany in 1887, No. 47,457, which is substantially identical with the Austrian patent of Falk. These two patents of Falk distinctly specify the use of basic salts, just as does the patent in suit. They both employ chloride of aluminium as the raw material of the production of the baths. They both provide for saturating a boiling solution of chloride of aluminium with either metallic zinc or metallic aluminium. The patent in suit calls for the use of commercial chloride of aluminium. The two patents of Falk, German and Austrian, call for the use of chloride of aluminium, the word 'commercial' being omitted. Mr. Horne's contention is that this difference is of the utmost importance, that it differentiates the patent in suit from the prior patents of Falk, notwithstanding the fact that both patents are for the use of baths for depositing zinc electrically, which contain basic salts of aluminium and zinc and he bases this alleged important distinction on the alleged fact that commercial chloride of aluminium contains a considerable, i. e. an important amount of free acid, and that this free acid plays a very important part in the process of the patent in suit, and further, that because Falk doesn't specify commercial chloride of aluminium, that he must employ chemically pure chloride of aluminium, which does not contain any free acid. There is absolutely no foundation for this distinction. There is no reason why Falk should say and emphasize commercial chloride of aluminium; commercial chemicals are what the manufacturer always purchases. After forty years of experience in studying patents and commercial processes, I am prepared to state that when a patent calls for the use of a chemical, it necessarily means the commercial article, unless for some special reason, which must be specified, the commercial article is not suitable for the purpose, and an article of some special, unusual quality, must be provided, and it must be specified in the patent; otherwise the patent will be void, because an important item in the process had been suppressed, so that persons skilled in the art would not be taught how to practice the process by the specification. If, therefore, it is true that the commercial chloride of aluminium contained a substantial amount of free acid, then there must have been just as much free acid employed in the baths of Falk as in the baths of the patent in suit, as they are both made by dissolving commercial chloride of aluminium, and the subsequent treatment with metallic zinc, or metallic aluminium, is identical in both. * * *

"I would say further, if commercial chloride of aluminium is employed in carrying out the process of this patent, which contains free acid, it will simply be neutralized by the metallic aluminium and add slightly to the amount of aluminium chlorides in the liquid, or it will be neutralized by zinc and add a small amount of chloride of zinc to the bath. After the free acid is neutralized and the boiling is continued as directed by the specification, the real process of the patent begins. The aluminium or the zinc is converted by solution into chloride, which becomes basic, and the chloride of aluminium or chloride of zinc already present also becomes basic. Now this process, which is the characteristic part of the process of the patent, would take place quicker if there were no free acid in the original chloride of aluminium, and would take place just as effectively and completely as if there had been no free acid in the original chloride of aluminium. It absolutely makes no difference whatever to the character of the bath produced by the patent in suit, whether the chloride of aluminium contains free acid or not."

Giving due weight to this scientific and expert testimony, we cannot avoid a conclusion that, by its preponderance, it establishes a clear anticipation of the patent in suit.

The decree of the court below is therefore affirmed, on the ground of the invalidity of the patent.

BALTIMORE & O. R. CO. v. McCUNE.

(Circuit Court of Appeals, Third Circuit. November 29, 1909.)

No. 16.

1. COURTS (§ 356*)—EXCEPTIONS TO RULING—PENNSYLVANIA PRACTICE.

The provision of the Pennsylvania Practice Act of April 22, 1905 (P. L. 286), which imposes upon a court refusing a motion for judgment non obstante veredicto, properly made thereunder, the duty of certifying the evidence and granting an exception to the party against whom the ruling is made, under the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), is applicable to the federal courts in that state, and no separate request for such exception is necessary.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

Conformity of practice in common-law actions to that of state court, see note to O'Connell v. Reed, 56 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

2. APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—NECESSITY.

A Circuit Court of Appeals may take notice of a plain palpable error appearing in the record, the correction of which is necessary to the administration of justice between the parties, even though it is not the subject of an assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982; Dec. Dig. § 719.*]

3. PATENTS (§ 328*)—INFRINGEMENT—LOCOMOTIVE ASH PAN.

The McCune patent, No. 341,930, for a locomotive ash pan, *held* not infringed on evidence showing that the ash pans in use by defendant lacked features essential to those of the patent to differentiate them from the prior art, and also that defendant had used substantially the same pan prior to the application for the patent.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by James B. McCune against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Robert J. Fisher, for plaintiff in error.

J. M. Martin, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. This is an action on the case, brought in the court below against the Baltimore & Ohio Railroad Company, the plaintiff in error (hereinafter called the defendant), to recover damages for the alleged infringement of letters patent No. 341,930, granted May 18th, 1886, to James B. McCune, defendant in error (hereinafter called the plaintiff), for a locomotive ash pan. The suit was begun February 12th, 1906. The American patent expired May 18th, 1903. Under the provisions of section 4921 of the Revised Statutes, as amended by the Act of March 3d, 1897 (29 Stat. 692, c. 391, § 6 [U. S. Comp. St. 1901, p. 3395]), relating to the limitation of actions,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

there was a period of only a little more than three years for which, in any event, recovery could be had.

The issue was, whether or not the defendant had infringed the plaintiff's patent within this period, the validity of or title to the patent not being contested.

At the close of the plaintiff's testimony in chief, a motion was made by the defendant for an involuntary nonsuit, upon the ground that the plaintiff had failed to prove infringement. This motion was refused by the court.

At the close of all the testimony, a motion was made on behalf of the defendant, for binding instructions to the jury to find a verdict for the defendant, which motion was also refused. The case was then submitted to the jury, after a charge by the court, and a verdict was rendered in favor of the plaintiff. A motion was then made by defendant for a new trial and also, under the act of Assembly of the state of Pennsylvania (P. L. 1905, 286), for a judgment non obstante veredicto. These motions were also refused, and judgment entered on the verdict, whereupon the writ of error, which brings the case before us, was sued out by the defendant. It has been urged in the oral argument that, inasmuch as no exception was taken to the refusal of the court below to enter judgment non obstante veredicto, no assignment of error could be based thereon. We think, however, that under the conformity act, section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), the act of Assembly of the state of Pennsylvania of 1905 is applicable here. That act imposes upon the court refusing a motion for judgment non obstante veredicto, properly made under the act, the duty of certifying the evidence and granting an exception to the party against whom the decision is rendered. It is argued that no motion is necessary for the granting of such exception, the motion for judgment non obstante veredicto being made with the view of having, in the case of its refusal, the evidence certified and an exception granted for the purpose of furnishing ground for the suing out a writ of error, the office of an exception being thus supplied by the law. But, however this may be, this court is at liberty to take notice of a plain, palpable error appearing in the record, the correction of which is necessary to the administration of justice between the parties, even though the same be not the subject of an assignment by the party aggrieved.

Without regard, however, to either of the foregoing propositions, we find that defendant's first request to the court to charge the jury was, "that under the pleadings and the evidence in this case, the verdict of the jury must be in favor of the defendant," and it is disclosed by the record that the trial judge "did then and there refuse and decline to instruct the jury as therein requested; to which ruling and decision of the court, defendant's counsel did then and there except, and prayed that a bill of exceptions might be sealed for defendant, and at the instance of defendant's counsel, said bill of exceptions was sealed." All of the evidence is therefore brought up by the record and is before this court, for the purpose of considering whether there was any evidence that would warrant the jury in finding a verdict in favor of the plaintiff.

The specification of the plaintiff's patent thus speaks of his invention:

"My invention relates to locomotive and fire engine ash pans; and consists in the parts which will be hereinafter described, and pointed out in the claims.

"The invention consists in a sectional movable bottom, the abutting sectional ends being covered by a stationary bridge to prevent the coal and ashes from falling through the joint.

"The invention further consists in levers for operating the sliding sections."

The drawings and specifications of the patent illustrate and describe a locomotive ash pan, hung underneath the grate bars of the fire box, consisting of a rectangular box-like structure, with vertical sides and ends, and a flat bottom, divided transversely into two equal sections. These two sections are closed and abut each other when in position for receiving the ashes from the grate. On either side of these sectional bottoms, are flanges, adapted to slide in grooved guides fitted for their reception, by means of which the two sections of the bottom may be drawn longitudinally in opposite directions, parallel with the tracks on which the locomotive is standing, for the removal of the ashes. When the sectional bottoms are closed and abut, they meet under an inverted V-shaped bridge, resting upon the upper surface of the grooved guide rails and secured to the fixed sides of the ash pan. This V-shaped arch extends entirely across the ash pan, immediately above the bottom thereof, and serves to prevent the ashes from falling through the joint of the abutting bottom sections. This bridge serves two purposes: First, that of preventing coal and ashes falling through the joint formed by the meeting ends of the bottom section; second, keeping these ends free from obstruction, so that they will not be prevented from closing tightly. The patentee thus speaks of this bridge in his testimony:

"That is a bridge, so the bottoms can pass underneath and they won't interfere from coming together, and there is no ashes or nothing can get there to do any harm. These bottoms have got to pass underneath that bridge; and when they are in there they can't get out of place and the ashes drop right over the top of this (bridge), so it don't interfere with the bottoms drawing at all and acts as a guard to keep the ashes from falling out when the locomotive is in motion."

In order to operate the sliding bottom sections, levers may be used, with appropriate connections to be operated from the cab of the locomotive. The claims of the patent are as follows:

"1. An ash-pan having a sectional or two part bottom, said bottoms having side flanges, grooved side guide rails for the reception of said flanges, and levers secured to the movable sections, whereby said sections may be opened and closed, substantially as described, and for the purposes set forth.

"2. An ash-pan having fixed sides and ends, grooved guide rails along said sides, a fixed bridge secured to the sides and located within the pan, movable flanged bottom sections, the flanges whereof being movable located in the grooved guide rails, and levers to open and close the movable sections, substantially as described, and for the purposes set forth.

"3. An ash-pan having fixed sides and ends and a movable sectional flanged bottom, side grooved guide rails for the reception of the flanged sides of the movable sections, an inverted V-shaped bridge centrally located within the ash pan to cover the abutting ends of the movable sections when closed, and

a lever provided with arms for connecting said movable sections, substantially as described, and for the purposes set forth."

These claims, and the specifications to which they refer, either expressly or by necessary implication require flanges on the side edges of the sliding bottom sections, and the meeting or abutting of the ends of these sections under the inverted V-shaped bridge. There is no evidence of any invention by the patentee prior to the date of his application for his patent, and that date is therefore, *prima facie*, the date of his invention, February 9th, 1886.

Sliding bottoms to ash pans were old in the art at the date of the application for the patent in suit. These ash pans were, as pointed out in the brief of plaintiff in error, of two general types,—first, a flat, comparatively shallow structure, provided with either a single opening or a series of openings in the bottom, closed by a slide or slides. In bottoms in which there is more than one opening, the pan has been provided with a series of bridges, not for the purpose of covering the abutting ends of a sectional bottom, as in the device of the patent in suit, but for covering or bridging the openings under which the slides move when dumping the ashes, the lower edges of the inverted V-shaped bridge serving to scrape the ashes off the slides as they are moved. This form of ash pan is obviously adapted, as is the ash pan of the patent in suit, for use in locomotives in which there are only two pairs of driving wheels, and in which there is room between the axles of the driving wheels for the entire pan. The plaintiff in error cites examples of these ash pans in the patents to Spear and Wight, Dodge, Bissell, and Graham. In the other type of ash pan, to quote from defendant's brief:

"There is a series of connected hoppers, the slides and ends of which are inclined toward the bottom of the hopper. Each hopper has a separate sliding bottom. In some instances, these bottoms are operated individually; in others, together; but in all, the ashes are discharged by gravity when the bottom slide is drawn back. In effect, this type is two or more ash pans, each provided with its own (sliding) bottom."

This type of ash pan is adapted for locomotives in which, for lack of room, it is necessary for the ash pan to straddle an axle.

It is not necessary to examine or discuss in detail the devices covered by the various patents cited by defendant, as existing in the prior art. Their citation by the defendant, as special matter attacking the validity of plaintiff's patent, having been expressly abandoned, they are only now referred to to interpret the claims of the patent in suit, and restrict them to the special device set forth in the drawings and specifications. The essential features of this special device, viewed in the light of the prior art, are, then, (1) the flanges on the sides of the sectional bottoms engaging with the grooved side rails, (2) the abutting ends of the bottom sections under the inverted V-shaped bridge, and (3) the specific arrangement of levers for operating the sliding bottoms.

We confine ourselves, therefore, to the consideration of what the record discloses, as to the use by the defendant, long prior to the date of the invention of the patent in suit, of the device now charged as an infringement of said patent. The testimony as to this was correctly admitted by the court below, over the objection of the plaintiff, on the

ground that it was not the introduction of evidence as to prior use affecting the validity of the patent, but evidence tending to show the rightful use by defendant of the alleged infringing device, on the ground that it had used it long prior to the application for the patent in suit. This fact being established, there is clearly no infringement, and that was the precise issue raised by the plea of "not guilty" in the court below.

Referring, therefore, to the testimony in the record as to this alleged infringing device, we find the following: Plaintiff's Exhibit No. 2 was introduced as a sketch to show the essential features of defendant's alleged infringing device, and defendant relies upon the same to establish the fact that, prior to the patent in suit, substantially this device was in use by it. It is constructed in two compartments, with the connecting inverted V-shaped arch for the purpose of straddling the axle of a pair of wheels. It is of the hopper type, as the inclining sides of the inverted V tend to carry the ashes to the bottom. The sliding bottoms obviously do not abut, when the two compartments are closed, and the testimony shows that these bottoms are made to slide by having their side edges engaged in a grooved guide attached to the lower edges of the sides of the ash pan. There are no flanges, as in the patent in suit, attached to the edges of these bottoms, for engagement in the grooves. Sliding bottoms, as has been abundantly shown, were old in the art. These sliding bottoms are separately operated by an independent lever attached to each of them. It is conceded that this exhibit shows the ash pan in use by the defendant. We have also the uncontradicted testimony of one Mr. Harrington, a mechanical engineer, who was in the employ of the defendant from December, 1871, to December, 1879. He testifies to making a drawing some time in 1873 for use upon the locomotive received from the Danforth Locomotive Company, of an ash pan, in all respects similar to that shown by Exhibit No. 2, introduced by plaintiff as an illustration of defendant's alleged infringing device. Looking at the drawing made by him at that time, he testified to all the substantial details shown thereby. He also testifies to the use by the defendant company of engines with ash pans, of a construction similar to plaintiff's Exhibit No. 2.

The evidence of the use of ash pans by the defendant on its locomotives, similar in all respects to plaintiff's exhibit of defendant's infringing device, was abundant and uncontradicted.

We therefore conclude, first, that no infringement is shown, for the reason that the alleged infringing device of defendant differs in essential particulars from the construction of the patent in suit. The defendant's device has twin hoppers, with inclined sides and ends leading to an opening, and discharging by gravity. The device of the patent in suit is a single, flat pan, with vertical sides and ends, from which the ashes must be scraped by a depending curtain piece. Each of the defendant's hoppers is independent of the other, and is provided with an integral or one part bottom, whereas the device of the patent in suit is provided with a sectional or two parts bottom, the ends of which must abut, in order to form a closed bottom. Moreover, the

independent sliding bottoms of the defendant do not and cannot abut under a bridge, or otherwise. The defendant's ash pan is not provided with a bridge over a joint between two abutting bottoms, as is the case in the patent in suit. The function of the bridge in the alleged infringing device is entirely different from that of the bridge in the device of the patent in suit. The function of the former is to connect the two independent hoppers over a locomotive axle. The function of the latter is to protect the meeting ends of the sliding sectional bottoms and to prevent ashes from sifting through the joint formed by the meeting ends. Moreover, sliding bottoms, as we have said, were old in the art, and the only novelty in connection therewith, that can be claimed for the device of the patent in suit, is the flanges upon their sides, which engage with the grooves of the guide rails. The defendant's device has no such flanges, the edges of the sliding bottoms of the hopper resting on said grooves.

As in view of the prior art, the plaintiff's invention must be confined to a combination of the specific sectional abutting bottoms, with flanges on their longitudinal edges to engage the guide rails attached to the sides of the ash pan, and the inverted V-shaped bridge covering the abutting ends of the sectional bottoms when the ash pan is closed, the defendant's device, possessing none of these essential elements of the combination, does not infringe.

Moreover, as the uncontradicted evidence shows that the defendant's device was the device substantially in use by it prior to the date of the patent in suit, it is clear that, on all the evidence, there should have been peremptory instructions for a verdict in favor of the defendant.

The judgment below is therefore reversed.

GENERAL ELECTRIC CO. v. HILL-WRIGHT ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. December 14, 1909.)

No. 91.

1. PATENTS (§ 328*)—PATENTABILITY—ELECTRIC BULBS—VACUUM PROCESS.

Howell patent, No. 726,293, for an improvement in a process of exhausting air from incandescent electric lamp bulbs, *held* not invalid for lack of patentability.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC BULBS—VACUUM PROCESS.

Howell patent, No. 726,293, for process of exhausting air from incandescent electric light bulbs, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

3. PATENTS (§ 18*)—SIMPLE DEVICE.

The fact that an invention is simple, and that at present it seems to have been obvious to the workers in the art, does not militate against its validity.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 18; Dec. Dig. § 18.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. PATENTS (§ 229*)—INFRINGEMENT—TRANSPPOSITION OF STEPS.

In a suit for infringement of a patented process, defendant could not avoid infringement by merely transposing the steps of the process.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 366; Dec. Dig. § 229.*]

Noyes, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit by the General Electric Company against the Hill-Wright Electric Company. From a decree of the Circuit Court of the United States for the Southern District of New York, dismissing complainant's bill for infringement of letters patent No. 726,293, dated April 28, 1903, to John W. Howell complainant's assignor, for a new method of exhausting incandescent lamps (170 Fed. 189), complainant appeals. Reversed and remanded, with instructions.

The patent was held valid on demurrer in *General Electric Company v. Campbell* (C. C.) 137 Fed. 600.

Richard N. Dyer and John Robert Taylor, for appellant.

A. Parker-Smith, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The inventor states at the outset that his method is an improvement upon the well-known chemical processes of exhausting the bulb. These processes require the expenditure of considerable time in order to secure the desired perfection in the vacuum necessary to preserve the filament for any extended period. They introduced in the tube of the vacuum inclosure a chemical which will readily combine when heated with the remnant of gases which are released during the final incandescence of the filament.

In the ordinary way of using these processes the selected chemical is placed in the tubulature of the lamp and after the desired vacuum is obtained the tubulature is sealed below the chemical. The filament is then brought to intensive incandescence and the chemical heated to drive vapors in the bulb which by combination perfect the vacuum. The tube is then sealed above the chemical, the superfluous portion of the tube is removed and the lamp is ready for use. The specification asserts that this process was objectionable for the reason, among others, that the application of heat to the tube in the first sealing is apt to volatilize too much of the chemical, tending to discolor the bulb of the lamp. Again, it is impossible to seize the definite moment of best exhaustion with the old method of producing the first sealing off of the lamp. There was also more or less loss from collapse of the tubes, permitting air to enter the bulb. These objections the patentee remedies by his method which consists in employing a very thick and substantial rubber tubing which is slipped over the pipe leading to the pump and into the end of which the lamp tubulature is inserted after the chemical has been placed therein. This connection is closed at the right moment by a pinch-cock, thus maintaining the vacuum unim-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

paired for a period long enough to effect the final exhaustion of the lamp by chemical means. After the connection to the pump is closed the lamp filament is brought to incandescence and after an almost complete vacuum is secured the tube is sealed off and the lamp is completed in the usual way.

"The essence of the invention therefore consists in closing the connection between the lamps and the pump without the use of heat, so that an excess of the chemical used to perfect the vacuum is not volatilized."

The claims involved are as follows:

"1. The process of exhausting incandescent lamp bulbs to form a high vacuum herein set out, which consists in connecting the tubulature containing a suitable chemical to the pumps, exhausting to the desired degree, then closing the pump connection below the chemical without the use of heat, then bringing the filament to incandescence and causing the chemical to react on the remnant gases, and then sealing the lamp between the chemical and the bulb.

"2. The method of exhausting lamp-bulbs to form a high vacuum, which consists in inserting a chemical exhausting agent in an extended open-ended tube leading from the bulb, exhausting the bulb through said tube to the desired degree by treatment on the pumps, closing the pump connection below the chemical without heating the tube, bringing the filament to incandescence, then heating the chemical to volatilize a small portion thereof and completing the exhaustion by its reaction on the remnant gases, and finally sealing the lamp between the chemical and bulb, as set forth."

The defenses relied on are lack of patentability and non-infringement.

Notwithstanding the formidable and, at times, well-nigh incomprehensible nomenclature of the electric lighting art, the invention is, in fact, an exceedingly simple one. It is not a fundamental invention, it did not revolutionize the art, but, by the substitution of an ordinary pinch-cock for heat in closing the connection between the lamp and the pump, it has accomplished a most useful and beneficial result with a corresponding economy of time, labor and material.

The patent purports to be, and is, an improvement upon the invention of Arturo Malignani for a process of evacuating incandescent lamps. This patent is sufficiently described in *Malignani v. Germania Co.* (C. C.) 169 Fed. 299, and need not be discussed here further than to say that the process of the patent in suit is Malignani's process with the substitution of the pinch-cock for the soldering of the lower end of the tube by heat.

The fact that the invention is simple and that at the present time it seems as if it might have been obvious to the workers in this art, does not militate against its validity. Many of the most useful inventions depend upon equally simple changes.

The important question is—what does the invention do?

Tested by results we think it quite clear that the patent discloses patentable novelty. The testimony shows that the Howell process saves time, material and the use of skilled labor. It makes better and cheaper lamps and more of them, avoids discoloration of the bulbs and permits an instantaneous and controllable closure. These are some, but not all, of the practical results obtained by using the patented method and we find nothing in the record which anticipates or limits

the claims. The defendant offered no oral testimony but introduced several patents and publications. An extract from a paper by Herman Sprengel on "Researches on the Vacuum" being the one upon which principal reliance is placed. The description and drawings, so far as we are able to understand them, show a complicated and awkward apparatus absolutely incapable of use in the art now under discussion. It avails nothing to prove that rubber tubes, pinch-cocks and exhaust pumps were old, unless it be shown that they were combined to produce the result of the Howell patent. We think nothing in the record shows that they were.

The Circuit Court dismissed the bill on the ground of non-infringement, holding that the process calls for a fixed series of steps and that the defendant does not follow the precise sequence as stated in the claims.

The court finds that the third step in the process is "closing the pump connection at a point between the chemical and the pump" and the fourth step is "incandescing the filament." The conclusion is therefore reached that the defendant does not use the process because it brings the filament to incandescence before closing the pump.

We are constrained to think that this is too strict an interpretation of the claims. If it appeared that the process was in the least dependent upon the closing of the pump prior to incandescing there would be more force in the contention, but it does not so appear. In order to describe intelligently the method practiced by him it was necessary for the patentee to state the various steps taken. When he reached the two steps in question he was compelled to mention one before the other although he might have reversed the order with equal propriety. In other words closing before incandescing is not of the essence of the invention.

Suppose that in a chemical patent the inventor, after describing the compound to be filtered should claim a process, the third and fourth steps being to place the compound on the filter bed and insert the bed in the filter. Could a user of the process escape the charge of infringement by showing that he inserted the bed in the filter and then placed the compound upon it? We think not. Very few patents could survive so illiberal a construction as is contended for by the defendant. A similar question arose in the Malignani Case *supra*, and we agree with Judge Cross in saying:

"The defendant does not avoid infringement by merely transposing the steps of the process. Transposition of the various steps is, under such circumstances, mere evasion."

In *Hammerschlag v. Bancroft* (C. C.) 32 Fed. 585, Judge Gresham says:

"The defendant may not observe the same order in the various steps of the process that we find described in the reissued patent, but it does not follow that the processes are different because the various steps do not succeed each other in precisely the same order."

Assuming, therefore, that the defendant makes the asserted transposition, a proposition which is by no means clear on the proof, we are satisfied that infringement is not thus avoided.

The decree is reversed with costs and the cause is remanded to the Circuit Court with instructions to enter the usual decree for the complainant.

NOYES, Circuit Judge (dissenting). In the Malignani invention as much air as possible was withdrawn from the lamp by an air pump attached to a glass tube projecting from the lamp. Then the connection with the air pump was shut off by "soldering up" the end of the glass tube. The process of volatilizing a chemical in the lamp then followed, resulting, through a combination of gases and consequent precipitation, in a nearly perfect vacuum.

The sealing of the end of the glass tube was for the purpose of shutting off the connection with the air pump. There is nothing whatever in the Malignani patent to indicate that the inventor had any other end in view than to prevent the return of the air to the lamp. The soldering, of course, required heat, but heat was a mere incident. If sealing the tube without the use of heat had been possible, it is obvious that it would have answered every purpose.

The heat used to solder the end of the tube sometimes prematurely volatilized the chemical, so that the problem before the users of the Malignani process was to shut off the connection with the air pump without the use of heat. Manifestly any sealing of the glass tube required the use of heat. So it was evident that the closure should be made at some other point in the connection. The present patentee—according to his specifications—made it by the use of a pinch-cock upon the rubber connection. This prevented the air from returning to the lamp just as the "soldering up" process did, and, of course, did not require the use of heat.

But it was old in the art to use pinch-cocks in connection with air pumps, and the use of this old device by the patentee accomplished no new results. The air drawn from the receptacle—the lamp—by the air pump was prevented from returning, just as pinch-cocks prevented the air from returning to other receptacles, including lamps, since their use began. The majority of the court say that:

"By the substitution of an ordinary pinch-cock for heat in closing the connection between the lamp and the pump it (the alleged invention) has accomplished a most useful and beneficial result with a corresponding economy of time, labor and material."

I do not question this statement. I merely say that, however many incidental advantages may have followed the use of the old device, the result which it accomplished—the shutting off of the air—was old. And I have never supposed that it involved invention to use old means to accomplish old results, even though those particular means in a particular case might possess incidental advantages over other means.

In view of the prior art, it seems to me that any person skilled in it should have been able to remedy the difficulties arising from the use of heat in shutting off the connection between the lamp and the air pump by employing the well-known pinch-cock for that purpose. And the fact that the use of the pinch-cock produced economies in time, labor, and material did not turn mechanical skill into invention.

Thus far the process of the patent has been treated as requiring the use of a pinch-cock to close the connection between the lamp and the air pump. The claims are, however, broader than the specifications and drawings, and it is contended that they cover a process wherein the connection is closed by any apparatus which does not necessitate the use of heat. Closure without heat is said to be the process of the present patent; closure with heat, the Maglinani process.

But closure was the essential thing of the Maglinani process. Heat was a mere incident. This incident proved troublesome. What was to be done? As already indicated, I think that mechanical skill should have been quite sufficient to answer this inquiry by pointing out that the difficulties arising from a closure with heat should be remedied by a closure without heat—there being appliances old in the art suitable for making it.

Treating the patent as broad in scope or narrow in scope, it is, in my opinion, void for want of invention. It must be borne in mind that this is not a case where special consideration must be given to a simple expedient because it accomplishes a result long sought for, but never attained. There is nothing in the record to indicate that any one other than the owner of the Maglinani process sought to remedy its deficiencies, and this patent was applied for soon after the Maglinani patent was granted.

In my opinion, the decree of the Circuit Court should be affirmed, with costs.

BECKWITH v. MALLEABLE IRON RANGE CO.

(Circuit Court, E. D. Wisconsin. January 21, 1910.)

1. PATENTS (§ 165*)—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATION.

While the courts lean toward reading into the claims of a patent such limitations as will save the real invention as disclosed by the specification and the prior art, where claims employ broad and nebulous terms for the apparent purpose of enabling the patentee to monopolize an important industry, the claims will not be narrowed beyond the boundaries clearly warranted by the specification.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 165.*]

2. PATENTS (§ 165*)—CONSTRUCTION OF CLAIMS—"CONVEX" SURFACE.

The word "convex," used in the claims of a patent as applied to a surface, is to be given its generally accepted meaning, as indicating a surface of a more or less spherical form rather than cylindrical.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 165.*]

3. PATENTS (§ 35*)—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

The great commercial success of a patented device may turn the scale on the question of invention in a doubtful case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*]

Utility, extent of use and commercial success as evidence of invention, see note to *Doig v. Morgan Mach. Co.*, 59 C. C. A. 620.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. PATENTS (§ 62*)—SUIT FOR INFRINGEMENT—DEFENSES—BURDEN OF PROOF.

In a suit for infringement of a patent, the burden rests on a defendant to prove the defenses of anticipation or prior use beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. § 62.*]

5. PATENTS (§ 34*)—ANTICIPATION—PRIOR PATENTS.

Where it is sought to show the state of the art by prior patents, nothing can be used except what is disclosed on the face of such patents which cannot be reconstructed in the light of the invention in suit and so used as a part of the prior art.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 34.*]

6. PATENTS (§ 65*)—ANTICIPATION—ACCIDENTAL FEATURES OF PRIOR STRUCTURES.

The accidental occurrence of an element or feature of a patented combination in prior structures, where its character and function as subsequently used were not recognized, does not constitute an anticipation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 80; Dec. Dig. § 65.*]

7. PATENTS (§ 167*)—CONSTRUCTION—ANTICIPATION.

The mere casual reference in the specification of a patent to a given feature will not make it a part of the invention, unless it is relied upon in describing the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

8. PATENTS (§ 61*)—ANTICIPATION—EVIDENCE—ACTION OF PATENT OFFICE.

The fact that two applications for patents were pending in the Patent Office and before the same examiner at the same time, and no interference was declared, is evidence that they were not for the same invention, and that one patent does not anticipate the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 77; Dec. Dig. § 61.*]

9. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—RESERVOIR FOR STOVES.

The Beckwith patent, No. 787,425, for a reservoir for stoves and ranges, claim 11, is not void for indefiniteness, nor for anticipation, but discloses patentable invention; the combination shown being one of great utility and success. Also, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by Arthur K. Beckwith against the Malleable Iron Range Company. Decree for complainant.

This is a bill in equity charging infringement of letters patent of the United States numbered 787,425, issued to complainant April 18, 1905, the application for which was made on the 11th day of September, 1903. Prayer for an injunction and accounting.

The answer denies that complainant was the first inventor and discoverer of the improvements described and claimed in complainant's patent; alleges that the said alleged invention in all material points thereof had been anticipated by a large number of patents, references to which are set out. The answer also sets up prior use of the supposed invention in this country for more than two years prior to the complainant's application, and a list of such prior users is set out. For further answer the defendant alleges that said patent discloses no patentable invention; that its several claims are inexact, incomplete, illegal, and void.

The only claim of complainant's patent involved in this litigation is claim No. 11, which reads as follows:

"In a stove or range the combination of the convex and rigid back-plate; the sheet metal reservoir; and means for clamping said reservoir against the convex surface of said plate for the purpose specified."

In the specification the inventor described the invention as follows:

"The objects of this invention are: First, to provide an improved reservoir by which water may be quickly heated; second, to provide an improved reservoir for stoves or ranges by which a maximum amount of waste heat may be utilized; third, to provide an improved reservoir for stoves or ranges in which the heating of the water is under control. Further objects, and objects relating to structural detail, will definitely appear from the detailed description following. I accomplish the objects of my invention by the devices and means described in the following specifications.

"The invention is clearly defined and pointed out in the claims. The structure embodying the features of my invention is clearly illustrated by the accompanying drawings forming a part of this specification. * * * I provide a back-plate, a, which is convex on its outer face, or curved outwardly. (See Fig. 1 and 2.) The back-plate, a, is cast or formed of rigid material. The reservoir, B, is formed of sheet metal, preferably copper, and its inner side, b, is clamped against the convex face of the back plate, a, by the supporting straps, B'. The clamping of the side of the reservoir against the convex plate, a, holds the side of the reservoir in close contact therewith over its entire surface, and places the same under tension, so that the tendency to buckle, or the possibility of its buckling, and thereby forming air-chambers between the side of the reservoir and the plate, is overcome. The inner end of the supporting straps, B', of the reservoir, are bent outwardly and perforated to receive the bolt, E, which are arranged through the back-plate, a. The straps are of such length that tension can be applied thereto by the bolts. The reservoir, B, is surrounded by casting, C, forming an air-chamber, C', between it and the side walls of the reservoir. The casting, C, is embraced by the frame-like N plate, C', supported on the plate, a, outwardly projecting flanges, i, on the back-plate, a, engage the end plate, C'. The inner edges of the metal casting, C, are turned inwardly to form flanges, c'. These flanges, c', are engaged by the lug, b', on the straps, B', so that the parts are securely supported. * * * The structure is economical to produce in its parts, and the parts are readily assembled, and the reservoir can be readily attached. I illustrate and describe my invention in detail in the form preferred by me on account of the economy of production. I am aware, however, that it is capable of very great structural variation without departing from my invention. While the particular form of damper I have illustrated is of advantage in that the heat delivered is very perfectly controlled, other forms can be used and desirable results be secured, or desirable results can be had by omitting the damper entirely. Other variations will readily appear to those skilled in the art to which my invention relates."

The record in this case is very voluminous. Some 10 or 15 ranges were introduced in evidence with numerous other exhibits. Experiments of various kinds were made by the several expert witnesses to verify their theories. Experimental gas-burning ranges were constructed for the purpose of testing the heating qualities of several reservoirs. The prior art was thoroughly scoured to find anticipation and prior use. It would be impracticable to enumerate the many issues of fact and law appearing in this record.

Harry C. Howard (Fred L. Chappell, of counsel), for complainant.
A. L. Morsell, for defendant.

QUARLES, District Judge (after stating the facts as above). The defendant insists that claim 11 of the Beckwith patent is void:

"Because the claim is not complete or clear, but is functional, indefinite, and uncertain, and does not cover the construction now contended for as novel, namely, a spherically convex contact plate convex in more than one direction, either by the language, or by reference to the drawing and specifications."

In another part of the brief, counsel say the "bone of contention in this case" is whether the element of the convex rigid back-plate should be given its ordinary and usual interpretation—that is, a contact plate of a convex form in a broad sense—and, when so interpreted,

whether this element is met by the prior art, or whether the said element should be construed, as contended for by complainant, to cover a back-plate of spherically convex form, or a back-plate convex in more than one direction; and, if so construed and limited, whether it is met by the prior art.

The situation here is one which frequently occurs in patent cases. The principles of law applicable are simple and undisputed. The sole difficulty arises in applying such principles to a concrete structure.

I agree entirely with the general proposition of law laid down by the defendant that the claim is the measure of invention; that, while the specification may be referred to for the purpose of explaining any ambiguity in the claim, it cannot be employed for the purpose of expanding or changing the claim; that courts lean toward reading into the claims of a patent such limitations as will save the real invention as disclosed by the specification and the prior state of the art. But when the claims are drawn in broad, nebulous terms, for the apparent purpose of enabling the patentee to monopolize an important industry, the court should be slow in attempting to sustain their validity by narrowing them beyond the boundaries which are clearly warranted by the specification. These are the familiar precepts laid down in *Cimiotti Unhairing Co. v. Am. Fur Co.*, 198 U. S. 410, 25 Sup. Ct. 697, 49 L. Ed. 1100; *National Enameling Co. v. New England Enameling Co.*, 151 Fed. 19, 80 C. C. A. 485; *Canda Bros. v. Mich. Malleable Iron Co.*, 124 Fed. 486, 61 C. C. A. 194.

The contention of the defendant is that these fundamental principles, when applied to claim 11 of the patent in suit, rendered such claim void because the inventor broadly claimed a convex rigid back-plate, without indicating whether such convexity was spherical, and that such defect was not cured by a reference to the specifications and drawings. Mr. Wilkinson, the defendant's expert, Prof. Cooley, the expert for the complainant, and Arthur Beckwith testify that the complainant's drawings show spherical convexity, and, until the argument on the final hearing, no testimony was offered or question raised as to that conclusion. It would seem to be rather late to predicate such an issue upon the statement of counsel. Undoubtedly the court might disregard the opinions of expert witnesses and reach a conclusion of its own. In such case my judgment is that the specification which describes the back-plate as "convex on its outer face or curved outwardly," together with Fig. 1 and Fig. 2, disclose convexity in more than one direction.

The vital questions raised on this branch of the case may be thus summarized:

First, is the expression "convex rigid back-plate," as it appears in each of the claims of complainant, sufficiently definite to cover and describe the structure embodied in the complainant's device?

And, second, if not sufficient, then is the defect cured by the reference to the drawings and specifications by the term "for the purpose specified"?

I am of opinion that both of these questions should be answered in the affirmative. In construing this claim we should seek to arrive at the ordinary and popular sense of the language employed.

Webster's International Dictionary defines "convex" as follows:

"Rising or swelling into a spherical or rounded form; regularly protuberant or bulging; said of a spherical surface or curved line when viewed from without in opposition to concave. Drops of water naturally form themselves into figures with a convex surface," etc.

The Century Dictionary defines the word as follows:

"Convex 1. Curved as a line or surface, in the manner of a circle or sphere when viewed from some point without it; curved away from the point of view; hence, bounded by such a line or surface; as a convex mirror. Specifically 2. In zool. and anat., elevated and regularly rounded; forming a segment of a sphere, or nearly so."

In the Standard Dictionary the term "convex" is defined as follows:

"Convex. Curving like the segment of a globe or of the surface of a circle, so as to form a rounded elevation; bulging out; rounded off."

Turning to Worcester's Unabridged Dictionary, I find the term "convex" defined as follows:

"Rising or swelling externally into a spherical form; protuberant outwards."

"Convex" as a noun is defined to be:

"A convex or spherical body."

And "convexity":

"The state of being convex; spheroidal protuberance."

These definitions from standard dictionaries clearly establish the ordinary sense and popular meaning of the term "convex" as employed by Beckwith. Certain scientific treatises are cited by defendant where technical definitions are given; but we do not resort to such authorities to arrive at the common understanding or popular meaning of words in common use.

Therefore it appears that Beckwith both accurately and adequately described in each of his claims this element of the combination.

There undoubtedly may be different degrees of convexity. There may be a protuberance which is convex in one direction only. If such peculiar form of convexity needs to be specifically described, a suitable adjective would be made use of to differentiate the structure from the popular conception of a convex surface, such as the crystal of a watch. To illustrate: It is strenuously contended that Beckwith should have claimed spherical convexity. It is obvious that such term would narrow the claim and impose a limitation thereon. It would leave him open to the technical objection that "spherical convexity," as defined in the Century Dictionary, means "bounded by or having the surface of a sphere."

As Beckwith's back-plate did not disclose the segment of a true sphere, the limitation might prove disastrous.

We are therefore of the opinion that the term "convex," as used in the Beckwith claims, was accurate and sufficient to suggest to the common mind the true shape of his back-plate.

But if we are wrong in this conclusion, the second proposition above suggested remains, whether the reference to the specifications and

drawings is legitimate by way of explanation. This is not an attempt to read something into the claim which is not there, but rather to define and exemplify something that is there. Beckwith has insisted upon the convexity of the protuberance of the back-plate in every one of these claims. If such terms were indefinite or vague as to the kind of convexity that he had in mind, it seems to me, under all the authorities, that the specification, being distinctly referred to, would in this case perform a normal function by showing convexity in more than one direction.

Defendant cites and presses upon our attention the case of *Wilkin v. Covell* (C. C.) 46 Fed. 925. No case could better illustrate the distinction that we are trying to draw. The invention in that case was for an improved machine for stretching saws. Judge Gresham held that all the elements were old, and that the combination evinced only mechanical skill. Complainant's counsel contended that the language of the specification, read in connection with the drawings, showed that the claim was allowed for convex or crowned rolls which were unlike anything found in the prior art. The court say:

"It will be observed that neither the specifications nor the claim describe or speak of rolls with convex or crowned surfaces. The specifications do not say that the invention consists of the use of convex rolls or rolls of any specific construction. Such rolls are not mentioned as part of the invention. The drawings do show rolls with convex surfaces, but that of itself is not sufficient to justify the court in limiting the claim in order to save the patent. In describing his invention, the complainant did not make convex rolls a distinctive feature of it, and he pointed out no advantage to be derived from the use of that particular form of rolls."

The court therefore concluded that complainant had failed to comply with section 4888, Rev. St. (U. S. Comp. St. 1901, p. 3383). Now, supposing the inventor had distinctly made the convexity of the rolls an important element in the claim and had assigned an important function thereto, but had not designated the degree of convexity that he had in mind; would not the reasoning of the court lead to the conclusion that, if it was desirable or necessary to make the claim more specific as to the degree of convexity, reference might properly be made to the specifications or drawings?

In no way, perhaps, could the doctrine which I gather from the authorities be better illustrated than by comparing the patent in suit with the second patent of *Keep*, 765,140. *Keep* has six claims, in neither of which does he claim any convex back-plate, and much less does he claim any function therefor. In his specifications, however, he says:

"A' shows a convex portion of the end of the range which forms the outer walls of one of the flues."

This is a mere incidental recital of the fact that the back-plate, following the contour of the descending flue, is convex. He makes no reference in the claims to the specification. Now if we were, under such circumstances, to read into one of these claims the element of a convex rigid back-plate, we should be reading the specification into the claim as a new element contrary to the doctrine of the authorities cited; and to assign to such convex portion of the back-plate the function and purpose of the Beckwith back-plate would be to interpolate

into the claim an element that the inventor never dreamed of. On the other hand, Beckwith consistently insists upon convexity of the plate in every claim and defines its reason and function. The rule preventing Keep from now reading convexity into his claim would not hinder Beckwith from showing by drawings more clearly the particular convexity relied upon in his claim.

In either case, therefore, the objection of defendant must be overruled.

The next proposition advanced by the defense is that claim 11 of the patent in suit discloses no invention. In support thereof counsel argues that the two elements, namely, the sheet metal reservoir and means for clamping said reservoir against the convex surface of said plate were old and well known and appear in a large number of prior patents. Therefore, if there is any novelty in the Beckwith claim, it must reside in the inclusion in the combination of the convex rigid plate. He then proceeds to show that convex back-plates have been shown in various other structures in the prior art, and therefore he reasons that the only novelty lies in the degree of the convexity of the protuberance in the back-plate. This line of reasoning is specious but unsound. It leaves out of view the basic fact that the invention is for a combination of three elements. Whether these elements were old or new is immaterial. *Niles Tool Works v. Betts Co.* (C. C.) 27 Fed. 301. The invention lies in the combination, and not in the elements. These several elements are brought into combination to coact in such manner as to produce a new result, or a better result, than had been before achieved. This distinction is so clearly pointed out by the Supreme Court in *Elizabeth v. Pavement Co.*, 97 U. S. 126, 144, 24 L. Ed. 1000, that further discussion of the point becomes unnecessary.

The history of the prior art teaches that for many years there had been a growing demand for a right-hand reservoir, that is, one located away from the fire box, and so adjusted as not to interfere with the heating of the oven, and so attached to the range that the water in the reservoir would heat quickly. Naturally stovemakers were anxious to meet this demand. The old form of cast-iron reservoirs was discarded, and sheet metal substituted therefor. The main difficulty in the employment of the sheet metal was its tendency to warp or buckle under the influence of the heat, and leave an air space between the reservoir and the range which seriously interfered with the transmission of heat to the water. The early back-plates were flat. Experience showed that they warped out of shape during the process of annealing. Bumps and hollows appeared which created numerous air pockets. This necessitated the use of the bulging bar to correct these imperfections. To meet complaints that water did not heat quickly, experiments were tried by leaving out the back-plate entirely and allowing the products of combustion to come into direct contact with the sides of the reservoir. This produced rapid and intense heat, but was found destructive to the sheet metal. To remedy this difficulty a baffle-plate was attached to the reservoir. Later rigid back-plates were again introduced. In most of these ranges the weight of the water in the reservoir was relied upon to secure close contact with the range,

but after all such efforts the right-hand reservoir remained unsatisfactory for one reason or another.

Among other experimenters was the defendant company. About the time the complainant's range came on the market, defendant was engaged in conducting certain experiments on sheet-metal reservoirs at the hardware store of one Rassman at Beaver Dam, Wis. While these experiments were going on, Rassman, who was also the sales agent of the Beckwith range at Beaver Dam, had occasion to visit Dowagiac, Mich., and there saw one of the Beckwith ranges built under the patent in suit. Rassman came back and told defendant that Beckwith had solved the problem of the right-hand reservoir. Thereupon one of the new Beckwith ranges was obtained, and at the store of Rassman defendant's officers and experts made a thorough examination of the same, and extended to Beckwith the compliment of adopting and appropriating all the elements of his device. Thereupon the defendant in its catalogue gave prominence to the convex rigid back-plate as a new and prominent feature. The clamping apparatus adopted by the defendant differed in form, but was clearly a mechanical equivalent of the Beckwith clamping means. In the defendant's structure introduced in evidence convexity of the back-plate is five-eighths instead of three-eighths of an inch, as shown by the Beckwith structure.

I am persuaded that the combination of the patent involves inventive thought. The device is so simple, and other experimenters had come so near reaching the same consummation, that it is perhaps natural to conclude after the fact that nothing but mechanical skill was necessary to reach the success obtained by the inventor.

In *Webster Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177, the attention of the Supreme Court was directed to a state of facts quite similar to those here present. The court say:

"This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed; one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. Who was the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

In this connection it is proper to consider the great commercial success of the complainant's device. The sale of the new style of range commenced in January, 1903. Prior to 1903 the complainant manufactured less than 1,500 ranges. During the year 1903 they sold 2,300 ranges. During the year 1907, they sold about 15,000 ranges.

This increase in business necessitated the construction of many new buildings and a corresponding increase in facilities all along the line. This enormous increase in the business is attributed largely to the popularity of the right-hand reservoir of the patent in suit, which practically superseded the structure theretofore built by complainant. Under the authorities this circumstance might turn the scale on the question of invention in a doubtful case. *Smith v. Goodyear Co.*, 93 U. S. 486, 495, 23 L. Ed. 952; *Magowan v. New York Belting Co.*, 141 U. S. 332, 344, 12 Sup. Ct. 71, 35 L. Ed. 781.

In conclusion we are reminded of the pertinent suggestion of the Supreme Court in *Washburn Manfg. Co. v. Barb Wire Co.*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154:

"Under such circumstances courts have not been reluctant to sustain a patent to a man who has taken the final step which has turned failure into success. In the law of patents it is the last step that wins."

See, also, *Western El. Co. v. Home Co.* (C. C.) 85 Fed. 649, 654.

While we cannot extend this opinion—already too long—by considering in detail the several practical experiments made by the respective experts, it is enough to say that they tended to show that complainant's device maintains a closer contact over a larger area of the side of the reservoir, and therefore heats the water more quickly, than any of the earlier ranges. We are constrained to hold that it was Beckwith that took the last step and produced the first perfect right-hand reservoir, and that the same involved invention.

It remains to consider the question of anticipation and prior use. In this field the defendant assumes the burden of proof. Not only so, but every reasonable doubt should be resolved against it. *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *Cantrell v. Wallick*, 117 U. S. 689, 696, 6 Sup. Ct. 970, 29 L. Ed. 1017.

Numerous references are made to the prior art. It would serve no useful purpose to deal separately with these prior patents and devices, even if the legitimate scope of an opinion would warrant such an attempt. I have carefully examined each such mechanism, have read all the testimony of expert witnesses, have studied the voluminous briefs of counsel, and have reached the conclusion that there is not anywhere in the prior art disclosed the combination of all the elements of the patent in suit employed in the same way to reach the same useful result.

At the outset it may be well to recall the language of the Supreme Court in *Manufacturing Company v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103:

"But when a class of machines so widely used as these in question it is made to appear after repeated and futile attempts that a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, the court should not be ready to adopt a narrow or astute construction, fatal to the grant."

It is elementary that, when it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. Such patents cannot be reconstructed in the light of the invention in suit and then used as a part

of the prior art. *Naylor v. Alsop Process Co.*, 168 Fed. 911, 920, 94 C. C. A. 315.

It is seriously contended that a convex back-plate was made by defendant when, by use of the bulging bar applied to the flat back-plate, a protuberance resulted outwardly, and that thus this element was anticipated; but the evidence shows that the force of the bulging bar was applied to crowd the plate out to fit the upper plates of the stove which were not of uniform length, or to remove the bumps and hollows created by the heat of the annealing oven. Defendant's foreman honestly testified that he did not know that there was any convex plate in the pattern from which the plate of the Weiser range, one of defendant's former devices, was made.

"Q. Were you obliged to pound into shape the plate you were using just prior to the present steel plate? A. No, not for the purpose of securing a convex surface, but to remove inequalities in the surface that appeared to result from annealing the castings.

"Q. Did you pound any portion of such casting which came in contact with the side of the reservoir? A. Yes, sir; frequently the plate was twisted in annealing, and, in order to put it on in form for use, we were obliged to pound the plate in almost all parts."

The testimony of Edward Grant, an employé of defendant, is to the same effect.

Thus it appears that the convex protuberance on defendant's prior structures, the Weiser, Drown, and Hicks ranges, was simply accidental. It attracted no attention and was considered a matter of no significance until Beckwith made this feature an important element in his combination. The law is well settled that such prior accidental production, when the character and function were not recognized until the patented invention came into being, cannot be relied upon by way of anticipation. *Walker on Patents* (4th Ed.) 67; *Wickelman v. Dick Co.*, 88 Fed. 264, 266, 31 C. C. A. 530; *Tilghman v. Proctor*, 102 U. S. 707, 711, 26 L. Ed. 279; *Pittsburg Reduction Co. v. Cowles Co.* (C. C.) 55 Fed. 301; *Chase v. Fillebrown* (C. C.) 58 Fed. 377.

Looking backward, several stovemakers now see how nearly they approached the consummation finally reached by Beckwith; but none of them hit upon the coacting law by means of which these three elements were combined to produce new and practical results so long sought. Their unsuccessful efforts in the art cannot now defeat a patent founded upon a readjustment of materials by which new and useful results have been brought about. *Edison El. Co. v. Novelty Co.*, 167 Fed. 977, 980, 93 C. C. A. 387.

I have had occasion to refer to the Keep patent, No. 765,140 in considering the application of certain legal principles. It is conceded that this second patent of Keep approximates nearer to the Beckwith structure than any other reference to the prior art. If claim 11 of the patent in suit cannot be read onto the Keep structure it would be idle to consider other references or devices. Let us therefore carefully consider whether No. 765,140 anticipates the patent in suit. It is insisted that Keep discloses a sheet-metal reservoir, a back-plate claimed to be convex in its construction, and a certain clamping device, which combination, it is argued, clearly anticipates claim 11 in suit. It seems

to me, however, that, although Keep assembled these several features, he never grasped the coating principle which was the soul of the Beckwith invention, namely, to stretch the sheet metal over a convex protuberance, and thus establish such tension that the sheet metal could not spring away or warp under the influence of heat; means being furnished for increasing the tension from time to time so as to make the close contact absolute and permanent by means of this constant stretching, and not otherwise. The reservoir was kept in such close contact that the water would quickly heat by conduction. Up to this time the weight of the water was chiefly relied upon to bring about this contact. Under the Beckwith scheme the pressure of the water is a negligible quantity.

We have seen that the convex back-plate was not made an element by Keep in either of his claims; neither is there any reference to specifications. As matter of law, a mere casual reference to a given feature, such as Keep makes in his specifications, to a convex back-plate, will not support a patent if the inventor does not rely upon it in describing the substance of his invention. *Waterman v. Lockwood*, 125 Fed. 290, 60 C. C. A. 204; *Greene v. United Shoe Co.*, 132 Fed. 973, 974, 66 C. C. A. 43.

Furthermore, an examination of his drawings will show that his convex surface was not so located that it could perform the function described by Beckwith as "clamping said reservoir against the convex surface of said plate, so that the clamping of the side of the reservoir against the convex plate holds the side of the reservoir in close contact therewith over the entire surface." Owing to the peculiar structure employed by Keep, the compression of clamping is against the flat surface at the bottom of the plate; and, owing to the slant of his reservoir, this would tend to spring the upper surface of the reservoir away from his convex plate.

Mr. Keep (page 176, Deft.'s Rec.), in speaking of his tank, says:

"The bottom straight edge bore against the straight bottom edge of the reservoir."

Prof. Cooley, complainant's expert, testified:

"It is clearly evident from the tank (in Keep's second patent) that it has no contact whatsoever on the horizontal convex part of the back-plate at its top. The tank being straight on its face, it would extend up by this curvature without conforming to it in any sense."

It conclusively appears from the evidence that there was no possibility of tension over the cylindrically convex surface, except such as was furnished by the weight of the water itself. Therefore the clamping device disclosed by this patent is not the equivalent of the iron straps of Beckwith. It does not do the same work by substantially the same means. *Owens Co. v. Twin City Co.*, 168 Fed. 259, 265, 93 C. C. A. 561; *Union Paper Bag Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935.

I agree with the conclusion of Prof. Cooley:

"I am myself unable to conceive any resemblance whatever between this flue strap and the convex rigid back-plate of the patent in suit. They do not act in the same way, and they do not accomplish the same result, and they are not the same thing."

It is interesting to consult the testimony given by Mr. Keep in this record, and to gather therefrom his own conception of his latest patent. We may thus see how far short he falls of the coacting principle of the Beckwith contrivance:

"I stated in my former testimony that the contact plate of my first patent, No. 715,666, was substantially of a spherical shape, and in the second patent, No. 765,140, I changed this surface, as experiments led me to do so, so as to make a more perfect contact. Therefore, as the result of this experience, I should say that making the central portion of a contact plate spherical would produce a poorer contact than even a flat plate; without water in the reservoir the contact with a flat plate would be a poor one, but with water in the contact would be reasonably good. Any bunching in the center with concave surfaces around the edges would make it unlikely that the water could press the flexible front of the reservoir into these concave surfaces. I think it would be found—in fact, I am sure of it—that the contact plate formed as under my second patent will heat water faster than a perfectly flat plate, or one with a convexity at the center."

On page 168, defendant's record, Mr. Keep, when asked as to the degree of convexity in the back-plate which he considered desirable, answered:

"I have found by experiment that just sufficient convexity to throw the flexible front of the reservoir inward produces better results than to make the convexity great enough to strain the front of the reservoir when in contact."

Thus Mr. Keep takes issue with the fundamental principle upon which Mr. Beckwith relies.

This conclusion is rendered more apparent by the repeated statements of Mr. Keep in his testimony that he relied upon the pressure of the weight of the water in the reservoir to complete the contact.

The defendant's exhibit Bryan Range, which embodies the principles of the second Keep patent which was put in evidence, corroborates the theory of Prof. Cooley, as it discloses no tension over the cylindrically convex surface. Prof. Cooley testified that he was able to pass an ordinary stove poker between the convex back-plate and the side of the reservoir. Thus it appears that the inventive conception of Mr. Keep, whether found in the patent or in the commercial structure, or in his testimony, is entirely at variance with the inventive thought of Beckwith.

I am constrained to hold that Mr. Keep's patent, No. 765,140, does not anticipate the patent in suit.

If there were doubt as to the conclusion just reached, such doubt would be resolved by the fact that Mr. Keep's application for patent No. 765,140, and the application of Beckwith, were in the Patent Office at the same time, and were under the eyes of the same principal examiner for something over eight months. No interference was declared, and both patents were issued. It is obvious that the judgment of the officials of the Patent Office was that there was no occasion for an interference, and that there were substantial features that distinguished one invention from the other. *Miller v. Eagle Co.*, 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121; *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; *Ransome v. Hyatt*, 69 Fed. 148, 16 C. C. A. 185; *Kokomo Fence Co. v.*

Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689; Ney v. Manufacturing Co., 69 Fed. 405, 408, 16 C. C. A. 293.

Defendant's counsel argues that this must have been an oversight or error on the part of the officials of the Patent Office; but this is mere assumption, not supported by any evidence in the case.

As to infringement, I think there can be no serious controversy. The defendant's device responds to every feature of claim 11 of the patent in suit. The contour of the back-plate in both structures is the same, except that the convexity in the defendant's structure is five-eighths of an inch, instead of three-eighths of an inch, as in the Beckwith patent. Instead of the iron straps employed by Beckwith for clamping purposes, defendant makes use of lugs and bolts at the back and front of the jacket, which accomplish the same purpose by equivalent means. Prof. Cooley's testimony leaves no doubt in my mind that the defendant has appropriated the entire invention of Beckwith. The catalogues sent out to the trade by the defendant indicate the same thing.

For these reasons I find that the complainant is entitled to the relief demanded in his bill of complaint.

An interlocutory decree may be prepared in accordance with this opinion.

GENERAL ELECTRIC CO. v. GERMANIA ELECTRIC LAMP CO.

(Circuit Court, D. New Jersey. December 18, 1909.)

1. PATENTS (§ 314*)—SUITS FOR INFRINGEMENT—EVIDENCE—CONSIDERATION OF.

In a suit for infringement of a patent relating to a highly developed and technical art, the validity of which is contested, little, if any, attention will be paid to patents introduced by defendant as showing the prior art, unless they are explained and their relevancy to the patent in suit pointed out by experts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 553; Dec. Dig. § 314.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS FOR EXHAUSTING LAMP GLOBES.

The Howell patent, No. 726,293, for a process for exhausting incandescent lamp globes, *held* valid and infringed.

In Equity. Suit by the General Electric Company against the Germania Electric Lamp Company. Decree for complainant.

Richard N. Dyer and John Robert Taylor, for complainant.

CROSS, District Judge. This is a suit in equity for an injunction and accounting. The bill sets up patent No. 726,293, issued April 28, 1903, to one John W. Howell, assignor to the complainant, and alleges infringement thereof by the defendant. The defendant answered the bill, asserting the invalidity of the patent in suit, and denying infringement. At the proper time it offered in evidence, without explanation or comment, copies of certain patents in the prior art, and some oral testimony upon the question of infringement, but was not represented at the argument, and has not submitted any brief. The evi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dence on behalf of the complainant satisfies me that the defendant is guilty of infringing the first and second claims of the complainant's patent, which are the only ones involved. In this connection it should be added that the testimony of one who was both secretary and treasurer of the defendant, and its acting manager from its incorporation, substantially admits that the defendant, for a time at least, infringed the claims in question. Under the circumstances it is deemed unnecessary to discuss the testimony upon this point. The patent in suit is for a process for exhausting incandescent electric lamps. The specifications fully and clearly describe the process of the patent in the following language:

"My present invention relates to the manufacture of incandescent electric lamps, and particularly to the now well-known chemical processes of exhausting the bulb. These processes have come into some use, and they depend for their utility upon the fact that the ordinary mechanical or mercurial pumps are incapable, without considerable expense of time, of obtaining the necessary perfection in the vacuum which is required for any extended life of the filament. In order to save the extended treatment necessary under the pump, the chemical processes referred to have been used; they consisting in introducing within the vacuum inclosure, and generally within the same tube which is used in exhausting (and which is afterward sealed off in making the completed lamp), a chemical which will readily combine, when heated, with the remnant of gases which are released during the final incandescence of the filament in the process of manufacture. In the ordinary ways of using these processes the selected chemical is placed in the tubulature of the lamp. After the vacuum is obtained as far as desired by mechanical means, the tubulature is sealed below the chemical. The filament is then brought to intensive incandescence, and the chemical heated to drive vapors in the lamp-bulb, which by combination perfect the vacuum. The tube is then sealed above the chemical, or between it and the lamp; the superfluous portion of the tube being, as usual, cut off. The process thus outlined, is, however, open to some objections. Among others, it is found that the application of heat to the tube in the first sealing is apt to volatilize too much of the chemical, introducing too much vapor within, and tending to discolor, the bulb of the lamp. The moment of best exhaustion by the mechanical pump must also be seized to perform the first sealing off of the lamp. This, however, is a definite moment, while the sealing occupies several seconds at least. In addition, there is more or less loss from collapse of the tubes, permitting air to leak into the bulb. These objections are obviated by the improved method of exhausting which I adopt. In this I connect the lamp-bulbs, as usual, to the mechanical pump; but I employ for the purpose a piece of very thick and substantial rubber tubing, which is slipped over the pipe leading into the pump and into the end of which the lamp-tubulature is inserted after the chemical has been placed in the latter. I find this a convenient and reliable form of connection, which is capable of being closed with promptness by an ordinary pinch-cock and one which will maintain the vacuum unimpaired long enough to effect the final exhaustion of the lamp by chemical means. It is, of course, understood that so long as the connection to the pump is open it is difficult to obtain a proper vacuum in the bulb. After the connection to the pump is closed the lamp-filament is brought to incandescence, the chemical being, if necessary, also heated slightly; but, as this operation is in my process practically independent of sealing, it may be performed with some exactitude. The tube is then sealed off and the lamp is completed in the usual way."

"The essence of my invention, therefore, consists in the closing of the connection between the lamps and the pump without the use of heat, so that an excess of the chemical used to perfect the vacuum is not volatilized."

"It consists, also, in the detail of the process by which I am enabled, in addition to the advantages already pointed out, to perform the sealing operation much more expeditiously and with a saving in the amount of tube necessary under the old process."

Some 10 or 12 advantages which the method of this patent has over the prior art are disclosed in the complainant's testimony. Among them, and possibly the more important are these: The operation is more advantageously and economically performed, thus saving time and labor. There is less danger of spoiling the lamp. A considerable saving is made in the amount of glass tubing required. The closure is instantaneous and easily controlled, permitting the operator to correct any errors in judgment, which he has made, as to the best time for making the closure. It may be performed by comparatively unskilled operators, and, furthermore, as a result of this improved process there is, under like conditions, a greatly increased output of better and cheaper lamps. Under the evidence there seems to be no doubt of the utility and commercial value of the process. The patent carries with it *prima facie* evidence of its validity. The defendant has offered no evidence to controvert this presumption, except that it has, as already intimated, produced and offered in evidence seven patents in the prior art. It has, however, not supplemented this offer by expert or other testimony to show their relation to the art, or to the patent in suit, or attempted to make any comparison between them. The process in question relates to a highly developed and technical art, and where such is the case the rule is well established that little, if any, attention will be paid to patents alleged to form the prior art, unless they are explained and their relevancy to the patent under consideration pointed out by experts skilled in the art. It is true cases may arise where, by reason of the simple and obvious character of the patents involved, no explanation would be required. Some of the cases bearing upon this point are subjoined.

In *Waterman v. Shipman et al.*, 55 Fed. 982, 987, 5 C. C. A. 371, 376, Judge Wallace, speaking for the Circuit Court of Appeals of the Second circuit, said:

"To sustain the defense of want of novelty the defendants have set up in their answer, and offered in evidence, a large number of patents prior in date to those of the complainant. In the absence of any expert testimony to explain these patents, or indicate what they contain tending to negative the novelty of the complainant's patents, we do not feel called upon to examine them. There may be cases in which the character of the invention has so little complexity that such expert testimony is not necessary to aid the court in understanding whether one patent, or several patents considered together, describe the devices or combination of devices which are the subject-matter of a subsequent patent; but this is not one of them."

To the same effect are *Putnam et al. v. Van Hofe* (C. C.) 6 Fed. 897, 902; *Fay v. Mason et al.*, 127 Fed. 325, 333, 62 C. C. A. 159; *Benbow-Brammer Mfg. Co. v. Heffron-Tanner Co.* (C. C.) 144 Fed. 429; *Bell v. MacKinnon*, 149 Fed. 205, 79 C. C. A. 163; *Stafford et al. v. Morris et al.* (C. C.) 161 Fed. 113; *Office Specialty Co. v. Winternight & Cornyn Mfg. Co.* (C. C.) 67 Fed. 923; *Charmbury v. Walden* (C. C.) 141 Fed. 373.

As already stated, not only is there the presumption of validity existing in favor of this patent, but that presumption is supported and re-enforced by the opinions of experts who have examined the alleged anticipatory patents and clearly and satisfactorily distinguished between them and the patent in controversy. In view of the meager

character of the evidence offered in support of the defense, the case might well end at this point. Notwithstanding this, however, the testimony in connection with the prior art has been examined, and, in the absence of conflicting testimony, sustains the patent.

Perhaps the closest reference bearing thereon is patent No. 537,693, issued in 1895 to one Malignani, for a process for evaporating incandescent lamps. This patent was before this court in a suit brought by the patentee against the present defendant, reported in 169 Fed. 299, and the nature and character of the patent was therein sufficiently stated for present purposes. This patent, at the date of its issue, apparently represented the most advanced state of the art. The main difference between the two patents is disclosed by the following extracts from the testimony of one of the complainant's expert witnesses:

"The essence of the Howell invention consists in the closing of the connection between the lamps and the pump without the use of heat, so that an excess of chemical used to perfect the vacuum is not volatilized, and it consists, further, in the detail of the process by which the operator is enabled, in addition to the advantages above pointed out, to perform the sealing operation much more expeditiously and with saving in the amount of tubing necessary under the old process. For the purpose of his improved process Howell employs an ordinary pinch-cock, in conjunction with a thick and substantial rubber tubing, to close off the lamps from the pump, and to these as pieces of apparatus he makes no claim at all. A great advantage in the use of this device in connection with the process arises from the fact that it may be opened and closed at will, so that the time of closure may be that preferred by the operator in carrying out the process. It is, of course, obvious that Howell's invention had its origin in his appreciation and discovery of the fact that serious disadvantages of the Malignani process could be overcome and the effectiveness of the process otherwise greatly increased by making the closure without the aid of heat. The mere detail means for effecting this closure is therefore relatively unimportant."

It will be seen therefrom that Malignani, in his process, effected closure by the use of heat, while Howell, by his method, produces the same result in a more expeditious, economical, and advantageous manner without the use of heat. The advantages thus produced have already been adverted to. The simple means by which this change was wrought does not destroy the inventive character of the method. It was not self-evident to effect the closure by applying an ordinary pinch-cock to a rubber tubing where before heat, sufficient to fuse glass tubing, had been necessary. This view is supported by testimony in the case as follows:

"Furthermore, at even so late a period as that of the expiration of the Edison patent, which created the art in incandescent lighting, and which expired somewhere about 1895, it appears that rubber and similar joints made without the use of heat were regarded as unreliable and objectionable. I quote, for instance, from the work entitled 'The Incandescent Lamp and Its Manufacture,' by Gilbert S. Ram, A. I. E. E., published New York, The D. Van Nostrand Co., page 168, in the chapter entitled 'Exhausting': 'The lamps should be joined to the pump by fusion. Rubber and other joints cannot be relied on.'"

It should be added that since the argument in this case, and, indeed, after this opinion was prepared, counsel for the complainant informed me that the patent in suit was sustained in the case of General Electric Co. v. Hill-Wright Electric Co., by the Second Circuit Court of Appeals, 174 Fed. 996.

It is deemed unnecessary to consider in detail the other citations in the prior art, which has been carefully done by the complainant's expert, whose uncontroverted conclusions are satisfactory.

The complainant is entitled to a decree, with costs.

GENERAL ELECTRIC CO. v. GERMANIA ELECTRIC LAMP CO.

(Circuit Court, D. New Jersey. December 18, 1909.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—INCANDESCENT LAMPS.

The Branin patent, No. 532,760, for an incandescent lamp and method of manufacturing the same, *held* valid and infringed as to both product and process claims.

In Equity. Suit by the General Electric Company against the Germania Electric Lamp Company. Decree for complainant.

Richard N. Dyer and John Robert Taylor, for complainant.

CROSS, District Judge. There is presented for consideration in this case the usual bill in equity, alleging infringement of a patent, with the customary prayer for an injunction and accounting, while the defendant by its answer denies the validity of the patent, and also denies its infringement. This suit is between the same parties, although upon a different patent, from one in which an opinion will be filed contemporaneously herewith. 174 Fed. 1013. This is referred to solely because the matters in issue are presented in much the same way. In this case, as in that, the defendant has presented proofs intended to show noninfringement, but has presented no evidence of the invalidity of the patent in suit, other than that it has dumped into the case 16 patents in the prior art, without a word of explanation or any expert testimony to show wherein or how, if at all, they disclose or anticipate the invention embraced in the patent in suit. Furthermore, the defendant was not represented at the argument, nor has the court been furnished with any brief in its behalf. The complainant's testimony, except upon the question of infringement, is wholly uncontradicted, unless by inferences to be drawn from the patents alleged to show the prior art. In this situation the patents referred to, under the authorities, need not, and will not, be considered at length.

In *Waterman v. Shipman et al.*, 55 Fed. 982, 987, 5 C. C. A. 371, 376, Judge Wallace, speaking for the Circuit Court of Appeals of the Second Circuit, said:

"To sustain the defense of want of novelty the defendants have set up in their answer, and offered in evidence, a large number of patents prior in date to those of the complainant. In the absence of any expert testimony to explain these patents, or indicate what they contain tending to negative the novelty of the complainant's patents, we do not feel called upon to examine them. There may be cases in which the character of the invention has so little complexity that such expert testimony is not necessary to aid the court in understanding whether one patent, or several patents considered together, describe the devices or combination of devices which are the subject-matter of a subsequent patent; but this is not one of them."

To the same effect are *Putnam et al. v. Van Hofe* (C. C.) 6 Fed. 897, 902; *Fay v. Mason et al.*, 127 Fed. 325, 333, 62 C. C. A. 159;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Benbow-Brammer Mfg. Co. v. Heffron-Tanner Co. (C. C.) 144 Fed. 429; Bell v. MacKinnon, 149 Fed. 205, 79 C. C. A. 163; Stafford et al. v. Morris et al. (C. C.) 161 Fed. 113; Office Specialty Co. v. Winternight & Cornyn Mfg. Co. (C. C.) 67 Fed. 928; Charmbury v. Walden (C. C.) 141 Fed. 373.

The patent in suit, No. 532,760, was issued January 22, 1895, to one Mark H. Branin, assignor to the complainant. It is for an incandescent lamp, and speaking of his invention the patentee says:

"My invention relates to incandescent lamps and their manufacture, and particularly to the sealing-in of the wires which convey current to the carbon filament of the lamp, commonly called the 'leading-in' or 'lead-wires' of the lamp, and has for its object to produce an economical form of such seal and one which shall form a secure anchorage for the lamp neck in the collar of the lamp."

The patent includes four claims, two of which are for a method and two for a product, and all are involved. In addition to the presumption of validity, which follows from the issuance of the patent, we have the fact that the application therefor was pending in the Patent Office for upwards of a year and a half; that two of the patents set up in the answer were cited against some of the original claims, which were thereupon canceled or modified, which tends to show that the application, during its pendency, received careful consideration. While, as above stated, it is not deemed necessary to consider the alleged anticipatory patents in detail, it is proper to say that each and every one of them has been considered by the expert witnesses of the complainant, and the characteristics which distinguish them from the patent in suit carefully pointed out. The evidence upon this point, uncontradicted as it is, considered in connection with the several patents to which it relates, satisfies me that the patent is valid. The advantages obtained by its use have also been pointed out, and are of a substantial character, and result, according to the evidence, in the production of a superior lamp at a very considerable reduction of labor and material. In the absence, therefore, of evidence to the contrary, the patent must be upheld.

Furthermore, I think the defendant is shown to have infringed it. The evidence of the complainant consists in the production of lamps manufactured by the defendant, which the evidence shows were manufactured by the method, and are like the product, of the patent in suit. It includes the testimony of witnesses who formerly worked for the defendant, and who described a method in substantial accord with that of the complainant's patent. One of the witnesses of the complainant, an incorporator of the defendant company, testified that the defendant manufactured lamps from April, 1905, to December, 1906, in accordance with the method, and like the product, of the complainant's patent. The secretary and treasurer of the defendant company, and its general superintendent for almost the entire period of its existence, when asked whether the process described in the patent in suit was used by the defendant answered, "Not according to my understanding thereof." Again, he would not swear positively that the method of the defendant, as testified to by two witnesses for the complainant, had not been followed by the defendant, and, when asked by

the counsel of the defendant to explain what he meant by his answer, said that, as he did not personally examine every lamp made in the defendant's factory, he could not say that such method was never used in a single lamp. Moreover, it may be said generally of the defendant's testimony upon the question under consideration that it is vague, hesitating, and uncertain; hence, after careful consideration of all of the testimony in this connection, I find that the complainant has sustained the burden of proof imposed upon it, and has satisfactorily shown that the defendant has infringed both the method and product claims of the patent.

A decree for the complainant will therefore be entered, with costs.

MEMORANDUM DECISIONS.

ACORD et al. v. WESTERN POCAHONTAS CORPORATION. (Circuit Court of Appeals, Fourth Circuit. November 4, 1909.) No. 818. Appeal from the Circuit Court of the United States for the Southern District of West Virginia, at Charleston. Arthur English, for appellants. J. Lewis Bumgardner (Simms, Enslow, Fitzpatrick & Baker, and Vinson & Thompson, on the brief), for appellee. Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

PER CURIAM. The record and the briefs of counsel, as well as the oral arguments, have been carefully considered in connection with the many authorities cited, with the result that this court is impelled to the conclusion reached by the court below. The case is fully stated, and the law applicable to the questions involved is correctly and clearly announced, in the thorough and able opinion of the court below. 156 Fed. 989. With that opinion we are in full accord. There is no error in the decree appealed from. Affirmed.

BLACK & LAIRD, Limited, v. ADAMS. (Circuit Court of Appeals, Fifth Circuit. February 8, 1910.) No. 1,905. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. Wm. C. Dufour, Lamar C. Quintero, Philip S. Gidiere, and E. D. Saunders, for plaintiff in error. Henry L. Lazarus and Eldon S. Lazarus, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. None of the assignments of error are well taken. See *Sternenberg et al. v. Mailhos et ux.*, 99 Fed. 43, 39 C. C. A. 408, and cases there cited. The judgment of the Circuit Court is affirmed.

BLACK & LAIRD, Limited, v. SCIAMBRA. (Circuit Court of Appeals, Fifth Circuit. February 1, 1910.) No. 1,900. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. B. R. Forman, for plaintiff in error. Armand Romain, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In Louisiana, father and mother both living, the father can stand in judgment to recover damages for the personal injuries of his

minor child. The joinder of the mother in this case was surplusage. The petition not only charges the negligence of the employé of the plaintiff in error, but also the negligence of the employer. We find no prejudicial error in the case, and the judgment of the Circuit Court is affirmed.

In re BURNS. VIRGINIA-CAROLINA CHEMICAL CO. v. HALL. (Circuit Court of Appeals, Fifth Circuit. October 29, 1909.) No. 1,962. Appeal from the District Court of the United States for the Southern District of Georgia. Walter T. Johnson, for appellant. M. P. Hall, for appellee. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. For the reasons given in the court below (171 Fed. 1008), the judgment of the District Court is affirmed.

CITY OF MOBILE et al. v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. (Circuit Court of Appeals, Fifth Circuit. December 21, 1909.) No. 2,020. Appeal from the Circuit Court of the United States for the Southern District of Alabama. See, also, 162 Fed. 523. B. B. Boone, for appellants. Wm. H. McIntosh, J. C. Rich, and Hunt Chipley (Edward P. Meany, on the brief), for appellee. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The part of the decree which follows the names of the defendants enjoined is amended, so as to make the sentence read as follows: "Are hereby perpetually restrained and enjoined from interfering with the property of complainant in said city of Mobile, its wires, poles, and any and all apparatus owned by it and constituting its telephone plant and system in said city, so as to impair any rights conferred on the complainant by said ordinances made Exhibits A and B to the bill; but said defendants are not otherwise restrained, nor are they enjoined from exercising such control of the use of said property by complainant as is consistent with the proper exercise of the police power; and they are also perpetually enjoined and restrained from interfering with the agents, servants, and employes of complainant in replacing the poles of the complainant on the east side of Claiborne street, between St. Anthony and Congress streets, in said city of Mobile." And, as so amended, the decree is affirmed.

ELLSWORTH TRUST CO. v. CONRAD et al. (Circuit Court of Appeals, Fifth Circuit. January 18, 1910.) No. 1,902. In Error to the Circuit Court of the United States for the Southern District of Florida. E. P. Axtell and C. D. Rinehart, for plaintiff in error. Geo. M. Robbins, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that the tax deed under which the plaintiff in error claims was void, because the assessment was not made in accordance with the law. The judgment of the Circuit Court is therefore affirmed.

FERNARD v. ONEIDA NATIONAL CHUCK CO. (Circuit Court of Appeals, Second Circuit. November 9, 1909.) No. 82. Appeal from the Circuit Court of the United States for the Northern District of New York. This cause comes here upon appeal from a decree of the Circuit Court, Northern District of New York, sustaining a demurrer and dismissing the bill. The suit was brought to restrain an alleged infringement of letters patent No. 747,874, granted to complainant December 22, 1903, for a thill coupling. The opinion of the Circuit Court is reported in 167 Fed. 559. George E. Ren-

dell (Hugh C. Lord, of counsel), for appellant. Richard R. Martin, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Appellant criticises the opinion of the Circuit Court on the ground that it "took judicial notice" of the thill couplings of the prior art. But it was not necessary to find any prior art other than such as the patent itself discloses. It is manifest from the patentee's own statements that all he did was to bend over or clinch the ends of the wire link, so as to prevent their slipping out of the apertures in which they were inserted. Of course, to do this he had to enlarge the interior of the aperture sufficiently to turn them. No amount of evidence, expert or other, could possibly raise such an obvious expedient to the dignity of an invention. The decree is affirmed, with costs.

LOUISVILLE & N. R. CO. v. HALL. (Circuit Court of Appeals, Fifth Circuit. January 25, 1910.) No. 1,974. In Error to the Circuit Court of the United States for the Northern District of Florida. See, also, 157 Fed. 464. W. A. Blount and A. C. Blount, Jr., for plaintiff in error. R. P. Reese and John P. Stokes, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The evidence with regard to the alleged contributory negligence of the deceased, J. L. Hall, was conflicting to such an extent as to warrant, if not require, the case to be submitted to a jury. No other errors in the trial proceedings being suggested in this court, the judgment of the Circuit Court should be affirmed, and it is so ordered.

LOUISVILLE & N. R. CO. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. December 21, 1909.) No. 1,825. In Error to the District Court of the United States for the Southern District of Alabama. For opinion below, see 162 Fed. 185. Gregory L. Smith and Harry T. Smith, for plaintiff in error. Wm. H. Ambrecht, U. S. Atty., and Philip J. Doherty, Sp. Asst. U. S. Atty. (Luther M. Walter, Sp. Asst. U. S. Atty., on the brief), for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that the judgment of the District Court is right, and it is, therefore, affirmed.

PANKEY et al. v. UNITED STATES.† (Circuit Court of Appeals, Fifth Circuit. December 21, 1909.) No. 2,016. In Error to the Circuit Court of the United States for the Middle District of Alabama. Warren S. Reese and W. A. Gunter, for plaintiffs in error. E. J. Parsons, U. S. Atty. (E. S. Thigpen, Asst. U. S. Atty., on the brief), for the United States. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The judgment of the Circuit Court is amended by striking out the words, "together with the further sum of interest at the rate of 8 per cent. per annum, or \$518.66%," and inserting in lieu thereof the words, "with interest thereon at the rate of 8 per cent. per annum from the date of this judgment." And, as so amended, the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. December 21, 1909.) No. 1,892. In Error to the District Court of the United States for the Northern District of Texas. E. B. Perkins and J. E. Gilbert (D. Upthegrove, on the brief), for plain-

† Rehearing denied February 1, 1910.

tiff in error. Wm. H. Atwell, U. S. Atty. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that no reversible error is shown by the record. The judgment of the District Court is therefore affirmed.

SMITH et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 14, 1909.) No. 106 (5,270). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 168 Fed. 462. B. A. Levett, for importers. D. Frank Lloyd, Deputy Asst. Atty. Gen., for the United States. Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We agree fully with the conclusions reached by the Board and the Circuit Court, and deem it unnecessary to add anything to their opinions. The decision is affirmed.

TEXAS & P. RY. CO. v. ELDER-DEMPSTER SHIPPING, Limited. ELDER-DEMPSTER SHIPPING, Limited, v. TEXAS & P. RY. CO. (Circuit Court of Appeals, Fifth Circuit, February 1, 1910.) No. 1,899. Appeal from the District Court of the United States for the Eastern District of Louisiana. W. W. Howe, W. B. Spencer, and Esmond Phelps, for appellant and cross-appellee. Henry P. Dart, for appellee and cross-appellant. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In the collision of the steamship Monarch and the transfer boat L. S. Thorne, both vessels were unquestionably in fault. The Monarch was in fault in not sooner observing the Thorne, which was well lighted up, and whose port light showed on her starboard bow, and then in not complying with the starboard rule. The L. S. Thorne was in fault in not renewing her signal of leaving her dock after the Corsair passed down, and in not keeping a competent lookout, whereby the Monarch would have been sooner seen, her signals heard and answered, and a collision probably avoided. In the peculiar state of the pleadings and proof, the court below properly refused demurrage to both parties. We think the decree appealed from does substantial justice between the parties, and it is therefore affirmed. The costs of this court to be divided.

UNITED STATES v. J. S. JOHNSON & CO. SAME v. MAURER. (Circuit Court of Appeals, Second Circuit. December 7, 1909.) Nos. 43, 44 (5,153, 5,154). Appeals from the Circuit Court of the United States for the Southern District of New York. For decision below, see 166 Fed. 1002. D. Frank Lloyd, Deputy Asst. Atty. Gen., for the United States. Walden & Webster (Howard T. Walden, of counsel) for importers. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. These cases are controlled by Johnson v. U. S. (C. C.) 143 Fed. 915, affirmed by this court 152 Fed. 164, 81 C. C. A. 416, and Dudley v. U. S., 153 Fed. 881, 82 C. C. A. 627. The additional amount of sugar found in the packages now under consideration has apparently had no effect, except to produce a sweeter flavor. Decision affirmed.

UNITED STATES v. NEW YORK MERCHANDISE CO. (Circuit Court of Appeals, Second Circuit. January 11, 1910.) No. 102 (5,354). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 167 Fed. 684. D. Frank Lloyd, Deputy Asst.

Atty. Gen. (Charles Duane Baker, Sp. Atty., of counsel), for the United States. Comstock & Washburn (Albert H. Washburn, of counsel), for importers. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Affirmed on the opinion of the Board of General Appraisers. G. A. 6,808, T. D. 29,265.

UNITED STATES v. WAENTIG. (Circuit Court of Appeals, Second Circuit. December 7, 1909.) No. 72 (4,146). Appeal from the Circuit Court of the United States for the Southern District of New York. D. Frank Lloyd, Deputy Asst. Atty. Gen. (William K. Payne, Asst. Atty., of counsel), for the United States. Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decision affirmed on opinion of Judge Holt. 168 Fed. 570.

CARMEL WINE CO. et al. v. PALESTINE HEBREW WINE CO. (two cases). (Circuit Court, S. D. New York. January 14, 1910.) Nos. 2-158, 4-98.

WARD, Circuit Judge. In these cases it appears that, following a preliminary injunction pursuant to the opinion of the court in the first-named case (161 Fed. 654), the prima facie case of the complainant has been fully presented, and has been followed by a brief statement of the defendant, practically admitting the complainant's case. A decree may be entered for an injunction and accounting, with costs to the complainant.